

THE
ALL INDIA REPORTER
1982

[Vol. 69]

BOMBAY SECTION

92

CITATION : A. I. R. 1982 BOMBAY



Published by

D. W. CHITALEY for All India Reporter, Ltd.

Head Office : Meadows House, Nagindas Master Road, Fort, Bombay (India).

Branch Office : Congress Nagar, Nagpur (India).

All correspondence to be addressed to :—

All India Reporter Ltd., (Post Box No. 209), NAGPUR. 440012.

Printed by D. W. CHITALEY at the A. I. R. Rotary Printing Press and by Laxmanrao Mahale, Secretary, Press Workers Anodyogic Sahkari, Sanstha Ltd., at the All India Reporter Press, and published by D. W. CHITALEY, on behalf of and in the name of the All India Reporter Ltd., at Congress Nagar, Nagpur.

(All Rights Reserved.)

BOMBAY HIGH COURT

1982

CHIEF JUSTICE :

The Hon'ble Mr. Justice, V. S. Deshpande [Retired 10.8.82.]

" " D. P. Madan (From 11.8.82.)

PUISNE JUDGES :

The Hon'ble Mr. Justice, D. P. Madan (up to 10.8.82)		The Hon'ble Mrs. Justice Sujata V. Manohar	
"	B.A., (Hons.), LL.B.	The Hon'ble Mr. Justice	M. L. Pandse.
"	M. N. Chandurkar, M.A., LL.B.	"	S. P. Kurdukar.
"	M. H. Kaniya, B.A., (Hons), LL.B.	"	D. N. Mehta.
"	S. K. Desai, B.A. (Hons.), LL.B.	"	V. S. Kotwal.
"	B. A. Masodkar.	"	M. S. Jamdar.
"	C.S. Dharmadhikari	"	M. R. Waikar.
"	F. S. Shah.	"	S. G. Manohar.
"	D. M. Rege.	"	D. B. Deshpande.
"	R. L. Aggarwal.	"	R. S. Padhye. (up to 26.10.82)
"	Bakhtavar Lentin.	"	V. A. Mohta.
"	P. B. Sawant.	"	B. J. Rele.
"	B. C. Gadgil.	"	N. K. Parekh.
"	A. A. Ginwala.	"	S. W. Paranjik.
"	R. A. Jahagirdar.	"	S. J. Deshpande.
"	S. C. Pratap.	"	M. M. Qazi.
"	M. P. Kanade.	"	G. M. Khandekar. (From 31.7.82).
"	S. P. Bharucha.	"	G. F. Couto (From 30.10.82).
"	R. D. Tulpule.	"	S. N. Khatril (From 20.12.82).
"	V. V. Joshi.	"	

ADVOCATE-GENERAL :

Shri Arvind V. Savant.

REPORTERS :

Shri R. S. Kelkar, B.A., LL.M., Advocate (at Bombay).

" G. W. Moharir, B.COM., LL.B., Advocate (at Nagpur).

CHIEF EDITOR :

Shri V. R. Manohar, Advocate (Nagpur).

NOMINAL TABLE

Abdul Samad Makhadum Bakh Sheikh v. Sau. Sudha Anant Parakhe (Dec) 585	Kazi Cumruddin Hussein v. Rajendrakumar Maneklal (Jan) 17
Abdur Rahim Undre Dr. v. Smt. Padma Abdur Rahim Undre (Jul) 341	Kranti Mohan Guruprasad Mehra v. Fatehchand Vasuram Behal (Jun) 263
Agarwal K. G. v. Divisional Superintendent, South Central Railway (Jun) 281	Krishnabai v. Dnyandeo Laxman Yeyale (Mar) 107
All India Reporter Ltd., Nagpur v. Union of India (Jan) 41	Krishnarao Anandrao Dhayagude v. Khandala Taluka Shetkari Sahakari Kharedi Vikri Sangh Ltd. Lonand (Sep) 410
All India Reporter Ltd. v. Union of India (Jan) 48	Kusum Bhimrao Patil v. Javahar Lalchand Katariya (Jun) 245
Anna Tatoba Jadhav v. Anna Bhau Chougule (Apr) 174	Lagoo L. Y. v. Special Land Acquisition Officer (2) (Sep) 440
Balubhai G. Navlakhi v. Dharamdas Vithaldas Shah (Nov) 538	Maharashtra State Co-operative Land Development Bank Ltd. v. State (May) 199
Bandra Green Park Co-operative Housing Society Ltd. v. Dayadasi Kalia (Sep) 428	Mallappa Guruppa Chaugule v. Padmanna Omanna Sajane (May) 211
Bhagwan Motiram Mali (Mahajan) v. Jayant Shridhar Khare (Mar) 82	Mehta R. J. v. His Lordship the Chief Justice, Venkat Shrinivas Deshpande (Mar) 125
Bhausahab Tavnappa Mahajan v. State (Jun) 284	Merwanji Dadabhai Mehta v. Dr. Mohan Madhav (Mar) 124
Central Bank of India v. Femme Pharma Ltd. (Feb) 67	Minocher Behramji Damania v. Hema N. Dadachanji (Apr) 151
Chandra Srinivasan v. D. M. Sukhtankar (Jun) 254	Minoti v. Sushil Mohansingh Malik (Feb) 68
Dhanaji Fakira Mokashi v. Lahu Kamalakar Koli (Mar) 113	Mohammed M. v. Union of India (Sep) 443
Dinkar Ananda Deore, v. Shantaram Punjaji Ahed (Mar) 99	Mohamad Maqbool Mohamad Khaja v. State (Jul) 312
Empire Industries Ltd. v. M. C. Subarna (Dec) 553	Mohamed Shafi Suleman Kazi v. Dr. Vilas Dhondur Kavishwar (Jan) 27
Gajanan Vasant Vijayanikar v. Mrs. Valubai Bapu Govandhi (Jul) 325	Mcreshwar Narayan Bhadke v. Shashikant Balakrishna Malkar (Jan) 10
Gangaram Ratanlal v. M/s. Simplex Mills Co. Ltd. (Feb) 72	Motilal v. Abdul Mazid (Apr) 157
Gopaldas Kishanchand Talreja v. Vijay-singh Bhimsingh Patil (Jul) 305	Mukand Iron and Steel Works Ltd. v. Maharashtra State Electricity Board (Dec) 580
Gopal Vishnu Ghatnekar v. Madhukar Vishnu Ghatnekar (Oct) 482	Municipal Corporation of Greater Bombay v. Ramadevi Shrinivas Ruia (Aug) 391
Govindji Jevat and Co. v. Shree Saraswati Mills Ltd. (Feb) 76	Municipal Corporation of Greater Bombay v. Vijay Metal Works (Jan) 6
Gulab Shankar Walve v. Spl. Land Acquisition Officer (Jul) 300	Nagesh Waman Patil v. Special Land Acquisition Officer (Sep) 421
Gunwantrao Yeshwantrao Deshmukh v. State (Jul) 295	Nana Tukaram Jaikar v. Sonabai (Sep) 437
Hanmantrao Yeshwantrao Patil v. Chintamani K. Gulvani (Aug) 377	National Textile Corporation (Maharashtra North) Ltd. v. Khushalchand Bissessardas Daga (Nov) 539
Hind Construction and Engineering Co. Ltd. v. Union of India (Aug) 365	Nevandram Jevermal v. Devikabai Haridas Gandhi (Dec) 589
Hindurao Balwant Patil v. Krishnarao Parshuram Patil (May) 216	Nilesh Construction Company v. Mrs. Gangu bai (Oct) 491
Hirjee Veerjee and Co. v. Smt. Saroja Narayan Shetty (Oct) 467 (FB)	Nilkanth Balappa Managave Shop a registered firm v. M/s. Raj & Co. (Aug) 388
Indian Hotel Co. Ltd. v. Mrs. T. Stevenson (Apr) 160	Oriental Fire & General Insurance Co. Ltd. v. Balkrishna Ramchandra Nayan (Jun) 277
Janardan Mahadev Dhuru v. Vijaynath Moreshwar Dhuru (Jun) 274	P. v. K. (Aug) 400
Jaypal Bandu Adake v. Basavali Gurulingappa (Dec) 563	P., v. P., and R. (Nov) 498
Kagal Education Society Ltd. v. Shrimant Ajitsingh Rao Yeshwantrao Ghatge (May) 206	Pandurang Narayan Mantri (deceased by L. Rs.) v. Anant Shankarrao Samel (Mar) 115
Kalyandas Manilal Shah v. S. M. Kankaria (Nov) 532	Patel B. J. v. M/s. Vadilal Dolatram and Sons (Feb) 66
Kanshiram Surinderkumar a firm v. M/s. Thakurdas Deomal Rohire (Nov) 505	Prakash Cotton Mills Pvt. Ltd. v. Municipal Commissioner for Greater Bombay (Aug) 387
Kartarchand Dalliram Jain v. Smt. Taravati Kartarchand Jain (Jan) 15	Prasanna Dinkar Sohale v. Director-in-charge, Laxminarayan Institute of Technology (Apr) 176
Kausar Husein Mohamed Hushin v. Mohamed Umer Bholay (Mar) 91	

Purshottam Vishindas Raheja v. Life Insurance Corporation of India (Nov) 523
 Rahimtulla Abdul Rahiman Nakib v. Chandrakant Anant Moog (Jun) 282
 Rajendra Kumar Sabharwal v. Smt. Lila K. Jagtiani (Jun) 243
 Rajeshbai v. Smt. Shantabai (May) 231
 Ratiram Pundlik Khedkar v. Pundlik Arjun Khedkar (Feb) 79
 Roosi K. Modi v. Union of India (Jan) 22
 Saheblal Rasulkhan Pathan v. Nanubi Kasimsaheb Shaikh (Aug) 382
 Satyavrata J. v. Mohamedbhai Abdulhussen Sadiq Bahreinwalla (Jan) 50
 Shamrao Abaji Jadhav v. Smt. Chaturbai Sidheshwar Javeri (Mar) 132
 Shankar Ganpat Sarphare v. Maruti Haibat Sarphare (Apr) 191

Shri Govardhandhari Devasthan v. Collector of Ahmednagar (Jul) 832
 Shrikrishna Annaji Sonatake v. Ramnaryan Pannalal Lathi (Oct) 487
 State v. Ganpatrao Amritrao Deshpande (May) 225
 Taj Mohammad v. Agricultural Produce Market Committee (Dec) 558
 Union of India v. Bhusawal Municipal Council (Nov) 512
 Vasudeo Raghunath Kulkarni v. Yashodabai (Sep) 425
 Vishwanath Maharudra Matkari v. Jan Mohammed (Jan) 30
 Wadilal Mathuradas Jain v. Assistant Collector of Central Excise (Jan) 1
 Yousuf Ali Abdulla Fazalbhoi v. M. S. Kasbekar (Mar) 135

SUBJECT INDEX

Arbitration Act (10 of 1940)

—Ss. 2 (a) and 33 — Arbitrator not having jurisdiction for want of a written arbitration agreement — Mere acquiescence by a party to the jurisdiction and admission of liability before him would not estop such party from questioning arbitrator's jurisdiction (Feb) 72 A

—S. 2 (a) — Contract between buyer and sole selling agent of manufacturer subject to terms and conditions contained in manufacturer's printed contract form — Arbitration clause contained in printed contract form must be deemed to have been imported into contract between buyer and sole selling agent (Feb) 72 B

—S. 2 (a) — Works contract — Term in contract for certificate of Engineer after completion of contract — Parties going to arbitration by consent long prior to completion — Certificate was not a condition precedent to entertainment of claim (Aug) 365 A

—S. 2 (a) — Works contract — Term in contract for certificate of Engineer — Arbitration clause empowering arbitrator to open up, review and revise certificate — Effect of absence of certificate (Aug) 365 B

—S. 13 — Power of arbitrator to award interest subsequent to date of award (Jun) 281

—S. 33 — See Ibid, S. 2 (a) (Feb) 72 A

Bombay General Clauses Act (1 of 1904)

—S. 11 — See Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (1947), S. 11 (3) (Jan) 10 A

Bombay High Court (Original Side) Rules & Forms (1950)

See under High Court Rules & Orders.

Bombay Land Requisition Act (13 of 1948)

—S. 9 — Government Circular No. CRA/1273/52-XV D/- 6-9-1973 — Duty of Government to release requisitioned premises

Bombay Land Requisition Act (contd.)

on public purpose coming to end — Effect of not releasing within reasonable time (Obiter) (Mar) 135 D

Bombay Motor Vehicles Rules (1959)

—R. 294 — See Motor Vehicles Act (1939), S. 110 E (Jun) 277

Bombay Municipal Corporation Act (3 of 1885)

See under Municipalities.

Bombay Paragana and Kulkarni Watans Act (60 of 1950)

See under Tenancy Laws.

Bombay Prevention of Fragmentation and Consolidation of Holdings Act (62 of 1947)

See under Tenancy Laws.

Bombay Public Trusts Act (29 of 1950)

—S. 18 — Application for registration of Trust — Assistant Charity Commissioner disposing of the application in a casual manner — Held, case should be remanded to avoid difficulties that would arise in respect of intervening transactions if applicant was compelled to file fresh application. F. A. No. 666 of 1973, D/- 7/8-1-1976 (Bom), Reversed (Mar) 113

—S. 36 — See Land Acquisition Act (1894), S. 31 (Jul) 332 B

—S. 56-B — See Land Acquisition Act (1894), S. 31 (Jul) 332 B

Bombay Rents Hotel and Lodging House Rates Control Act (57 of 1947)

See under Houses and Rents

Bombay Tenancy and Agricultural Lands Act (67 of 1946)

See under Tenancy Laws.

Bombay Village Panchayats Act (3 of 1959)

See under Panchayats.

Bombay Village Panchayats (Meeting) Rules (1959)

See under Panchayats.

Civil Procedure Code (5 of 1908)

—S. 2 (2), O. 22, R. 1; O. 41, R. 1 — Order holding that right to sue did not survive after death of original plaintiff — It amounts to a decree under S. 2 (2) and appeal is maintainable under O. 41, R. 1 (Apr) 174

—S. 9 — See

(1) Arbitration Act (1940), S. 2 (a) (Feb) 72 A

(2) Debt Laws — Maharashtra Debt Relief Act (1976), S. 11 (Mar) 82

(3) Hindu Marriage Act (1955), S. 5 (i) (May) 231

(4) Maharashtra Agricultural Produce Marketing (Regulation) Act (1964), Section 29 (Dec) 558

(5) Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (1948), S. 85-A (Oct) 491 B

—S. 9-A — Objection to jurisdiction of Court — Issue to be tried as preliminary issue (Jun) 263

—S. 10 — See also Ibid, S. 151 (Apr) 151 B

—S. 10 — Stay of suit — For application under S. 10, mere identity of subject-matter of suit is not enough — Court in earlier suit should also have jurisdiction to grant reliefs claimed in subsequent suit

—S. 11 — See also Constitution of India, Art. 226 (Mar) 135 B

—S. 11 — Res judicata — Validity of Govt. notifications challenged under Art. 226, Constitution, on ground that they were not duly published — Notifications held to be duly published — Suit filed not by petitioners but by a different party challenging notifications on same ground — Suit is not barred by res judicata (Jun) 284 D

—S. 11 — Res judicata — Finality of decree — Decree against which appeal is preferred does not operate as res judicata between parties (Sep) 437 A

—S. 11 — Res judicata — Suit dismissed with adverse finding against defendant — Finding does not operate as res judicata (Sep) 437 B

—S. 47 — See Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (1947), S. 12 (Nov) 532

—S. 94 and O. 39, Rr. 1 and 2 — Grant of injunction — When could not be allowed (Feb) 79

—S. 103 (b) — Applicability — Suit for specific performance of contract of sale — Issue of delivery of possession wrongly determined by lower appellate court — Held, High Court in second appeal could reopen issue under S. 103 (Aug) 382

—Ss. 151, 10 — Inherent power to grant stay — Requisite conditions for stay of suit under S. 10 not fully satisfied — Court cannot exercise its inherent powers under Section 151 to grant stay (Apr) 151 B

—S. 151, O. 39, R. 1 — Suit for declaration that marriage stood dissolved by talaq and for injunction restraining the defendant from entering the matrimonial house — Court finding that marriage was subsisting in law

Civil P. C. (contd.)

but had broken down beyond repairs, 1982 Mah LJ 243, **Reversed** (Jul) 341 H

—S. 151, O. 41, R. 27 (1) (a) and (b) — Production of additional evidence — Respondents accidentally coming across old files containing lease deeds — Whether leases complied with requirements of S. 175 (3) of Government of India Act, 1935 — Held that if documents existed, they should not be shut out (Sep) 443 A

—O. 1, R. 9 and O. 41, R. 4 — Suit impleading trust as defendant No. 1 and trustees as defendant Nos. 2 to 11 — Decree against trust only — Appeal by defendants 3, 5 and 6 without impleading other defendants co-trustees — Competency (Oct) 487

—O. 1, R. 10 — Applicability — Suit against more than one defendant — One of the defendants dead at time of institution of suit — Held, death of defendant did not render suit a nullity (Dec) 589 A

—O. 1, R. 10 — Application under — Limitation — When delay could not defeat application of plaintiff (Dec) 589 B

—O. 6, R. 2 — See

(1) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (1947), S. 13 (1) (g) (Dec) 585

(2) Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (1948), S. 85-A (Oct) 491 A

—O. 7, R. 11 — Suit for specific performance of agreement of sale — Notice of motion for appointment of receiver and injunction — Part of cause of action found defective against some of the defendants — Held, O. 7, R. 11 was not applicable (Nov) 523 B

—O. 8, R. 2 — See Hindu Marriage Act (1955), S. 13 (1) (i) (Nov) 498 A

—O. 20, R. 18 — See Partition Act (1893), S. 2 (Jun) 274

—O. 21, R. 50 (1) — See Partnership Act (1932), S. 49 (Aug) 388

—O. 21, R. 92 — Auction sale confirmed — Judgment-debtor found to have no salable interest in property — Suit by auction-purchaser against decree holder for recovery of money paid by him for purchase of property in auction — Not maintainable — Principles underlying S. 65 of Contract Act do not apply — Even principle of money had and received embodied in S. 72 of Contract Act does not apply. AIR 1964 Raj 140 (Pt. B), **Dissented from** (Jan) 30

—O. 22, R. 1 — See Ibid, S. 2 (2) (Apr) 174

—O. 23, R. 3 — See Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (1947), S. 12 (Nov) 532

—O. 39, R. 1 — See

(1) Ibid, S. 94 (Feb) 79

(2) Ibid, S. 151 (Jul) 341 H

(3) Maharashtra Agricultural Produce Marketing (Regulation) Act (1964), Section 29 (Dec) 558

—O. 39, R. 2 — See Ibid, S. 94 (Feb) 79

—O. 40, R. 1 — See Specific Relief Act (1963), S. 20 (Nov) 523 C

—O. 41, R. 1 — See Ibid, S. 2 (2) (Apr) 174

Civil P. C. (contd.)

- O. 41, R. 4 — See Ibid, O. 1, R. 9 (Oct) 487
- O. 41, R. 22 — Appeal — Respondent may without filing cross-objections support decree on grounds decided against him by lower court (Sep) 437 C
- O. 41, Rr. 25, 27 — Application for additional evidence — Court cannot set aside entire judgment and decree of trial Court and remand suit for fresh trial — Court must proceed either under R. 25 or R. 27 of O. 41 (Mar) 124
- O. 41, R. 27 (1) (a) and (b) — See Ibid, S. 151 (Sep) 443 A
- O. 41, R. 27 — See Ibid, O. 41, R. 25 (Mar) 124

Companies Act (1 of 1956)

- Ss. 314 (1-B), 637-A and 637-AA — Application to Central Government for approval of increase in salary of manager's relatives — Grant of approval — Cannot be arbitrary — Conditions cannot be imposed on basis of Government policy contemplated by Section 637-AA (Jan) 41 A
- Ss. 314 (1-B) and 637-A — Approval of Central Government — Duty of Central Government (Jan) 41 B
- Ss. 314 (1-B) and 637-A — Application for approval to payment of salary exceeding Rs. 3000 to Manager's relatives — Grant of — Validity — Approval sought for scale of Rs. 4000-250-5250 — Sanction granted for payment of Rs. 2500 initially and to payment of fixed salary of Rs. 3000 by revised order on representation — Orders liable to be set aside for non-application of mind (Jan) 48
- S. 637-A — See (1) Ibid, S. 314 (1-B) (Jan) 41 A, B; (Jan) 48
- S. 637-AA — See Ibid, S. 314 (1-B) (Jan) 41 A

Constitution of India

- Art. 13 — Fundamental rights — Principles of waiver or estoppel not applicable (Mar) 135 C
- Art. 14 — See also (1) Companies Act (1956), S. 314 (1-B) (Jan) 41 (2) Municipalities — Maharashtra Municipalities Act (1965), S. 40 (3) (Jul) 312
- Arts. 14, 226 — Educational institutions — Admission — No rules framed — Does not mean that plea of discrimination would not be maintainable (Apr) 176 A
- Art. 14 — Reasonable classification — Test (Apr) 176 B
- Arts. 14, 226 — Educational Institutions — "Spot admissions" on last date — Not invalid, provided equitable procedure is followed and due and wide publicity is given (Apr) 176 C
- Arts. 14, 226 — Educational Institutions — Spot admissions on last date — Seats remaining vacant from reserved quota at initial admissions would not go to general quota — Principle of reservation can be followed even at the stage of "spot admission" (Apr) 176 D

Constitution of India (contd.)

- Art. 14 — Cotton Textiles (Control) Order (1948), Cl. 20 and Notification No. CER/24/77 dated 15-4-1977 issued thereunder — Validity — Power conferred on the authorities by Cl. 20 of said order and provisions of Notification — Are not uncanalised or unguided as to be violative of Art. 14 (Dec) 553 C
- Art. 14 — Cotton Textiles (Control) Order (1948), Cl. 20 — Notification No. CER/24/77 dated 15-4-1977 issued under — Validity — Notification differentiating between hand printers and printers with the aid of power — Is not discriminatory and violative of Art. 14 (Dec) 553 D
- S. 19 (1) (c) — See Co-operative Societies — Maharashtra Co-operative Societies Act (1961), S. 73-G (2) (May) 216
- Art. 19 (1) (g) — Cotton Textiles (Control) Order (1948), Cl. 20 — Notification No. CER/24/77 dated 15-4-1977 issued under — Validity — Notification prohibiting printing of powerloom produced cloth — Is not violative of Art. 19 (Dec) 553 B
- Art. 226 — See also (1) Ibid, Art. 14 (Apr) 176 A, C, D (2) Companies Act (1956), S. 314 (1-B) (Jan) 48 (3) Gold Control Act (1968), S. 82 (Jan) 1 (4) Municipalities — Maharashtra Municipalities Act (1965), S. 40 (3) (Jul) 312
- Art. 226 — Scope of judicial review (Mar) 125 A
- Art. 226 — Assignment of work to Judges by the Chief Justice — Is not justiciable and cannot be judicially reviewed or controlled (Mar) 125 B
- Art. 226 — Res judicata — Applicability of principles to writ petitions (Mar) 135 B
- Art. 226 — Authorities under Public Premises (Eviction of Unauthorised Occupants) Act, 1971, coming to conclusion that premises were taken on lease by the Government — High Court cannot interfere with assumption of jurisdiction where existence of jurisdictional facts is not denied (Sep) 443 D
- Art. 226 — Natural justice — Opportunity of hearing — Notification No. CER/24/77 dated 15-4-1977 issued under Clause 20 of Cotton Textiles (Control) Order, 1948, without affording opportunity of hearing to adversely affected persons — Is not violative of principles of natural justice (Dec) 553 E
- Art. 285 — See Railways Act (1890), S. 135 (Nov) 512 A
- Art. 299 (1) — Government of India Act (1935), S. 175 (3) — Execution of contracts — Non-compliance with requirements of Art. 299 or S. 175 — Effect (Sep) 443 B
- Art. 300 — Suits on torts — Negligence of hospital employees — Running of hospitals is not part of legal functions of State — State is liable for acts of negligence committed by its employees in course of their employment in such hospitals. AIR 1939 Mad 663, Held impliedly Overruled by AIR 1960 SC 610; ILR (1980) Bom 660, Held no

Constitution of India (contd.)**Longer good law in view of AIR 1978 SC 548**

—Sch. 7, List 2, Entry 5 — See Municipalities — Maharashtra Municipalities Act (1965) S. 40 (3) (Jan) 27 (Jul) 312

Contract Act (9 of 1872)

—S. 65 — See Civil P. C. (1908), O. 21, R. 92 (Jan) 30
—S. 72 — See Civil P. C. (1908), O. 21 R. 92 (Jan) 30

CO-OPERATIVE SOCIETIES**—Maharashtra Co-operative Societies Act (24 1961)**

—S. 2 (16) — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Ss. 5 (3), 5 (4A), 5 (11) (bb), 14 and 15-A — Landlord and tenant relationship — Co-operative Housing Society permitting member to induct licensee on premises — Does not become the landlord of the licensee (Sep) 428 B

—S. 30 — Transfer of share or interest of deceased member to a nominee or to an heir or legal representative recognised by Society — Does not create interest in such person to exclusion of other heirs — He only holds share and interest of deceased for disposal of the same in accordance with law (Oct) 482 A

—S. 30 — Nomination by a member is permitted only in respect of the shares in and the property of the Society — Held, nomination in respect of structure built by member on land leased out to him by Society was invalid (Oct) 482 B

—S. 69-A (3) and (4) — Fund established by State Level Caderrisation Committee and not by Apex Society — Demand for contribution from notified society is not sustainable (May) 199 A

—S. 69-A (4) — Notice to petitioner notified Society demanding contribution to fund — Benefit to petitioner society from cadre and fund found to be too indirect, remote and far-fetched — Demand notice must be quashed (May) 199 B

—S. 73G (2) — Powers and functions of Managing Committee — Removal of Chairman or Vice-Chairman by vote of no confidence — Absence of rule or bye-law as regards — No violation of Art. 19 (1) (c) of the Constitution (May) 216

—S. 91 — Proceedings by disputant member for eviction of non-disputant occupier of flat — Society whether has cause of action against occupant of flat — Whether relationship of landlord and tenant exists between them (Jun) 243

—S. 91 — Dispute touching the business of society — What is. Misc. Petn. No. 1258 of 1976, D/- 23-4-1980 (Bom), **Reversed**

—Ss. 93 (1), 152 (4) — Maharashtra Co-operative Societies Rules (1961), R. 76 — Decision in regard to 'satisfaction' under Section 93 (1) about existence of dispute is of a *prima facie* nature — No notice to non-disputants is necessary at this stage. (1982) 1 Bom CR 186, **Overruled** (Sep) 428 C

Co-operative Societies — Maharashtra Co-operative Societies Act (contd.)

—S. 144-T (3) and (4) — Election petition — Powers of Commissioner or Specified Officer — Has power to dismiss petition for non-appearance or for default (Sep) 410

—S. 144-U — Term 'a petitioner' — Includes petitioners — In case of joint election petition, security deposit payable is only Rs. 500, since petition is only one — Security deposit credited under S. 144-U is not liable to forfeiture (Sep) 410 B

—S. 152 (4) — See *Ibid*, S. 93 (1) (Sep) 428 C

—Maharashtra Co-operative Societies Rules (1961)

—R. 76 — See Co-operative Societies — Maharashtra Co-operative Societies Act (1961), S. 93 (1) (Sep) 428 C

Cotton Textiles (Control) Order (1948)

—Cl. 20 — See

- (1) Constitution of India, Art. 14 (Dec) 553 C, D
- (2) Constitution of India, Art. 19 (1) (g) (Dec) 553 B
- (3) Essential Commodities Act (1955), S. 3 (Dec) 553 A

DEBT LAWS**—Maharashtra Debt Relief Act (3 of 1976)**

—Ss. 11 and 12 — Bar of jurisdiction of Civil Courts — Civil Court is barred from deciding questions referred to in S. 7 (1) or (6). AIR 1977 Bom 42, **Overruled**

(Mar) 82
—S. 12 — See *Ibid*, S. 11 (Mar) 82

Deed

—Construction — See T. P. Act (1882), S. 8 (Mar) 107

EDUCATION

—Reservations quota — See Constitution of India, Art. 14 (Apr) 176 D

—Spot admissions — See Constitution of India, Art. 14 (Apr) 176 C

—Nagpur University Act (26 of 1974)

—S. 4 (23) — See Constitution of India, Art. 14 (Apr) 176 B

—S. 4 (30) — See Constitution of India, Art. 14 (Apr) 176 B

—S. 75 — See Constitution of India, Article 14 (Apr) 176 B

Electricity Act (9 of 1910)

—S. 22 Proviso — Minimum charge — Contract for supply of electricity — Inability of Board to supply the contract demand due to power cut — Consumer if liable to pay the minimum demand charge (Dec) 580

Essential Commodities Act (10 of 1955)

—S. 3 — Cotton Textiles (Control) Order (1948), Clause 20 and Notification No. CER/ 24/77 dated 15-4-1977 issued thereunder

Essential Commodities Act (contd.)

Said clause and notification are not ultra vires the powers conferred under Section 3 of the Act (Dec) 553 A

Evidence Act (1 of 1872)

—Ss. 5, 64, 67 — Proof of contents of sale deed — Admissibility in evidence. (1968) 70 Bom LR 683, Held not good law in view of AIR 1971 SC 1949 (Aug) 387

—S. 64 — See Ibid, S. 5 (Aug) 387

—S. 67 — See Ibid, S. 5 (Aug) 387

—S. 114 (e) — Presumption under — Publication of Government notification — Held presumption that notifications had been regularly published could not be drawn under S. 114 (e) (Jun) 284 B

—S. 115 — See also

(1) Arbitration Act (1940), S. 2 (a) (Feb) 72 A

(2) Constitution of India, Art. 13 (Mar) 135 C

—S. 115 — Estoppel — Arbitration award — Party accepting payment under award is estopped from challenging the award (Feb) 76

—Ss. 126 and 129 — Scope — Sections give protection even to a salaried employee who advises his employer on legal matters — However, communication should not be in furtherance of illegal purpose (Jan) 6

—S. 129 — See Ibid, S. 126 (Jan) 6

—Ss. 137 and 138 — Cross-examination — Scope (Nov) 498 B

—S. 138 — See Ibid, S. 137 (Nov) 498 B

Fatal Accidents Act (13 of 1855)

—Ss. 1-A, 2 — Determination of compensation — Mode of — Receipt of insurance amount — Not the whole of it but only the value of acceleration is to be excluded. 1972 Acc CJ 334 (Punj and Har), 1975 Acc CJ 56 (Delhi), AIR 1980 Him Pra 16 and AIR 1982 Delhi 1, Dissented from (Oct) 467 (FB)

—S. 2 — See Ibid, S. 1-A (Oct) 467 (FB)

Foreign Marriage Act (33 of 1969)

—S. 18 — Scope — Words "any other marriage solemnized in a foreign country" — Include all marriages solemnized in a foreign country either before or after coming into force of the Act (Jul) 341 B

—S. 18 — Expression "grant relief in respect of such marriage" — Means relief which a Court can grant in matrimonial matter — Voluntary and unilateral act of giving talaq to wife is not covered by the expression (Jul) 341 C

—S. 18 — Provision cannot be said to be retrospective in nature or one affecting any vested right (Jul) 341 D

—S. 18 — Marriage solemnized under British Marriage Act, 1954, between Muslim husband and Hindu wife in 1966 — Marriage is governed by Special Marriage Act, 1954, and not by personal law of the husband (Jul) 341 E

General Clauses Act (10 of 1897)

—S. 13 — See Co-operative Societies — Maharashtra Co-operative Societies Act (1961), S. 144-U (Sep) 410 B

General Clauses Act (contd.)

—S. 16 — See Co-operative Societies — Maharashtra Co-operative Societies Act (1961), S. 73-G (2) (May) 216

Gold Control Act (45 of 1968)

—S. 82 — Section does not contemplate personal hearing when order under appeal is being confirmed in revision (Jan) 1

Government of India Act (1935)

(26 Geo. v. Ch. 2)

—S. 154 — See Railways Act (1890), S. 135 (Nov) 512 A

—S. 175 (3) — See Constitution of India, Art. 299 (1) (Sep) 443 B

HIGH COURT RULES AND ORDERS**—Bombay High Court (Original Side) Rules and Forms (1980)**

—R. 227 — Suit placed on board for dismissal — Court has wider discretion now than under the Rules of 1957 and is not bound to dismiss the suit (Feb) 67

Hindu Adoption and Maintenance Act (78 of 1956)

—S. 20 — See Hindu Marriage Act (1955), S. 24 (Jan) 15

Hindu Marriage Act (25 of 1955)

—Ss. 5 (i), 11 and 25 — Issue as to validity of marriage arising before Civil Court in suit or other proceeding — Can be decided by that Court — Provisions of Act no bar (May) 231

—S. 11 — See Ibid, S. 5 (i) (May) 231

—S. 12 — Evidence — Requirements of notice and petition — Minute details and entire evidence need not be stated (Aug) 400 A

—S. 12 (1) (a) — Impotency — Question of curability is immaterial (Aug) 400 C

—S. 12 (1) (a) — Impotency — Aversion shown by husband due to prolapse of uterus can amount to impotency (Aug) 400 D

—S. 12 (1) (a) — Evidence — Non-summation of marriage — Details of one or two attempts are sufficient (Aug) 400 E

—S. 12 (1) (c) — Consent as to any material fact or circumstance concerning the respondent — Connotation of, AIR 1972 Bom 132, Held no longer good law in view of amendment in 1976 (Aug) 400 E

—S. 13 (1) (i) — Pleadings — Alibi evidence of co-respondent — Cannot be believed in absence of pleading in that behalf (Nov) 498 B

—S. 13 (1) (i) and (ia) — Evidence and proof — Respondent-wife in hotel cabin with her blouse and brassiere unhooked and co-respondent holding her breasts in his hands — Not by itself sufficient to prove adultery or cruelty (Nov) 498 C

—Ss. 24, 26 — Maintenance pendente lite — Cannot be granted to adult children under Sec. 24 (Jan) 15

—S. 25 — See also Ibid, S. 5 (i) (May) 231

Hindu Succession Act (30 of 1956)

—S. 25 — 'Murder' — Word 'murder' must be construed in its popular sense and not in technical sense as defined in I. P. C. — Includes culpable homicide or unlawful manslaughter (Feb) 68

—S. 26 — See Ibid, S. 24 (Jan) 15

HOUSES AND RENTS

—Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947)

—S. 5 (3) — See Co-operative Societies — Maharashtra Co-operative Societies Act (1961), S. 2 (16) (Sep) 428 B

—S. 5 (4-A) — See also Co-operative Societies — Maharashtra Co-operative Societies Act (1961), S. 2 (16) (Sep) 428 B

—S. 5 (4-A) — Licensee — Shopowner is not a protected "licensee" (Apr) 160 B

—S. 5 (8) (b) — Words 'a room or other accommodation in a hotel or lodging house' — Meaning of — Area occupied by hair-dressing saloon is a room or accommodation in a hotel — Not being premises — Act does not apply thereto (Apr) 160 A

—S. 5 (11) (bb) — See Co-operative Societies — Maharashtra Co-operative Societies Act (1961), S. 2 (16) (Sep) 428 B

—S. 5 (11) (c) — Transmitted tenancy — When amounts to (Mar) 115

—S. 11 (1) and (3) and S. 12 (2) — Application for fixation of standard rent — To be filed under S. 11 (1) or S. 11 (3) depending upon class of tenant, S. 11 (3) applying to tenants who have received notice under S. 12 (2) for arrears of rent, S. 11 (1) to tenant who has not received such notice — Held District Judge erred by holding that application by all classes of tenants could be filed only under S. 11 (1) and that Section 11 (3) merely provided for fixation of interim rent (Jan) 10 B

—S. 11 (3) and S. 12, Explan. I — Application for fixation of standard rent under S. 11 (3) — Limitation under S. 12, Explan. I (Jan) 10 A

—S. 11 (3) and S. 12, Explan. I — Benefit of Explan. I of S. 12 — Cannot be denied merely on ground that on date of filing of application under S. 11 (3) the tenant did not get interim rent fixed — Application for determination of interim rent is not a sine qua non to attract Explan. I of S. 12 (Jan) 10 C

—Ss. 12, 13 — Decree of eviction on basis of compromise not snapping relationship of landlord and tenant between the parties — Compromise decree would be inexecutable (Nov) 532

—S. 12 (1) — Readiness and willingness to pay — Ascertainment of (Mar) 132

—S. 12 (2) — See also Ibid, S. 11 (1) and (3) (Jan) 10 B

—Ss. 12 (2), 13 — Eviction suit by co-heirs of deceased landlord — All the co-heirs need not be joined in the notice and in the suit. AIR 1973 Guj 131 (FB) and AIR 1976 Bom 417, Not followed in view of AIR 1977 SC 1599 (Jun) 282

—S. 12 (3) (a) and Explanation 1 — Mode of raising dispute with regard to standard rent — Dispute raised in reply to S. 12 (2) notice within one month from receipt of S. 12 (2) notice — Cannot take case out of S. 12 (3) (a). AIR 1980 Bom 307 : 1980 Bom CR 716, Overruled; AIR 1977 Guj 15 : 18 Guj LR 32 (FB), Dissented from (Dec) 563 A

Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (contd.)

—S. 12 (3) (b) — Condition as to payment of rent regularly — Tenant seeking benefit of section must strictly comply with condition — Court has no discretion to grant relief to tenant on basis of substantial compliance. (1958) 60 Bom LR 1359, Held not good law in view of AIR 1968 SC 1109 and AIR 1978 SC 955; AIR 1980 Bom 307 (Pt. B) : 1980 Bom CR 716, Overruled (Dec) 563 B

—S. 12, Explan. 1 — See Ibid, S. 11 (3) (Jan) 10 A, C

—S. 13 — See

(1) Ibid, S. 12 (Nov) 532

(2) Ibid, S. 12 (2) (Jun) 282

—S. 13 (1) (b) — "Permanent structure" — Notice served on tenant under S. 195, Maharashtra Municipalities Act, to demolish and reconstruct dilapidated temporary structure — Structure rebuilt with bricks and cement instead of with bricks and lime mortar — Held, mere use of cement did not make structure a permanent one — Structure built in pursuance of notice amounted to restoration of premises and not to a new construction (Jul) 305 B

—S. 13 (1) (e) — Lease in respect of open land — Tenant constructing superstructure on it and letting it out — It would not amount to unlawful subletting within meaning of S. 13 (1) (e) (Jan) 17 B

—S. 13 (1) (e) — Suit for eviction — Decree can be passed not only against ex-tenant but also against persons who claim through him (Jun) 245 B

—S. 13 (1) (e) — Expression "transferred" in any other manner his interest therein" — Unpermitted transfer of possession by tenant in favour of stranger if a transfer within meaning of expression (Jun) 245 C

—S. 13 (1) (g) — Suit in eviction on ground of bona fide personal requirement — Evidence at variance with allegations in plaint — Held, decree of eviction on basis of case not made out in suit could not be sustained (Dec) 585

—S. 13 (1) (l) — Eviction under — Suitable alternative accommodation acquired by tenant — Effect (Sep) 425

—S. 14 — See Co-operative Societies — Maharashtra Co-operative Societies Act (1961), S. 2 (16) (Sep) 428 B

—S. 14 (1) — Nature of statutory tenancy under S. 14 (1) — Is different from that under S. 12 (1) inasmuch as S. 14 (1) does not merely protect possession of statutory tenant but also entitles him to benefits under the original contract of sub-tenancy (Mar) 91

—S. 15 (1) — "But subject to any contract to the contrary" — Meaning (Jan) 17 A

—S. 15 (1) Proviso and Notification issued thereunder — Mere fact that partnership business vests in continuing partners does not mean that retiring partner has assigned business with stock-in-trade and goodwill thereof in favour of remaining partners (Jun) 245 A

—S. 15 (1) Proviso and Notification issued thereunder — Lease deed incorporating specific prohibition against assignment —

Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (contd.)

Neither proviso nor Notification has overriding effect over contractual prohibition

(Jun) 245 D

—S. 15-A — See also Co-operative Societies — Maharashtra Co-operative Societies Act (1961), S. 2 (16)

(Sep) 428 B

—S. 15A — Undertaking given by licensee before enactment of S. 15A to a court to hand over possession on expiry of license — Whether licensee can be relieved of undertaking on ground of public policy

(Apr) 160 C

—S. 24 — Word "withhold" — Connotes withdrawal or deprivation of essential supply or service by some indirect or negative act on part of landlord, i. e., by his failing to do what he was bound to do and what was within his power and control to do, 1973 Cri LJ 1848 (Bom), **Overruled**

(Jan) 50 A

—S. 24 — "Just or sufficient cause" — A cause is "just or sufficient" if it is reasonable, bona fide and substantial and does not allow a landlord to take advantage of or perpetuate his own wrong

(Jan) 50 B

—S. 28 — See also Co-operative Societies — Maharashtra Co-operative Societies Act (1961), S. 91

(Jun) 243

—S. 28 — Section covers all claims arising under Act even though parties may not be landlord and tenant — Whether claim is one under Act or not depends upon substance of claim in plaint — Held, suit was not covered by S. 28

(Nov) 523 A

—Hyderabad Houses (Rent, Eviction and Lease) Control Act (20 of 1954)

—S. 15 (2) (i) read with proviso — Payment of rent — Rent deposited in Court under R. 4 of Rules constitutes payment of rent within meaning of S. 15 (2) (i) read with proviso

(Apr) 157 A

—S. 15 (3) (a) (iii) and S. 15 (3) (c) — Cls. (iii) and (c) of S. 15 (3) are mutually exclusive and cl. (c) applies only when additional accommodation is required by landlord for purpose of business which he is carrying on

(Apr) 157 B

Hyderabad Houses (Rent, Eviction and Lease) Control Act (20 of 1954)

See under Houses and Rents.

Interpretation of Statutes

—Ambiguity — Interpretation consistent with Part IV of Constitution is to be preferred — See Foreign Marriage Act (1969), S. 18

(Jul) 341 E

—Form Prescribed under Statute — See Foreign Marriage Act (1969), S. 18

(Jul) 341 B

—Mandatory or directory provisions — See

(1) Maharashtra Agricultural Produce Marketing (Regulation) Act (1964), Section 3 (1)

(Jun) 248 A

(2) Maharashtra Agricultural Produce Marketing (Regulation) Act (1964), Section 3 (1) last Part

(Jun) 284 C

Khoti Settlement Act (1 of 1888)

—S. 6 — See Ibid, S. 9

(Apr) 191 B

—S. 9 — Transfer of property by occupancy tenant without consent of Khot — No plea that transferor was occupancy tenant taken and no evidence also in that regard. Held, Section 9 did not apply

(Apr) 191 A

—Ss. 9 and 6 — Transfer of property by occupancy tenant without Khot's consent — Effect

(Apr) 191 B

Land Acquisition Act (1 of 1894)

—S. 3 (b) — See Ibid, S. 30

(Aug) 391

—Ss. 6 and 48 — Notification under Section 6 — Part of land however subsequently acquired under S. 10 (3) of Urban Land (Ceiling and Regulation) Act, 1976 — Section 6 notification to the extent of remaining land remains unimpaired and could be acted upon to that extent

(Jan) 22

—S. 23 — Compensation — Deductions — Permissibility

(Jul) 332 A

—S. 23 — Agreement between claimant and acquiring body — Agreement can be taken as good evidence of market value but is not binding on Land Acquisition Officer

(Sep) 421 A

—S. 23 — Payment of solatium — Agreement between claimant and acquiring parties fixing market value of property including all interests therein at Rs. 4.25 per sq. yard — Held solatium could not be regarded as interest in land and hence figure of Rs. 4.25 was not inclusive of solatium

(Sep) 421 B

—Ss. 23 and 34 — Taking of possession means taking of possession by the authorities referred and interest is to be awarded from the time of taking of such possession

(Sep) 421 C

—S. 23 — Assessment of compensation — Belting system — When applicable

(Sep) 440 A

—S. 23 — Market value — Assessment of from sale instances

(Sep) 440 B

—S. 23 (1) — Determination of compensation in respect of land used for non-agricultural purposes and held on restricted tenure governed by Sec. 4 (2) of Bombay Pargana and Kulkarni Watans Abolition Act, 1950, and Govt. Resolution D/- 18-8-1953. AIR 1972 Guj 189 (pt. A), Diss. from.

(May) 225

—S. 30 read with S. 3 (b) — Person interested in appropriation of compensation — Person having a mere agreement in his favour to enter into agreement of lease is not such a person — In absence of enforceable agreement S. 40 of T. P. Act could not be invoked. L. A. Ref. No. 80 of 1972 (Bom), **Reversed**.

(Aug) 391

—Ss. 31 and 32 — Applicability — Acquisition of lands belonging to public trust governed by Bombay Public Trusts Act — Trustees not competent to alienate property except with previous sanction of Charity Commissioner — Procedure under Ss. 31 and 32 has to be followed

(Jul) 332 B

—S. 32 — See Ibid, S. 31

(Jul) 332 B

—S. 34 — See Ibid, S. 23

(Sep) 421 C

—S. 48 — See Ibid, S. 6

(Jan) 22

Law Reports

—Cases reported in 1980 Bombay Cases Reporter 503 not shown to be based on certified copy of the judgment — Report not allowed to be cited before the Court (Nov) 538

Law Reports Act (18 of 1875)

—S. 3 — See Law Reports (Nov) 538

Limitation Act (9 of 1908)

—S. 18 — Knowledge of fraud — Suit by company against its managing director for recovery of amount obtained by him by fraud — Other directors' knowledge to fraud is not knowledge of Company (Nov) 539 C
—Art. 36 — See Ibid, Art. 120 (Nov) 539 B

—Arts. 120 and 36 — Suit by company against its managing director for recovery of amount obtained by him by fraud — Suit falls under S. 88 of Trusts Act — Art. 120 applies and not Art. 36 (Nov) 539 B

Limitation Act (36 of 1963)

—S. 4 — See Houses and Rents — Bombay Rents, Hotel & Lodging House Rates Control Act (1947), S. 11 (3) (Jan) 10 A
—S. 29 (2) — See Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (1947), S. 11 (3) (Jan) 10 A

—S. 30 — Cause of action arising after coming into force of 1963 Act — S. 30 has no application (Nov) 512 B

Maharashtra Agricultural Produce Marketing (Regulation) Act (20 of 1964)

—S. 3 (1) — Notification under — Requirement as to publication in newspaper is directory (Jun) 284 A
—S. 3 (1) last part — Maharashtra Agricultural Produce Marketing (Regulation) Rules (1967), R. 3 — Last part of S. 3 (1) dealing with third mode of publication and provisions of R. 3 are mandatory — Held, Notification No. APMC/Kolhapur 67 dt. 3-2-68 issued u/s. 3 was invalid for non-compliance with mandatory provisions — Consequently, Notification No. APMC/Kolhapur/68 dt. 16-5-68 issued u/s. 4 pursuant to notification u/s. 3 was also invalid (Jun) 284 C

—Ss. 29, 46 — Maharashtra Agricultural Produce Marketing (Regulation) Rules (1967), Rr. 7 (4), 120 (e) — Agricultural Produce Market Committee — Power to file civil suits (Dec) 558

—S. 46 — See Ibid, S. 29 (Dec) 558

Maharashtra Agricultural Produce Marketing (Regulation) Rules (1967)

—R. 3 — See Maharashtra Agricultural Produce Marketing (Regulation) Act (1964), S. 3 (1) last para. (Jun) 284 C

—R. 7 (4) — See Maharashtra Agricultural Produce Marketing (Regulation) Act (1964), S. 29 (Dec) 558

—R. 120 (e) — See Maharashtra Agricultural Produce Marketing (Regulation) Act (1964), S. 29 (Dec) 558

Maharashtra Co-operative Societies Act (24 of 1961)

See under Co-operative Societies.

Maharashtra Co-operative Societies Rules (1961)

See under Co-operative Societies.

Maharashtra Re-settlement of Project Displaced Persons Act (41 of 1976)

—Ss. 13, 15 and S. 16 (2) — Compliance with requirements of Sections 13-15 is condition precedent for exercising powers conferred under S. 16 (2) (Jul) 300 A

—S. 13 (3), cls. (c) and (d) — Scope of cl. (d) (Jul) 300 B

—S. 15 — See Ibid, S. 13 (Jul) 300 A

—S. 16 (2) — See Ibid, S. 13 (Jul) 300 A

Maharashtra Zilla Parishads and Panchayat Samitis Act (5 of 1962)

See under Panchayats.

Meeting

—Amendment of motion and Revocation of decision — See Municipalities — Bombay Municipal Corporation Act (1888), Section 69 (c), Proviso (Jun) 254

Motor Vehicles Act (4 of 1939)

—S. 96 (4) — See Ibid, S. 110-E (Jun) 277

—S. 110-B — See Ibid, S. 110-E (Jun) 277

—Ss. 110E, 110B, 96 (4) and 110F — Powers of tribunal under Section 110E (Jun) 277

—S. 110-F — See Ibid, S. 110-E (Jun) 277

MUNICIPALITIES**Bombay Municipal Corporation Act (3 of 1888)**

—S. 69 (c) Proviso — Scope and object — Approval of Standing Committee to the proposal of Municipal Commissioner not granted within 15 days from date it was put on the agenda of the meeting — Effect (Jun) 254

Maharashtra Municipalities Act (40 of 1965)

—S. 2 (7) — See Ibid, S. 16 (Aug) 377

—Ss. 16, 44, 2 (7), 302 — Disqualification of President — Disqualification prescribed for elected Councillor applies to President also (Aug) 377

—S. 19A — See Ibid, S. 40 (3) (Jul) 312

—Ss. 40 (3), 19A, 48A — Scope and object of S. 40 (3) — Councillors cannot claim to hold office beyond term of six years — S. 48A is not ultra vires the State Legislature — Connotation of expression 'changed circumstances' in Section 48A — Power to appoint Administrator under S. 48A is not absolute and unguided — Principles of natural justice are not violated if S. 48A notification is issued without notice to councillors (Jul) 312

—S. 44 — See Ibid, S. 16 (Aug) 377

—S. 48A — See Ibid, S. 40 (3) (Jul) 312

—S. 195 — Notice under — Validity (Jul) 305 A

—S. 302 — See Ibid, S. 16 (Aug) 377

Muslim Law

- See Foreign Marriage Act (1969), S. 18 (Jul) 341 E
- Conversion to — Essentials — Burden of proof where conversion is denied (Jul) 341 G
- Divorce — Unilateral talaq — Whether violates Articles 14 and 44 of the Constitution (Jul) 341 F
- Marriage — Husband has no vested right to marry more than one wife — See Foreign Marriage Act (1969), S. 18 (Jul) 341 D
- Nikah Fasid — Presence of two witnesses of mohammadan faith cannot ipso facto convert a civil marriage into a Nikah Fasid (Jul) 341 A

Natural Justice

- Opportunity of hearing at revisional stage — See Gold Control Act (1968), Section 82 (Jan) 1

PANCHAYATS

- Bombay Village Panchayats Act (3 of 1959)
- S. 36 r/w. proviso — Disqualification of Sarpanch — Failure of Sarpanch to hold meetings for some months — He is liable to be disqualified (Jul) 295 A
- Ss. 36 and 39 — Order of disqualification — Whether amounts to removal (Jul) 295 B
- S. 36 — Bombay Village Panchayats (Meeting) Rules 1959, Rr. 3, 13, 15, 23, 29, 39, 40 — Failure to hold meeting — Sufficient cause for — Circulating memos issued by Sarpanch do not constitute sufficient cause for failure to convene meeting (Jul) 295 C
- S. 39 — See Ibid, S. 36 (Jul) 295 B
- Bombay Village Panchayats (Meeting) Rules (1959)
- R. 3 — See Panchayats — Bombay Village Panchayats Act (1958), S. 36 (Jul) 295 C
- R. 13 — See Panchayats — Bombay Village Panchayats Act (1959), S. 36 (Jul) 295 C
- R. 15 — See Panchayats — Bombay Village Panchayats Act (1958), S. 36 (Jul) 295 C
- R. 23 — See Panchayats — Bombay Village Panchayats Act (1958), S. 36 (Jul) 295 C
- R. 29 — See Panchayats — Bombay Village Panchayats Act (1959), S. 36 (Jul) 295 C
- R. 39 — See Panchayats — Bombay Village Panchayats Act (1958), S. 36 (Jul) 295 C
- R. 40 — See Panchayats — Bombay Village Panchayats Act (1958), S. 36 (Jul) 295 C
- Maharashtra Zilla Parishads and Panchayat Samitis Act (5 of 1962)
- Ss. 16 (1) (a) (i) and 58 (1-A) — Words "Zilla Parishad" — Cannot be read as "Panchayat Samiti" — Person having direct or indirect interest in contract with Zilla

Panchayats — Maharashtra, Zilla Parishads and Panchayat Samitis Act (contd.)

- Parishad is disqualified under S. 16 (1) (a) (i) to be member of Panchayat Samiti. (Mar) 99 B
- S. 27 — Election Petition — Disqualification of returned candidate can be raised as ground of challenge and can be considered by Election Court. 1966 Mah LJ 321 and 1963 Mah LJ 834, held not good law in view of AIR 1976 SC 2283 and AIR 1975 Bom 205 (FB) (Mar) 99 A
- S. 58 (1-A) — See Ibid, S. 16 (1) (a) (i) (Mar) 99 B

Partition Act (4 of 1893)

- Ss. 2, 3 — Power of Court to order sale in partition suit — Has no inherent power dehors provisions of Act. AIR 1958 Andh Pra 647 Held not good law in view of AIR 1973 SC 643 (Jun) 274
- S. 3 — See Ibid, S. 2 (Jun) 274

Partnership Act (9 of 1932)

- S. 32 — See Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (1947), S. 15 (1) Proviso (Jun) 245 A
- S. 49 — Debt of partnership firm — Joint and several decree against firm and its partners — Decree must be executed as it stands and S. 49 cannot be invoked, nor O. 21, R. 50 (1) of Civil P. C. (Aug) 388

Precedents

- See Law Reports (Nov) 538

Private International Law

- Marriage — Rights under — See Foreign Marriage Act (1969), S. 18 (Jul) 341 E

Public Premises (Eviction of Unauthorised Occupants) Act (40 of 1971)

- S. 2 (e) — Words "belonging to the Central Government" — Do not mean the same thing as "owned by" — Premises taken on lease by government and allotted to others are public premises (Sep) 443 E

Railways Act (9 of 1890)

- S. 135 — Notification D/- 29-11-1907 — Goods imported within municipal limits by Railway Administration — Liability to pay octroi duty (Nov) 512 A

Railways (Local Authorities' Taxation) Act (25 of 1941)

- S. 3 — See Railways Act (1890), S. 135 (Nov) 512 A
- S. 4 — See Railways Act (1890), S. 135 (Nov) 512 A

Requisitioning and Acquisition of Immovable Property Act (30 of 1952)

- S. 24 (2) — Continuance of requisition — Section confines continuance of requisition only to purpose of Union — It does not envisage continuance of requisition for purpose of State (Mar) 135 A

Sick Textile Undertakings (Nationalisation) Act (57 of 1974)

- Ss. 4 (6) and 5 (2) — Suit filed by company, a sick textile undertaking, against managing director for recovery of amount

Sick Textile Undertakings (Nationalisation) Act (contd.)

- embezzled by him — National Textile Corporation is entitled to continue suit. Judgment of Vimadalal, J. in Suit No. 35 of 1968 (Bom), **Reversed** (Nov) 539 A
 —S. 5 (2) — See Ibid, S. 4 (6) (Nov) 539 A

Special Marriage Act (43 of 1954)

- S. 1 — See Foreign Marriage Act (1969), S. 18 (Jul) 341 E

Specific Relief Act (47 of 1963)

- S. 5 — See Civil P. C. (1908), O. 7, R. 11 (Nov) 523 B
 —S. 20 — Suit for specific performance of agreement of sale — Remedy is discretionary — Plaintiff does not get right of possession unless he gets a decree — He cannot, therefore, dispossess anybody at interlocutory stage (Nov) 523 C

TENANCY LAWS**—Bombay Pargana and Kulkarni Watans Abolition Act (60 of 1950)**

- S. 4 (2) — See Land Acquisition Act (1894), S. 23 (1) (May) 225

—Bombay Prevention of Fragmentation and Consolidation of Holdings Act (62 of 1947)

- S. 15A — Preparing draft scheme for consolidation — Notice of enquiry not given to concerned landowner before preparation — Scheme is vitiated (May) 211 A
 —S. 19 — See Ibid, S. 32 (1) (May) 211 B
 —Ss. 32 (1), 19 — Only one day's time granted by Consolidation Officer for communicating objections to draft scheme in violation of S. 19 — If justified (May) 211 B

—Bombay Tenancy and Agricultural Lands Act (67 of 1948)

- S. 27 — Applies to lands leased for cultivation of sugarcane in view of Government Notification dt. 8-10-1969 issued under Section 43A (3). 1977 Mah LJ 768, **Overruled** (Jul) 325 A
 —Ss. 29 (2) & 84 — Illegal subletting — Remedy of landlord (Jul) 325 B
 —S. 32 — See also Ibid, S. 43 (May) 206 A
 —Ss. 32, 32G, 32M, 32P, 43 and 84C — Tenant purchasing land u/s. 32, and, before paying entire price, transferring it in violation of Sec. 43 — Effect (May) 206 B
 —S. 32 G — See Ibid, S. 32 (May) 206 B
 —S. 32 M — See Ibid, S. 32 (May) 206 B
 —S. 32 P — See Ibid, S. 32 (May) 206 B
 —S. 43 — See also Ibid, S. 32 (May) 206 B
 —Ss. 43 and 32 — Tenant in possession of land on Tillers' day — He becomes deemed purchaser on that day u/s. 32 and S. 43 immediately comes into play — Payment of entire price and certificate under S. 32 M — Not necessary (May) 206 A
 —S. 45-C Proviso — See Ibid, S. 88 (1) (b) (Oct) 491 C

Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (contd.)

- S. 84 — See Ibid, S. 29 (2) (Jul) 325 B
 —S. 84-C — See Ibid, S. 32 (May) 206 B
 —S. 85-A — Issue of tenancy — Cannot be raised on vague plea (Oct) 491 A
 —S. 85-A — Bar of jurisdiction of Civil Court — Power of Civil Court to determine applicability of Act and recall reference — Notice of Motion No. 1236 of 1981, dated 11-3-1982 (Bom), **Reversed** (Oct) 491 B
 —Ss. 88 (1) (b) and 45-C Proviso — Land covered by S. 88 (1) (b) Notification — Effect — Relevancy of Section 45-C Proviso in context of such land (Oct) 491 C

Torts

- Negligence — Liability of Government for acts of its servants — See Constitution of India, Art. 300 (Jan) 27

Trade and Merchandise Marks Act (43 of 1958)

- Ss. 11 (a), 12 (3) and 33 — Identical marks falling under S. 11 (a) — Registrability — Relevant considerations (Nov) 505 A
 —S. 12 (3) — See also Ibid, S. 11 (a) (Nov) 505 A
 —S. 12 (3) — Claim of honest concurrent user — Claimant must show that concurrent use of the mark was honest — Question of honest belief as to reputation of opponent's mark is irrelevant for consideration (Nov) 505 B
 —S. 33 — See Ibid, S. 11 (a) (Nov) 505 A

Transfer of Property Act (4 of 1882)

- S. 8 — Deed — Construction — Grant in favour of Hindu female — Family dispute — Decree for possession of immovable property in favour of plaintiff Hindu widow — Neither decree nor subsequent compromise in execution providing that limited estate was granted — Held, what was granted was absolute estate. (1874) 2 Ind App 7 (PC), **held not good law** in view of AIR 1954 SC 355 and AIR 1951 SC 139 (Mar) 107
 —S. 40 — See Land Acquisition Act (1894), S. 30 (Aug) 391
 —S. 52 — Application for relief from lis pendens — Principles to be applied (Feb) 66
 —S. 52 — Suit for possession of suit properties on the basis of ownership — Ratification deed purporting to perfect title of plaintiff brought into effect during pendency of litigation — Defendants not proving their title by adverse possession — Held, Section 52 did not apply and document was not hit by doctrine of lis pendens (Apr) 191 C
 —S. 58 — Mortgage by conditional sale or sale with condition of repurchase (Sep) 437 D
 —S. 106 — See Houses & Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (1947), S. 12 (2) (Jun) 282

Transfer of Property Act (contd.)

—S. 107 — Contract by Government creating a monthly lease — Contract is required to be in writing and must comply with requirements of Article 299. Decision in Misc. Petn. No. 1016 of 1973 (Bombay), Reversed (Sep) 443 C

Trusts Act (2 of 1882)

—S. 88 — See Limitation Act (1908), Article 120 (Nov) 539 B

Urban Land Ceiling & Regulation) Act (33 of 1976)

—S. 10 (3) — See Land Acquisition Act (1894), S. 6 (Jan) 22
—S. 42 — See Land Acquisition Act (1894), S. 6 (Jan) 22

Words and Phrases

—Word "cut off or withhold" in rent cases — Meaning of — See Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (1947), S. 24 (Jan) 50 A

LIST OF BOMBAY CASES OVERRULED, REVERSED AND DISSENTED**FROM IN A. I. R. 1982**

Diss. : Dissented from in; Over. : Overruled in; Revers. : Reversed in

- (1874) 2 Ind App 7 (PC) — Held not good law in view of AIR 1954 SC 355 and AIR 1951 SC 139. AIR 1982 Bom 107 (Mar).
- (1958) 60 Bom LR 1359 — Held not good law in view of AIR 1968 SC 1109 and AIR 1978 SC 955 (Pt. B). AIR 1982 Bom 563 B (Dec).
- (1963) Mah LJ 834 — Held not good law in view of AIR 1976 SC 2283 and AIR 1975 Bom 205 (FB). AIR 1982 Bom 99 A (Mar).
- (1966) Mah LJ 321 — Held not good law in view of AIR 1976 SC 2283 and AIR 1975 Bom 205 (FB). AIR 1982 Bom 99 A (Mar).
- (1968) 70 Bom LR 683 — Held not good law in view of AIR 1971 SC 1949. AIR 1982 Bom 387 (Aug).
- AIR 1970 Bom 144 — Over. AIR 1982 SC 865 C (Apr).
- AIR 1972 Bom 132 — Held no longer good law in view of amendment in 1976. AIR 1982 Bom 400 B (Aug).
- AIR 1972 Bom 177 (Pt. 'B) — Diss. AIR 1982 Delhi 362 B (Aug).
- (1972) L. A. Ref. No. 80 of 1972 (Bom) — Revers. AIR 1982 Bom 391 (Aug).
- 1973 Cri LJ 1848 (Bom) — Over. AIR 1982 Bom 50 A (Jan).
- (1973) Decision in Misc. Petn. No. 1016 of 1973 (Bom) — Revers. AIR 1982 Bom 443 C (Sep).
- 1975 Acc CJ 100 (Bom) — Diss. AIR 1982 Mad 83 B (Mar).
- (1975) Criminal Appeal No. 1639 of 1972, D/- 1-9-1975 (Bom) — Revers. AIR 1982 SC 839 A, C (Apr).
- AIR 1976 Bom 222 (Pt. A) — Diss. AIR 1982 Kant 105 B (Apr).
- AIR 1976 Bom 417 — Not followed in view of AIR 1977 SC 1599. AIR 1982 Bom 282 (Jun).
- (1976) C. A. No. 1741 of 1976, D/- 18-11-1976 (Bom) — Revers. AIR 1982 SC 127 A, B (Jan).
- (1976) F. A. No. 666 of 1973, D/- 7/8-1-1976 (Bom) — Revers. AIR 1982 Bom 113 (Mar).
- AIR 1977 Bom 42 — Over. AIR 1982 Bom 82 (Mar).
- 1977 Mah LJ 768 — Over. AIR 1982 Bom 325 A (Jul).
- AIR 1979 Bom 269 — Diss. AIR 1982 Punjab 281 (Jul).
- (1979) 2 Serv LR 583 (Bom) — Revers. AIR 1982 SC 101 (Jan).
- ILR (1980) Bom 660 — Held no longer good law in view of AIR 1978 SC 548. AIR 1982 Bom 27 (Jan).
- 1980 Bom CR 716 : AIR 1980 Bom 307 (Pt. A) — Over. AIR 1982 Bom 563 A, B (Dec).
- (1980) Misc. Petn. No. 1258 of 1976, D/- 23-4-1980 (Bom) — Revers. AIR 1982 Bom 428 A (Sep).
- (1982) Notice of Motion No. 1236 of 1981, D/- 11-3-1982 (Bom) — Revers. AIR 1982 Bom 491 B (Oct).
- 1982 (1) Bom CR 186 — Over. AIR 1982 Bom 428 C (Sep).
- 1982 Mah LJ 243 — Revers. AIR 1982 Bom 341 H (Jul).

COMPARATIVE TABLE

AIR 1982 Bombay

AIR Bombay — Other Journals

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1	1982 JSOTL 17	82	1981 Mah LJ 216	231con	1982 Hindu	410	...
6	1982 Mah LJ 798		1981 Bom CR 819		LR 445	421	1982 Mah LJ 37
	1982 Hindu		1981 Mah LR	243	1982 Mah LJ 154		84 Bom LR 4
	LR 93	91	(Bom) 112		84 Bom LR 1	425	(1982) 2 Ren
	(1982) 1 Rent	99	1981 Mah LJ 873	245	1980 Bom CR 679		CR 419
	LR 197	107	...		(1980) 2 Rent	428	(1982) 84 Bom
	(1982) 1 Serv	113	...		CR 302		LR 177
	LR 645	116	...		1981 Mah LR	437	1982 Mah LJ 588
10	(1982) 1 Ren	124	...		(Bom) 242		1982 (1) Bom
	OR 135	125	1982 (1) Bom	254	84 Bom LR 48		OR 811
	1981 Bom CR 291		CR 273	263	(1981) 83 Bom		1982 Mah LR
	(1981) 83 Bom		1982 (1) Civ		LR 445	440	(Bom) 362
	LR 160		LJ 569	274	1980 Mah LJ 5:5	443	...
	1981 Mah LJ 540	182	1982 (1) Bom		1982 Mah LR	467FB	(1982) 2 Bom
	(1982) 1 Ren		CR 60		(Bom) 376		CR 428
	CJ 408		1982 Mah LJ 347	277	...		1982 Mah LJ 895
15	(1982) 1 DMQ 97	185	84 Bom LR 9	281	...	482	1981 Bom
	1982 Mat LR 109		(1982) 2 Ren	282	(1982) 1 Ren		CR 1010
	1981 Mah LJ 239	151	OR 484		OR 706		1982 Mah LJ 65
17	(1981) 1 Ren	157	1981 Mah LJ 783	284	(1981) 83 Bom		1982 Mah LR
	CR 475		1981 Mah LJ 843		LR 586		(Bom) 122
22	...		1981 Bom CR 817		1982 Mah LJ 2:9		(1982) 84 Bom
	...		1981 Mah LR 280	295	(1981) 83 Bom		LR 41
27	1982 Mah LJ 223		1981 (2) Ren		LR 448	487	...
	ILR (1981)		CR 702		1981 Mah LJ 815	491	1932 (1) Bom
30	Bom 1222	160	(1982) 1 Ren		1981 Mah LJ 881		CR 577
	1982 Tax	174	CR 527	300	(1981) 1 Ren		1982 Mah LJ 664
41	LR 2422		1982 (1) Bom	305	CJ 380	498	...
	1982 Tax		CR 136		(1981) 83 Bom	505	...
48	LR 2429		1982 (1) Civ	312	LR 573	512	(1981) 83 Bom
	1980) 2 Ren	176	LJ 264		1982 Mah LJ 417		LR 452
	OR 413	191	...	325	...	523	...
	1981 Bom CR 163	199	(1981) 86 Bom	332	1982 Mah LJ 390	532	...
	1981 Mah LJ 413		LR 234		1982 Mah LR	538	1982 Cri LJ 2147
	(1981) 2 Rent	206	1981 Bom CR 540		(Bom) 296	539	1982 (2) Bom
	LR 155		1981 Mah LJ 685	341	(1982) 2 DMQ 204		CR 525
55	(1981) 83 Bom	211	1980 Mah LJ 877	363	(1982) 84 Bom	553	...
	LR 599	216	1982 (1) Bom		LR 142	558	1981 Mah LJ 450
	1982 Mah LJ 252		OR 65	377	1982 Mah LJ 477	563	1981 Mah LJ 512
57	...		(1982) 1 Co-op	382	...		1982 (1) Bom
	...		LJ 149	387	1982 (1) Bom		CR 590
68	1981 Mah LJ 659	225	1982 Mah LJ 339		OR 819		1982 Mah LR
	1981 Hindu	231	(1981) 83 Bom		1982 Mah LJ 840	580	(Bom) 455
	LR 531		LR 327	388	1982 Mah LJ 285	585	1982 Mah LJ 647
72	(1981) 83 Bom		1981 Bom CR 699	391	1982 Mah LJ 377		(1982) 2 Ren
	LR 307		1981 Mah LJ 820	400	1982 (1) Bom		OR 461
76	...		1981 Mah LR 292		OR 454	589	...
79	...		1982 Mat LR 41				

Other Journals = All India Reporter

(1981) Bom LR AIR 122 1982 Bom 20 1980 Bom C R B m OR AIR 573 1982 Bom 249 1981 Bom C R Bom OR AIR 185 1982 Bom 50 291 " " 10 319 " " 82 540 " " 206 599 " " 251 317 " " 157 1010 " " 482 1982 (1) Bom C R Bom OR AIR 60 1982 Bom 132 65 " " 218 135 " " 174 278 " " 185 454 " " 400 577 " " 491 590 " " 568 811 " " 487 819 " " 887 379 " " 428 1982 (2) Bom C R Bom OR AIR 428FB1982 Bom 467 525 " " 589 (1981) 83 Bom L R Bom LR AIR 180 1982 Bom 10 284 " " 199 307 " " 72	(1981) 83 Bom L R Bom LR AIR 327 1982 Bom 231 445 " " 263 448 " " 295 452 " " 512 573 " " 312 586 " " 284 599 " " 86 (1982) 84 Bom L R Bom LR AIR 1 1982 Bom 243 4 " " 421 9 " " 132 41 " " 492 48 " " 254 142 " " 365 177 " " 428 1980 Mah L J Mah LJ AIR 577 1982 Bom 211 1981 Mah L J Mah LJ AIR 216 1982 Bom 82 239 " " 17 413 " " 50 453 " " 553 540 " " 10 659 " " 68 665 " " 206 673 " " 89 783 " " 151 798 " " 6 815 " " 295 820 " " 231 843 " " 157 881 " " 300	1982 Mah L J Mah LJ AIR 37 1982 Bom 421 65 " " 482 154 " " 243 223 " " 27 229 " " 284 252 " " 66 285 " " 388 347 " " 182 377 " " 391 390 " " 332 417 " " 312 477 " " 377 512 " " 663 538 " " 437 545 " " 274 539 " " 235 647 " " 585 664 " " 491 870 " " 587 855FB " " 467 1981 Mah L R (Bom) Mah LR AIR 112 1982 Bom 82 242 " " 245 260 " " 157 292 " " 251 1982 Mah L R (Bom) Mah LR AIR 122 1982 Bom 489 296 " " 332 362 " " 437 376 " " 274 455 " " 563 1982 (1) Civ L J Civ LJ AIR 264 1982 Bom 174 569 " " 125	(1982) 18 Co-op L J Co-op LJ AIR 149 1982 Bom 218 (1982) 1 DMC DMC AIR 97 1982 Bom 15 (1982) 2 DMC DMC AIR 204 1982 Bom 341 1981 Hindu L R Hindu LR AIR 531 1982 Bom 68 1982 Hindu L R Hindu LR AIR 93 1982 Bom 6 445 " " 231 1982 JSCTL JSCTL AIR 17 1982 Bom 1 1982 Mat LR Mat LR AIR 41 1982 Bom 231 109 " " 15 (1981) 1 Ren C J Ren CJ AIR 380 1982 Bom 305 (1982) 1 Ren C J Ren CJ AIR 408 1982 Bom 10	(1980) 2 Ren CR Ren CR AIR 302 1982 Bom 245 413 " " 50 (1981) 1 Ren CR Ren CR AIR 135 1982 Bom 10 475 " " 17 (1981) 2 Ren CR Ren CR AIR 702 1982 Bom 157 (1982) 1 Ren CR Ren CR AIR 537 1982 Bom 180 705 " " 282 (1982) 2 Ren CR Ren CR AIR 419 1982 Bom 425 461 " " 595 484 " " 132 (1981) 2 Rent L R Rent LR AIR 155 1982 Bom 50 (1982) 1 Rent L R Rent LR AIR 197 1982 Bom 6 (1982) 1 Serv L R Serv LR AIR 645 1982 Bom 6
---	--	--	--	--

THE All India Reporter

1982

Bombay High Court

AIR 1982 BOMBAY 1 DHARMADHIKARI AND PALSHIKAR, JJ.

Wadilal Mathuradas Jain, Petitioner v. The Assistant Collector of Central Excise and others, Respondents.

Spl. Civil Appln. No. 486 of 1978, D/-1-12-1980.

Gold Control Act (45 of 1968), S. 82 — Section does not contemplate personal hearing when order under appeal is being confirmed in revision. (Natural justice — Opportunity of hearing at revisional stage; Constitution of India, Art. 226).

The only obligation upon the Government of India while deciding the revisional order under Clause (b) of sub-section (3) of S. 82 is that if the order is to be varied, then the person against whom such order is being passed prejudicial to his interest, has to be given a reasonable opportunity of making a representation and, if he so desires, of being heard in his defence. A combined reading of Sections 79, 80 makes it clear that at the stage of initial adjudication under S. 79 and at the appellate stage under Section 80 if the person concerned demands an opportunity of being heard, it has to be given. These two sections amply provide for observance of the principles of natural justice while adjudicating the matters. However, same is not the position when the revisional powers are being exercised by the Central Government. The Central Government is bound to grant a personal hearing if any order is to be varied prejudicially to the interest of any person. The intention of the Legislature,

therefore, appears that it is not necessary at the revisional stage to grant a personal hearing. AIR 1977 SC 567 and AIR 1977 SC 1691, Foll. (Para 10)

So far as the rules of natural justice are concerned, they do not necessarily require that there should be repeated hearings at all later stages, namely appeals, revisions, etc. AIR 1967 Cal 321, Rel. on. (Para 13)

Cases	Referred:	Chronological	Paras
AIR 1977 SC 567	: 1977 Lab IC 55		11
AIR 1977 SC 1691			12
AIR 1971 SC 862			11
AIR 1967 SC 1606			11
AIR 1967 Cal 321	: 1967 Cri LJ 738		13
AIR 1966 SC 671			11

Kumar. Mehta with Shirish Gupte, for Petitioner; V. D. Govilkar with Miss S. G. Shah, for Respondents.

PALSHIKAR, J.:— In this petition the petitioner is challenging the orders of the authorities under the Gold Control Act.

2. According to the Central Excise Officers at Amalner, the petitioner had gone to Bombay for purchasing gold on 2nd Feb., 1970 and was likely to return by a bus from Bombay on 4th February, 1970. The Superintendent, Central Excise, Amalner, therefore, proceeded to Dhulia to apprehend the petitioner and at Dhulia they found that the petitioner was travelling by a bus from Bombay to Jalgaon. He was asked to get down with all his luggage. Thereafter his personal search was taken by the Superintendent, Central Excise, Amalner, in the presence of Panchas and he found that the petitioner was wearing two gold patlies in crude form on both his hands. These patlies weighed 113.100 gms. of gold. His luggage was,

therefore, searched by the authorities and they found six gold patlies in crude form which were hidden in the bents for fitting water pipes. The pipes were closed with screws on. The total weight of these six patlies was 361.000 gms. When he was questioned by the authorities, the petitioner could not satisfactorily explain the possession of these gold patlies. All the 8 patlies were, therefore, seized along with other articles and according to the authorities the petitioner had contravened the provisions of Section 8 of the Gold Control Act as he was in possession of 8 gold patlies in crude form weighing 474.100 gms. According to them these patlies were liable to confiscation under Section 71 (1) of the G. C. Act and the petitioner was also liable to penalty under Section 74 of the G. C. Act.

3. It appears that there was a panchanama prepared by the Central Excise authorities dated 20th April, 1970. This purports to be an assay report. However, it also contains the observations of the panchas that out of these 8 patlies 6 were in complete form of ornaments and the other two patlies were in incomplete shape and form of ornaments. They also observed that such patlies were used in Maharashtra.

4. The Central Excise authorities served a show cause notice dated 15th May, 1970 upon the petitioner asking to show cause why the gold in question should not be forfeited and why he should not be penalised under the Act. The authorities relied upon two panchanamas dated 4th February, 1970 and 20th April, 1970 and also the statements dated 4th February, 1970 and 25th February, 1970 of the petitioner. According to the authorities the petitioner was in possession of primary gold in the form of round crude patlies in an unfinished form. These were hidden in the pipes and the pipes were closed with screws. Two of these patlies were worn by the petitioner on his hand.

5. The defence of the petitioner was that these were the family ornaments and when he had gone to Bombay for purchasing certain hardware materials he wanted to sell them in the market at Bombay. However, he could not get sufficient price for these articles and, therefore, he brought them back; but in order to keep them at a safe place he wore two patlies on his hands and had kept the rest of them in the pipes so that nobody would think that he was carrying gold ornaments. He also stated in his reply that these were his family ornaments in a finished form and such ornaments were normally used in conservative Marwari families and there was

nothing unusual in it; but since he could not sell them in Bombay, he brought them back.

6. The Assistant Controller of Central Excise, Integrated Division, Nasik, granted a personal hearing to the petitioner and passed an order on 12th October, 1970 confiscating all the 8 patlies holding them to be the primary gold. He also levied a penalty of Rs. 500/- upon the petitioner. Against this order the petitioner filed an appeal. Before the appellate authority he was represented by a lawyer and was granted a personal hearing on 20th October, 1972. The Collector of Excise, Poona, who heard the appeal, dismissed the same by his order dated 17th November, 1972. He also confirmed the findings of the Assistant Collector of Central Excise, Nasik, that these so-called patlies were primary gold and were liable to confiscation.

7. Being aggrieved by the appellate order, the petitioner filed a revision application before the Government of India. The Government of India did not grant any personal hearing to the petitioner and decided the revision application by its order dated 27th July, 1976. The Government of India also held that these patlies were not the ornaments as defined by the Gold Control Act and they were clearly the pieces of primary gold. The Government of India, therefore, confirmed the findings recorded by the Assistant Collector of Central Excise Nasik, and the Collector of Central Excise, Poona. These orders have now been challenged in the present petition.

8. Shri Mehta, the learned counsel for the petitioner, argued that the order passed by the Government of India was vitiated because no personal hearing was granted to the petitioner. According to him he had demanded a personal hearing even before the Government of India and since the same was not granted, the principles of natural justice were violated. He said that the Government of India was acting in a quasi-judicial manner while disposing of the revision application. It was, therefore, obligatory upon the revisional authority to grant a personal hearing. He further submitted that the Government of India as well as the authorities below have not taken into consideration an important piece of evidence viz. the panchanama dated 20th April, 1970. He submitted that this was the panchanama drawn by the authorities concerned and the Panchas were specifically asked their opinion on the question whether those patlies were the ornaments or not and whether such ornaments were used in the State of Maharashtra or not. The opinion ex-

pressed by the Panchas was binding on the Department, and since none of the authorities has stated any reasons for rejecting the said panchanama, all the orders are liable to be set aside. He also argued that it was not open to the authorities concerned to examine the articles themselves and come to their own independent conclusions. Mr. Mehta also argued that the opinion expressed by the Panchas should have been accepted by the authorities concerned. He, therefore, contended that all the orders of the authorities concerned, are liable to be set aside.

9. Before dealing with the questions raised by Shri Mehta, it would be necessary to note certain provisions as regards adjudication of the disputes under the G. C. Act. Chap. XIV of the G. C. Act deals with adjudication, appeal and revision under the Act. Section 79 lays down that no order of adjudication or confiscation or penalty shall be made unless the owner of the gold, conveyance, or animal or other person concerned is given a notice in writing— (i) informing him of the grounds on which it is proposed to confiscate such gold, conveyance or animal or to impose a penalty; and, (ii) giving him a reasonable opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the confiscation or imposition of penalty mentioned therein and, if he so desires, of being heard in the matter. We are not concerned in the present petition with the rest of the provisions of Section 79. This section clearly lays down that if before the adjudicating authority the person concerned demands a personal hearing, it has to be granted.

10. Section 80 provides for an appeal against the order passed by the authorities under Section 79. It lays down that the appellate authority may, after giving to the appellant an opportunity of being heard, if he so desires, and after making such further inquiries, if any, as it may consider necessary, pass such order as it thinks fit, confirming, modifying or reversing the decision or order appealed against, or may send back the case, with such directions, as it may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence if necessary. Section 80 also, therefore, provides that if the appellant demands an opportunity of being heard, it has to be granted. We may observe at this stage that both the Assistant Collector of Central Excise, Nasik, and the Collector of Central Excise, Poona, had granted an opportunity of being personally heard to the petitioner. We are mainly concerned in this petition with the

question whether it was obligatory upon the revisional authority to grant a personal hearing. Section 82 of the G. C. Act empowers the Central Government either on its own motion or otherwise, to call for and examine the record of any proceeding in which any decision or order has been made on appeal for the purpose of satisfying itself as to the correctness, legality or propriety of such decision or order and may pass such order thereon as it may think fit. The only obligation upon the Government of India while deciding the revisional order under Clause (b) of sub-section (3) of Section 82 is that if the order is to be varied, then the person against whom such order is being passed prejudicial to his interest, he has to be given a reasonable opportunity of making a representation and, if he so desires, of being heard in his defence. A combined reading of all these provisions makes it clear that at the stage of initial adjudication under Section 79 and at the appellate stage under Section 80 if the person concerned demands an opportunity of being heard, it has to be given. In our opinion, these two sections amply provide for observance of the principles of natural justice while adjudicating the matters. However, same is not the position when the revisional powers are being exercised by the Central Government. The Central Government is bound to grant a personal hearing if any order is to be varied prejudicially to the interest of any person. The intention of the Legislature, therefore, appears that it is not necessary at the revisional stage to grant a personal hearing.

11. In *Madhya Pradesh Industries Ltd. v. Union of India*, AIR 1966 SC 671, it has been laid down by their Lordships of the Supreme Court in para 10 which reads as under :

“10. As regards the second contention, I do not think that the appellant is entitled as of right to a personal hearing. It is no doubt a principle of natural justice that a quasi-judicial tribunal cannot make any decision adverse to a party without giving him an effective opportunity of meeting any relevant allegations against him. Indeed, R. 55 of the Rules, quoted supra, recognizes the said principle and states that no order shall be passed against any applicant unless he has been given an opportunity to make his representations against the comments, if any, received from the State Government or other authority. The said opportunity need not necessarily be by personal hearing. It can be by written representation. Whether the said opportunity should be by written re-

presentation or by personal hearing depends upon the facts of each case and ordinarily it is in the discretion of the tribunal. The facts of the present case disclose that a written representation would effectively meet the requirements of the principles of natural justice. But there is some apparent justification in the submission that the Central Government had taken into consideration an extraneous matter that came into existence subsequent to the filing of the revision, namely, that Messrs. Manganese Ore (India) Ltd., which is a public sector undertaking, had applied for the lease of the area in question on October 5, 1962, for the purpose of mining. The appellant did not allege in its affidavit that this fact was not brought to its notice before the Central Government made the order; indeed, it did not file any reply affidavit to the effect that the said matter was kept back from it. I would have pursued the matter a little further but for the fact that I am refusing to interfere in this appeal on other grounds."

However, it was argued that personal hearing even at the revisional stage was necessary because the decision of the Supreme Court in the aforesaid case was held to be no longer good law. However, the Supreme Court in a later decision is *Tara Chand Khatri v. Municipal Corporation of Delhi*, AIR 1977 SC 567 observed in para 24 as under:

"24. We would also like to point out that the observations in *Travancore Rayon Ltd. v. Union of India*, (AIR 1971 SC 862) (supra) that in *Bhagat Raja v. Union of India*, (AIR 1967 SC 1606) (supra) this Court in effect overruled the judgment of the majority in *Madhya Pradesh Industries Ltd. v. Union of India*, (AIR 1966 SC 671) (supra) seem to have crept therein through some oversight. A careful perusal of the decision in *Bhagat Raja v. The Union of India* (supra) would show that this Court did not make any observations therein which can be interpreted as overruling the majority judgment in *Madhya Pradesh Industries Ltd. v. Union of India* (supra). It is also worthy of note that in *Bhagat Raja's case* (supra), the amendment of Rule 55 of the Mineral Concession Rules, 1960 introduced in July, 1965 laid down a special procedure in regard to revisions. It required the Central Government to send copies of the application for revision to all the impleaded parties including the person to whom a lease had been granted calling upon them to make such comments as they might like to make within three months from the date of the issue of the communication and on receipt of the comments from

any party to send copies thereof to the other parties calling upon them to make further comments as they might like to make within one month from the date of the issue of the communication. It also provided that the revision application, the communications containing comments and counter-comments referred to above would constitute record of the case. Thus under the amended rule, the party whose application was rejected got an ample opportunity of showing to the Central Government by reference not only to the record which was before the State Government but by reference to the fresh material as well that the State Government was misled in its consideration of the matter or that its decision was based on irrelevant considerations. This is evident from the following observations made in *Bhagat Raja v. The Union of India* (supra):

"The old Rule 55 was replaced by a new rule which came into force on 19th July, 1965. Whereas the old rule directed the Central Government to consider comments on the petition of review by the State Government or other authority only, the new rule is aimed at calling upon all the parties including the State Government to make their comments in the matter and the parties are given the right to make further comments on those made by the other or others. In effect, the parties are given a right to bring forth material which was not before the State Government. It is easy to see that an unsuccessful party may challenge the grant of a leave in favour of another by pointing out defects or demerits which did not come to the knowledge of the State Government. The order in this case does not even purport to show that the comments and counter-comments which were before the Central Government in this case, had been considered."

It is clear from this paragraph that the decision in *Madhya Pradesh Industries case* (AIR 1966 SC 671) was still a good law and relying upon the said decision in *Madhya Pradesh Industries case* and this case, there is no manner of doubt that the petitioner had no right of personal hearing at the revisional stage before the Central Government under Section 82 of the Gold Control Act as a matter of right.

12. It may also be pointed out that the Supreme Court in *Shrikrishnandas Tikara v. State of Madhya Pradesh*, AIR 1977 SC 1691 observed as follows (at p. 1694):—

"... .. The lessee having been heard, natural justice has been complied with. The fact that in the second notice by the Collec-

for a personal hearing was offered, does not mean that the failure personally to hear the petitioner was a contravention of the canon of natural justice in the first case. It is well-established that the principles of natural justice cannot be petrified or fitted into rigid moulds. They are flexible and turn on the facts and circumstances of each case. Has there been any unfair deal by the authority? Has the party affected been hit below the belt? Has he had a just opportunity to state his plea? Having regard to the features of the present case, we are hardly satisfied that the order is bad on this score."

It is, therefore, clear that in the present case the petitioner had ample opportunity to defend himself against the proposed action before the Assistant Collector of Central Excise who originally adjudicated the matter. From the reply to the show cause notice it appears that the petitioner had every opportunity to defend himself. It is also clear from the appellate order that the Collector of Central Excise, Poona, also gave an opportunity to the petitioner of being represented by a lawyer and of being heard personally. If this be so, we do not think that there was any violation of the principles of natural justice, when the Government of India declined to grant any personal hearing. In their order the Government of India have stated that they carefully considered the submissions made by the applicant in his revision application and also examined the records. The plea of the petitioner for a personal hearing was turned down on the ground that it was not so provided in law and that the Government of India did not think it necessary, having regard to the nature and circumstances of the case, to meet the ends of natural justice. We find from the order of the Government of India that they were aware of the argument advanced that the Collector ignored the opinion of the gold dealers, though experts in gold business. We may further observe that it was not pointed out to us that since no personal hearing was granted, the petitioner was prejudicially affected in his defence in any manner. In the absence of any such material on record, we do not think that the order of the Government of India dated 27th July, 1976 is vitiated on this count.

13. We may also usefully rely upon the decision of the Calcutta High Court in *Prafulla Kumar Mazumdar v. Inspector General of Police, West Bengal*, AIR 1967 Cal 321, wherein it was observed that at the stage of an enquiry, the accused must be heard and given every opportunity to defend himself.

But once the proceedings have terminated, subsequent stages like appeals or revisions are in most cases governed by rules and regulations which are framed or according to practice. Though personal hearing is essential at the primary stage of enquiry, at later stages if the rules do not permit it, personal hearing cannot be given since the matter is governed by rules framed. So far as the rules of natural justice are concerned, they do not necessarily require that there should be repeated hearings at all later stages, namely appeals, revisions, etc.

14. As already observed, Section 82 does not contemplate a personal hearing when the order under appeal is being confirmed. In our opinion, therefore, the order is perfectly valid. When we turn to the next contention raised by Shri Mehta, we find that so far as the panchanama dated 20th April, 1970 is concerned, the Assistant Collector of Central Excise has taken into consideration the same. However, the real question that arises is what is the evidentiary value of this panchanama and the opinion expressed by the so-called experts. In the first place, there is no legal bar to the authorities concerned in using their own eyes to compare the articles and to come to their own conclusions. Neither the sections nor the rules create any such legal bar. In our opinion, therefore, it was open to the authorities concerned to physically examine the articles and come to a finding whether they were ornaments or primary gold. Moreover, they have also taken into account the panchanama dated 20th April, 1970. However, it was argued by Shri Mehta that no reasons were stated by the authorities concerned for not accepting the said piece of evidence and according to him without assigning any cogent reasons for rejecting that piece of evidence the authorities could not compare the articles and come to their own finding. Having regard to the facts and circumstances of this case, we find that when the authorities have examined the articles themselves and have come to the conclusion that this was primary gold, by necessary implication they have rejected the panchanama to the extent of the opinion of the expert. There is another aspect in this case. In the first place, we do not accept that the two panchas were experts on the question whether the articles were ornaments or primary gold. There is nothing on record to suggest that they had any expertised knowledge in the field. If that is the state of affairs, we do not think that even non-consideration of the panchanama, if any, would vitiate the order.

15. It was also contended that the department failed to establish that the articles in question were the pieces of primary gold. We must examine this question with reference to the defence made out by the petitioner in his reply to the show cause notice. In paragraph 3 of his reply the petitioner stated that he had gone to Bombay for purchase of certain hardware goods and that at that time he had carried with him 8 patlies for the purpose of sale in Jhaveri Zazar at Bombay. However, since he could not get the desired price as the purity of the gold was found to be less, he brought them back. For the purpose of safety of his valuable articles he wore two of them on his hands and kept the others in the pipe bents so that nobody would doubt the possession of the valuables. He has also stated that they were family ornaments in a finished form and were normally used in a conservative Marwari family. The Assistant Collector of Central Excise, personally examined these articles and found that they were primary gold from their finish. The ends of those pieces were crudely cut and the inside surface was so rough and crudely made that the pieces could hardly be called ornaments intended for decorating human body in any society in this country. The same is the finding of the higher authorities. We do not accept the contention of the petitioner that the department has failed to establish that these were the pieces of primary gold. Having regard to the circumstances under which the petitioner brought them from Bombay to Dhulia and the explanation given by him which was ultimately found to be false, the authorities were justified in coming to their own conclusion.

16. In the result, the rule is discharged with costs.

Petition dismissed.

AIR 1982 BOMBAY 6

PALSHIKAR, J.

Municipal Corporation of Greater Bombay and another, Petitioners v. Vijay Metal Works, Bombay, Respondent.

Writ Petn. No. 3253 of 1980, D/- 13-3-1981.

Evidence Act (1 of 1872), Ss. 126 and 129 — Scope — Sections give protection even to a salaried employee who advises his employer on legal matters — However, communication should not be in furtherance of illegal purpose.

GY/GY/D397/81/HR/RSK

A salaried employee who advises his employer on all legal questions and also other legal matters would get the same protection as others, viz., barrister, attorney, pleader or vakil, under Ss. 126 and 129, and, therefore, any communication made in confidence to him by his employer seeking his legal advice or by him to his employer for the purpose of giving legal advice should get the protection of Ss. 126 and 129, provided that such communication is not made in furtherance of any illegal purpose. AIR 1954 J & K 11 and (1972) 2 QB 102, Rel. on. (Para 4)

The Law Officer of the Municipal Corporation had prepared a note for the purpose of sending a reply by the Municipal Commissioner to a letter of the State Government. No legal advice was sought from the Law Officer on any question. The sum and substance of the note was that eviction proceedings under the Corporation Act were started against the occupants of the Arches below a bridge on the ground of reconstruction of the said bridge, but really they were not covered by the reconstruction of the bridge and it was necessary to drop enquiries against those occupiers and it was also decided to create a public purpose i.e. storage of cement etc. for the bridge so as to evict the occupants on the pretext of public interest. It was also sought from the Municipal Commissioner whether the Corporation should apprise the State Minister for Urban Development about the real facts of the case as to why the eviction proceedings had been started against the occupants.

Held, the document was not in the nature of a confidential communication between the client and his legal adviser. On the contrary it disclosed certain shocking facts that destroyed the privilege, if any granted under Ss. 126 and 129. It showed that the enquiries were started against the occupants on a false ground and pretext that they were required to be evicted because of the reconstruction of the bridge. However, since they were not under the bridge the enquiries were dropped and the Corporation was preparing another false ground to evict the occupants as if it was in the public interest. Certain facts were sought to be suppressed from the Government for which the orders of the Municipal Commissioner were required. In the circumstances, the document could not get any protection of law either under S. 126 or 129 of the Evidence Act. (Para 5)

Cases Referred: Chronological Paras
 (1972) 2 QB 102 : (1972) 2 All ER 353 :
 (1972) 2 WLR 835 (CA), Crompton Ltd.
 v. Customs and Excise Commrs. 4
 AIR 1954 J & K 11 4

R. T. Walawalkar with Smt. M. V. Shetty, N. V. Kamat and P. B. Karhadkar, for Petitioners; C. M. Korde, i/b M/s. Crawford Baylay and Company, for Respondent.

ORDER:— The petitioners had initiated action against the respondents for eviction on the ground that Mahalaxmi Bridge at Bombay was to be reconstructed and those premises which are in the shape of Arches at the junction of Clark Road and Hains Road were to be vacated. The notices were, therefore, served by the petitioners upon the respondents and eviction proceedings under Section 105-B of the Bombay Municipal Corporation Act, 1888 were taken, before the Small Causes Court at Bombay. During the cross-examination of the witness for the respondents, the Corporation was called upon to produce original letter dated 5-2-1975. Earlier inspection of this letter was granted by the Corporation and I am told that the letter has been filed before the Enquiry Officer of the Corporation. When the respondents called upon the Advocate of the Corporation to produce the original letter dated 5-2-1975, an objection was raised mainly as regards privilege. According to the Corporation, this was a confidential communication by the Legal Adviser of the Corporation and the same was privileged under Sec. 129 of the Evidence Act. The learned Judge of the Small Causes Court by his order dated 8th Oct., 1980 held that this communication was not privileged either under S. 129 or under S. 126 of the Evidence Act. He, therefore, ordered the production of that letter and adjourned the case till 28th Oct., 1980. This order has been challenged in the present petition.

2. Shri R. T. Walawalkar the learned counsel for the petitioners argued that the letter dated 5-2-1975 was a confidential communication by the Legal Adviser of the Corporation to his client, the Municipal Corporation of Greater Bombay. Under Section 129 of the Evidence Act no one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case, he may be compelled to disclose any such communication as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

Shri Walawalkar, therefore, argued that the learned Judge was in error in compelling the production of this document by the Corporation.

3. Shri Korde, the learned counsel appearing for the respondents argued that the Law Officer of the Corporation who has written the said letter dated 5-2-1975, is not covered by either S. 126 or 129 of the Evidence Act. A salaried Law Officer of the Corporation is not the Legal Adviser, or even Barrister, Vakil or Attorney. He is a paid employee of the Corporation and there is no relationship between the Corporation and him as that of client and Legal Adviser. He further submitted that what Ss. 126 and 129 contemplate is that a person who is practicing law in Courts of law has the privilege under these sections and it is not an employee who acts as a Law Officer who is protected by these sections. He further submitted that Ss. 126 and 129 are supplementary to each other and they must be construed in the same manner and a Legal Adviser which is mentioned in S. 129 must be of the category of a Barrister, Vakil or Attorney as mentioned in S. 126, and not anybody employed by a Corporation or a Company.

4. Section 126 protects the professional communications made by a client to his barrister, attorney, pleader or vakil. It prohibits these persons from disclosing any communication made to them in the course and for the purpose of their employment as such barrister, pleader, attorney or vakil by or on behalf of the client, unless there is an express permission of the client to disclose the same. These persons are also prohibited from stating contents or conditions of any document with which they are acquainted in the course of and for the purpose of their professional employment. They also cannot be compelled to disclose what advice was tendered by them to the client in the course of and for the purpose of such employment. However, the section does not protect any disclosure regarding any such communication made in furtherance of any illegal purpose of any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment. It is immaterial under this section whether attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client. These obligations not to disclose certain communications as stated

above continue even after the employment as such has come to an end. Sec. 129 gives protection to persons that they shall not be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case, he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given but no others. Therefore, any confidential communication between a client and a legal professional adviser is protected under S. 129 and they shall not be compelled to disclose any such communications to the Court unless such person offers himself as a witness and it appears to the Court that such disclosure is necessary in order to explain any evidence which such person has given and nothing beyond than that. However, the crucial question which arises in this petition is what is the status of a salaried Legal Adviser who is an employee of the Corporation or Company or even for that matter of State and Central Government. Merely because he does not appear in the Court does he cease to get this protection of law? Is it that only those persons who are professing and practicing law in the Law Courts are entitled to protection under the law of evidence? A close reading of these sections would make it clear that what is protected is a disclosure made in confidence by a client to his legal adviser. Of course, there is no protection to any such statement which is for illegal purpose or for offence for practicing fraud or for committing forgeries. While considering these two sections we must look to the spirit behind the law rather than the letter of law. In the recent past a practice of employing legal advisers who are well qualified in law has grown up. Instead of going to the professional lawyers every now and then a practice has come into operation to retain the lawyers in full time employment of the Corporation. Their nature of duty is to advise their employers on the questions which are of a legal character. They advise their employers on all matters pertaining to law and litigation. Their nature of duties is the same as that of barrister, pleader, vakil, or attorney except that they do not appear in Courts. If it is so, then I do not see any reason why they should not get same protection of law as the other legal advisers who appear in Courts of law. In my opinion, therefore, a paid or salaried employee who advises his employer, on all questions of law and relating to litigation, must

get the same protection of law and therefore any such communication made in confidence by his employer to him for the purpose of seeking legal advice or vice versa should get protection of Sections 126 and 129 of the Evidence Act. In AIR 1954 J & K 11, *L. Tirath Ram v. His Highness Govt. Jammu and Kashmir*, the learned Judge has observed that a communication made by a Legal Remembrancer of the Government is privileged under Section 129. Even though there is no elaborate discussion of this question, I respectfully agree with the statement of law made by the learned Judge. What the learned Judge of the Jammu and Kashmir held in 1954 has been elaborated by Lord Denning M. R. in (1972) 2 QB 102 at p. 129. The Great Judge in *Crompton Ltd. v. Customs and Excise Commrs. (C. A.)*, has observed as follows :—

“The law relating to discovery was developed by the Chancery Courts in the first half of the 19th century. At that time nearly all legal advisers were in independent practice on their own account. Nowadays it is very different. Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the Government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer. For that reason *Ferbes J.* thought that they were in a different position from other legal advisers who are in private practice. I do not think this is correct. They are regarded by the law as in every respect in the same position as those who practice on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the Court. They must respect the same confidences. They and their clients have the same privileges. I have myself in my early days settled scores of affidavits of documents for the employers of such legal advisers. I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege: and I have never known it questioned. There are many cases in the books of actions against railway

companies where privilege has been claimed in this way. The validity of it has never been doubted.

I speak, of course, of their communications in the capacity of legal advisers. It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps of an executive nature. Their communications in that capacity would not be the subject of legal professional privilege. So the legal adviser must be scrupulous to make the distinction. Being a servant or agent too, he may be under more pressure from his client. So he must be careful to resist it. He must be as independent in the doing of right as any other legal adviser. It is true, as the Law Reform Committee said in their report in 1967 on Privilege in Civil Procedure (Cmd. 3472) that the "system is susceptible to abuse," but I have never known it abused. So much so that I do not think the law should be changed in the way that Forbes J. would have it. There is a safeguard against abuse. It is ready at hand. If there is any doubt as to the propriety or validity of a claim for privilege, the master or the judge should without hesitation inspect the documents himself so as to see if the claim is well founded, or not. He has ample power under R. S. C. Order 24, R. 12. The affidavit should not be treated as conclusive, nor anything like it. A party cannot use the affidavit as a taboo or spell to prevent anyone looking at the documents. When the master or judge sees the documents, he will see if the privilege is rightly claimed — or not — and make an order accordingly."

With due respect to the learned Judge, I am in full agreement with the position of law stated in this case. I, therefore, hold that a salaried employee who advises his employer on all legal questions and also other legal matters would get the same protection as others under Sections 126 and 129 of the Evidence Act and even otherwise these communications are properly covered by these sections.

5. It was then contended that since such communication is privileged one the learned Judge was in error in ordering production of that document. It is, therefore, necessary to see whether the letter in question is confidential one which is protected by these sections. A reading of this letter makes it clear that the Law Officer of the Corporation had prepared a note for the purpose of sending a reply by the Municipal Commissioner to a letter of the State Government. It refers to the endorsement dated 25-1-1975. The endorsement number is MGC/8959 dated

21-5-1975. This is an endorsement made to the Law Officer that a draft reply for the Municipal Commissioner's approval has to be prepared. Now this was for a reply to the letter from the Government dated 24-1-1975, wherein the Government had made certain queries. It, therefore, appears that the Law Officer was requested to prepare a draft reply to the letter dated 24th January, 1975 for the purpose of Municipal Commissioner who was supposed to reply that letter. It appears that no legal advice was sought from the Law Officer on any question. On the contrary this draft letter discloses the facts as they had occurred. Sum and substance of this letter is that eviction proceedings under S. 105/B of the Corporation Act were started against the occupants of the Arches below Mahalaxmi Bridge on the ground of reconstruction of Mahalaxmi Bridge, but really they were not covered by the reconstruction of Mahalaxmi Bridge and it was necessary to drop enquiries against those occupiers and it was also decided to create a public purpose i.e. storage of cement etc. for the bridge so as to evict the occupants on the ground of public interest. It was also sought from the Municipal Commissioner whether the Corporation should apprise the State Minister for Urban Development about the real facts of the case as to why the eviction proceedings have been started against the occupants. In my opinion, this document is not in the nature of a confidential communication between the client and his legal adviser. On the contrary it discloses certain shocking facts that would destroy the privilege, if any. This shows that the enquiries were started against the occupants on a false ground and pretext that they were required to be evicted because of the reconstruction of Mahalaxmi Bridge. However, since they were not under the Mahalaxmi Bridge the enquiries were dropped and the Corporation was preparing another false ground to evict the occupants as if it was in the public interest. Certain facts were sought to be suppressed from the Government for which the orders of the Municipal Commissioner were required. The text of the entire letter is such that it shocks the conscience of common man about the manner in which the public bodies like Corporation is behaving. In my opinion, such a document can never get any protection of law either under Section 126 or 129 of the Evidence Act.

6. Apart from this, this letter has been produced in another enquiry No. 119/1976, 240/1976 as Exhibit 1. The original document has been produced before the Enquiry

Officer. The respondent was also given inspection of the same with the express consent of the Municipal Corporation. Considering these facts, I do not think that any such protection either under Section 126 or 129 of the Evidence Act is available to the petitioners.

7. In the result, therefore, I confirm the order passed by the learned Judge, though for different reasons.

The application, therefore, fails and is dismissed.

Rule is discharged.

Corporation should pay costs of this petition to the respondents and bear its own.

Petition dismissed.

AIR 1982 BOMBAY 10

PENDSE, J.

Moreshwar Narayan Bhadke, Petitioner
v. Shashikant Balakrishna Malkar, Respondent.

Writ Petn. No. 639 of 1980, D/- 12-9-1980.

(A) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 11 (3) and S. 12, Explan. I — Application for fixation of standard rent under S. 11 (3) — Limitation under S. 12, Explan. I — Notice under S. 12 (2) received on April 27, 1974 — Application filed only on June 10, 1974, i. e. on reopening of Court after vacation — Held application was within time in view of provisions of S. 4 r/w. S. 29 (2) of Limitation Act (1963) or S. 11 of Bombay General Clauses Act (1904). (Limitation Act (1963), Ss. 4, 29 (2) and Bombay General Clauses Act (1904), S. 11).

(Paras 8, 9)

(B) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 11 (1) and (3), and S. 12 (2) — Application for fixation of standard rent — To be filed under S. 11 (1) or S. 11 (3) depending upon class of tenant, S. 11 (3) applying to tenants who have received notice under S. 12 (2) for arrears of rent, S. 11 (1) to tenant who has not received such notice — Held District Judge erred by holding that application by all classes of tenants could be filed only under S. 11 (1) and that Section 11 (3) merely provided for fixation of interim rent.

There is a distinction between an application to be filed by the tenant under sub-section (1) and sub-section (3) of S. 11. The application under sub-section (1) of Sec. 11

does not require the tenant to deposit any interim rent, nor can such a tenant be called upon to deposit any amount in the Court. The power to direct the tenant to deposit interim rent is conferred on the Court provided the tenant has received notice under sub-section (2) of S. 12 and files an application under sub-section (3) of S. 11 of the Rent Act. The intention of the Legislature in imposing additional obligation on the tenant who files the application under sub-section (3) is obvious. The tenant who has committed default in payment of rent and receives notice from the landlord, cannot avoid his liability to make payment by merely filing an application for determination of the standard rent. Sub-section (5) of S. 11 also provides that such a tenant would not be entitled to file any appeal against the order passed in his application under sub-section (3) of S. 11. Hence it is wrong to proceed on an assumption that the application for fixation of standard rent by all classes of tenants can be filed only under sub-section (1) and sub-sec. (3) of S. 11 merely provides for fixation of interim rent. The scope of sub-section (1) and sub-section (3) is totally different and the application under sub-section (3) of Sec. 11 is an independent application.

(Para 10)

(C) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 11 (3) and S. 12, Explan. I — Benefit of Explan. I of S. 12 — Cannot be denied merely on ground that on date of filing of application under S. 11 (3) the tenant did not get interim rent fixed — Application for determination of interim rent is not a sine qua non to attract Explan. I of S. 12.

Once an application is filed for determination of standard rent under sub-sec. (3) of S. 11 of the Rent Act, then a duty is cast upon the Court to forthwith specify the amount of rent. It is open either for the tenant to file such an application or for the landlord to request the Court to fix the interim rent, but the date of such a request or actual fixation of interim rent cannot be deemed to be the date of filing of the original application under sub-sec. (3) of Section 11 of the Rent Act. The application for determination of interim rent is not a sine qua non to attract Explan. I of Sec. 12 of the Rent Act. It is open for a tenant to file the application under sub-section (3) and thereafter to pay or deposit the contractual rent without seeking determination of the interim rent. In such a case, even though interim rent is not fixed, the advantage of ex-

planation is available to the tenant. Determination of the interim rent is merely a facility accorded to the tenant and it cannot be treated as an obligation or a liability of the tenant. (Para 11)

Cases Referred: Chronological Paras
(1954) 56 Bom LR 619 12

M. A. Rane, for Petitioner; G. R. Rege with D. R. Banavalikar, for Respondent.

ORDER:— By this petition filed under Art. 227 of the Constitution of India, the petitioner is challenging the legality of the judgment dated Jan. 5, 1980, passed by the District Judge, Kolhapur, reversing the decree passed by the Second Joint Civil Judge, Junior Division, Kolhapur, on June 7, 1977.

2. The proceedings arise out of a suit for eviction filed by the respondent under the provisions of S. 12 (3) (a) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the Rent Act). The respondent is an owner of a house bearing City Survey No. 1094 at Kolhapur with three rooms on the first floor. One room on the loft and two rooms on the ground floor were let out to the petitioner for his residence at the contractual monthly rent of Rs. 70/-. The petitioner remained in arrears from Aug. 1, 1970 and the respondent terminated the tenancy and called upon the petitioner to pay the arrears of rent as required by Section 12 (2) of the Rent Act by notice dated April 17, 1974. The notice was received by the petitioner on April 27, 1974. On June 10, 1974, the petitioner filed Misc. Appln. No. 98 of 1974 in the Court of Civil Judge, Junior Division, Kolhapur for fixation of standard rent as provided by S. 11 (3) of the Rent Act. Thereafter on June 12, 1974, the respondent instituted Civil Suit No. 498 of 1974 in the Court of Civil Judge, Junior Division, Kolhapur for recovery of possession of leased premises on two grounds. The first was that the premises are unlawfully sublet by the petitioner, while the second ground was that the petitioner had incurred liability by not paying the arrears of rent and is liable to be evicted under Section 12 (3) (a) of the Rent Act.

3. In the Misc. Application filed by the petitioner, on July 28, 1974, an application was filed by the petitioner for fixation of interim rent. It appears that no order was passed on the application by the trial Court.

On August 29, 1974, the respondent/landlord filed an application in the suit instituted by him for direction to the tenant to pay the rent. In answer to this application, the petitioner filed an application at Exh. 14 on Sept. 16, 1974 in the suit requesting the trial Court to fix interim rent. On this application, the trial Court passed order, in the suit, on Oct. 4, 1974 directing the petitioner to deposit the entire arrears then due before Nov. 11, 1974 and also to deposit the costs of the suit. Accordingly, the petitioner deposited the entire arrears on Oct. 16, 1974 along with the amount of costs. It is not in dispute that thereafter all along the petitioner-tenant had regularly paid the rent in the Court.

4. At the hearing of the suit, the trial Court found that the petitioner-tenant had filed the application under S. 11 (3) of the Rent Act within one month of the receipt of notice and has also paid the interim rent as directed by the Court, and is, therefore, entitled to the advantage of Explan. 1 to Section 12 of the Rent Act. The trial Court held that the case of the petitioner falls under S. 12 (3) (b) of the Rent Act and dismissed the claim of the respondent for recovery of possession as conditions of that sub-section were satisfied. The trial Court also found that the petitioner was not guilty of unlawfully subletting the premises.

5. The respondent carried an appeal before the District Judge, Kolhapur and before the learned District Judge the only ground on which possession was sought was the default committed by the petitioner in payment of rent. The learned District Judge came to the conclusion that the application for fixation of standard rent under S. 11 (3) of the Rent Act was not filed by the petitioner within a period of one month from the date of receipt of the notice under sub-section (2) of S. 12 of the Rent Act, and, therefore, the tenant is not entitled to the advantage of Explan. 1 to Sec. 12 of the Rent Act. The learned District Judge also held that the mere filing of the application under S. 11 (3) of the Rent Act is not sufficient to attract the Explan. 1 of S. 12, but it is obligatory on the tenant to get the interim rent determined forthwith. The learned District Judge also held that as the petitioner did not apply for fixation of interim rent till July 28, 1974 the application under Section 11 (3) of the Rent Act should be deemed to have been filed on that day. The learned District Judge was of the opinion that mere filing of the application under

Sec. 11 (3) of the Rent Act by the petitioner without seeking fixation of the interim rent forthwith, indicates that the application was not bona fide. On the strength of these findings, the learned District Judge allowed the appeal and passed the decree of eviction. The judgment of the learned District Judge is under challenge in this petition.

6. Shri Rane, the learned counsel appearing in support of the petition, submitted that the learned District Judge has committed an error apparent on the face of record in disturbing the decision of the trial Court. Shri Rane submitted that the presentation of the application on July 10, 1974, could by no stretch of imagination be held to be beyond period of one month from the date of receipt of notice. Shri Rane further urges that the learned District Judge did not properly appreciate the scope of sub-section (1) and sub-sec. (3) of S. 11 of the Rent Act. The learned counsel submits that the assumption of the learned District Judge that advantage of Explan. 1 of Section 12 is available only when the application under S. 11 (3) of the Rent Act is filed and an application for fixation of interim rent is made forthwith, is not correct. Shri Rege, the learned counsel appearing on behalf of the respondent, on the other hand urges that the findings arrived at by the learned District Judge are in accordance with law and need no interference in this petition. Shri Rege submits that the application under S. 11 (3) of the Rent Act filed by the petitioner did not include prayer for interim rent and unless the application includes such a prayer, the advantage of Explanation 1 of S. 12 of the Rent Act is not available. Shri Rege also submitted that the presentation of the application after the expiry of one month from the date of receipt of the notice disentitles the petitioner from claiming advantage of the explanation.

7. In view of these rival submissions, two questions fall for my determination in the present petition. The first question is whether the presentation of the application on June 10, 1974 by the petitioner was within period of limitation provided by Explanation 1 to S. 12 of the Rent Act, and secondly whether the petitioner is entitled to advantage of Explan. 1 of S. 12 of the Rent Act even though the interim standard rent was not determined at the behest of the tenant immediately on the lodging of the application under S. 11 (3) of the Rent Act.

8. Turning to the first question, it is not in dispute that the notice of termination issued on April 17, 1974 was received by the petitioner-tenant on April 27, 1974. On receipt of such notice, it was open for the tenant to file an application under S. 11 (3) of the Rent Act within a period of one month to claim advantage of Explan. 1 to Section 12. It is not in dispute that the Civil Courts at Kolhapur were closed for Summer Vacation from May 6, 1974 to June 9, 1974. The period of one month from the date of receipt of notice expired during the time the Court was closed for vacation. The petitioner filed the application under S. 11 (3) of the Rent Act on the reopening of the Court i.e. on June 10, 1974. The trial Court rightly held that the presentation of the application on the reopening of the Court was perfectly within time in view of provisions of S. 4 read with Section 29 of the Limitation Act, 1963. The learned District Judge observed that the trial Court seems to have developed a new idea to attract the provisions of S. 4 read with S. 29 of the Limitation Act to the filing of the application under S. 11 (3) of the Rent Act. The learned District Judge is obviously in error in assuming that the provisions of S. 4 read with S. 29 (2) of the Limitation Act has no application to the filing of proceedings under S. 11 (3) of the Rent Act. The learned District Judge overlooked that S. 4 of the Limitation Act specifically provides that—

“Where the prescribed period for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the Court re-opens.”

The Limitation Act, 1963 encompasses in its sweep not only the suits or appeals, but the applications also. Sub-section (2) of S. 29 of the Limitation Act provides that—

“Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Ss. 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.”

Article 137 of the Limitation Act provides that the period of limitation for filing any application for which no period of limitation is provided elsewhere in the schedule is three years from the date when the right to apply accrues. This residuary article provides period of three years for any application, but by the provisions of the Rent Act, which is local law, period for filing of the application under S. 11 (3) of the Rent Act is limited to one month from the date of receipt of the notice under S. 12 (2) of the Rent Act. Sub-section (2) of S. 29 of the Limitation Act would clearly attract to the filing of such applications. In my judgment, it is very difficult to appreciate why the learned District Judge observed that the provisions of the Indian Limitation Act are not attracted to the filing of the application under S. 11 (3) of the Rent Act.

9. Even otherwise, the learned District Judge has overlooked the provisions of Section 11 of the Bombay General Clauses Act, 1904. That section provides that—

“Where, by any Bombay Act (or Maharashtra Act) made after the commencement of this Act, any act or proceedings is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open.”

Proviso to S. 11 states that—

“Nothing in this section shall apply to any act or proceedings to which the Indian Limitation Act, applies.”

In my judgment, the provisions of the Limitation Act applies to the filing of the application under S. 11 (3) of the Rent Act, but even otherwise the provisions of Sec. 11 of the Bombay General Clauses Act, 1904, is a clear answer to the finding of the learned District Judge that the application filed on July 10, 1974 was not within period of limitation.

10. The learned District Judge deprived the protection of Explan. 1 of S. 12 of the Rent Act to the petitioner-tenant on the ground, that even if the application filed on June 12, 1974 under S. 11 (3) of the Rent Act is found to be within period of limitation, the petitioner-tenant has not filed the application for determination of the interim rent on the same date. The conclusion arrived at by the learned District Judge is clearly erroneous. Section 11 of the Rent

Act provides for determination of the standard rent when a dispute arises between the landlord and the tenant about the quantum of rent. Sub-section (1) of S. 11 enables the Court upon an application made to it to fix the standard rent having regard to the provisions of the Act and the circumstances of the case. Sub-section (1) of Section 11 enables either the tenant or the landlord to approach the Court for fixation of standard rent. The tenant would file an application if contractual rent, according to him, is excessive, while the landlord would file the application if contractual rent is required to be increased due to alteration in the premises or due to change in the amenities or in respect of any other factors which are relevant to the fixation of the standard rent. Sub-section (2) of Sec. 11 enables the landlord or tenant to approach the Court for determination of the dispute regarding the amount of permitted increases. Sub-section (3) of S. 11 provides that an application for fixing the standard rent or for determination of permitted increase can be filed by the tenant who has received the notice from his landlord under sub-sec. (2) of S. 12 of the Rent Act. In other words, sub-section (3) carves out a class of tenants who have received notice under sub-sec. (2) of S. 12 about being in arrears of rent. A tenant who has not received such a notice can approach the Court for determination of the standard rent under S. 11 (1) of the Rent Act and for determination of permitted increases under sub-section (2) of Section 11 of the Rent Act, but a tenant who receives notice under sub-section (2) of Section 12 can file the application only under sub-section (3) of S. 11. The Legislature expects such a tenant to perform certain obligations. The tenant who files the application under sub-section (3) of S. 11 is required to deposit the interim rent that would be determined by the Court. In fact sub-section (3) itself provides that on filing of the application the Court shall forthwith specify the amount of rent or permitted increases which are to be deposited in Court by the tenant and make an order directing the tenant to deposit such amount. A copy of such order is also required to be served upon the landlord. Sub-section (3) further provides that if the tenant fails to deposit such amount, his application shall be dismissed. It is required to be stated that there is a distinction between an application to be filed by the tenant under sub-sec. (1) and sub-section (3) of S. 11 of the Rent Act. The application under sub-section (1)

of S. 11 does not require the tenant to deposit any interim rent, nor can such a tenant be called upon to deposit any amount in the Court. The power to direct the tenant to deposit interim rent is conferred on the Court provided the tenant has received notice under sub-section (2) of S. 12 and files an application under sub-sec. (3) of Section 11 of the Rent Act. The intention of the Legislature in imposing additional obligation on the tenant who files the application under sub-section (3) is obvious. The tenant who has committed default in payment of rent and receives notice from the landlord, cannot avoid his liability to make payment by merely filing an application for determination of the standard rent. Sub-section (5) of S. 11 also provides that such a tenant would not be entitled to file any appeal against the order passed in his application under sub-section (3) of Sec. 11. In other words, a tenant filing an application under sub-section (3) is required to perform certain obligations and is also deprived of a right to file an appeal against the order passed in the application, while these restrictions are not present in the case of a tenant who files an application under sub-section (1) of S. 12 of the Rent Act. This distinction has escaped the attention of the learned District Judge. The learned District Judge proceeded on the assumption that the application for fixation of standard rent by all classes of tenants can be filed only under sub-section (1) and sub-sec. (3) of S. 11 of the Rent Act merely provides for fixation of interim rent. As pointed out hereinabove, the scope of sub-section (1) and sub-section (3) is totally different and the application under sub-section (3) of Sec. 11 is an independent application.

11. The learned District Judge was also in error in holding that the tenant is required forthwith to apply to the Court under sub-section (3) of S. 11 for fixation of interim rent and in absence thereof it will be deemed that the application under sub-section (3) was filed only when a request is made by the tenant for fixation of interim rent. The assumption of the learned District Judge is not warranted by the language of sub-section (3). Once an application is filed for determination of standard rent under sub-section (3) of S. 11 of the Rent Act, then a duty is cast upon the Court to forthwith specify the amount of rent. It is open either for the tenant to file such an application or for the landlord to request the Court to fix the interim rent, but the date of such a request or actual fixation of interim rent cannot be deemed to be the

date of filing of the original application under sub-section (3) of S. 11 of the Rent Act. The application for determination of interim rent is not a *sine qua non* to attract Explan. 1 of S. 12 of the Rent Act. It is open for a tenant to file the application under sub-sec. (3) and thereafter to pay or deposit the contractual rent without seeking determination of the interim rent. In such a case, even though interim rent is not fixed, the advantage of explanation is available to the tenant. It must be remembered that determination of the interim rent is merely a facility accorded to the tenant and it cannot be treated as an obligation or a liability of the tenant. In my judgment, the advantage of the explanation to S. 12 of the Rent Act cannot be denied to the tenant merely on the ground that on the date of filing of the application under S. 11 (3) of the Rent Act, the tenant did not get the interim rent fixed. The application under S. 11 (3) of the Rent Act cannot be treated as not bona fide on that count.

12. Shri Rege, relied upon certain observations made by Chief Justice Chagla in the case of *Karamsev Kanji v. Velji Virji*, reported in (1954) 56 Bom LR 619 to claim that not only filing of the application under S. 11 (3) of the Rent Act avoid the liability of the tenant of being ejected under Section 12 (1) of the Rent Act. There cannot be any dispute with the principle laid down by the learned Chief Justice, but it is a far cry to suggest that the tenant must also get the interim rent determined within one month from the date of receipt of notice under S. 12 (2) of the Rent Act. Neither the section requires it nor the judgment relied upon supports such proposition. The judgment of the learned District Judge cannot be sustained.

13. Accordingly, the petition succeeds and the rule is made absolute and the judgments of the learned District Judge dated Jan. 5, 1980 is set aside and that passed by the Second Joint Civil Judge, Junior Division, Kolhapur on June 7, 1977 is restored. In the circumstances of the case, there will be no order as to costs.

Petition allowed.

AIR 1982 BOMBAY 15

MEHTA, J.

Kartarchand Dalliram Jain, Petitioner v.
Smt. Taravati Kartarchand Jain, Respondent

Civil Revn. Appln. No. 64 of 1980. D/-
30-1-1980.

Hindu Marriage Act (25 of 1955), Ss. 24, 26 — Maintenance pendente lite — Cannot be granted to adult children under Sec. 24 — Section 26 empowers Court to provide for maintenance of only minor children — Held order granting maintenance to adult daughters was beyond scope of Sections 24 and 26 — Proper recourse for them is to seek maintenance under S. 20 of Hindu Adoptions and Maintenance Act (1956). (Hindu Adoptions and Maintenance Act (1956), S. 20).

(Paras 9, 10)

Cases Referred :	Chronological	Paras
AIR 1972 Pat 80		5
AIR 1968 Guj 150		4
AIR 1964 SC 1336		6
AIR 1964 SC 1341		7

A. N. Samant, for Petitioner; P. L. Nain, for Respondent.

ORDER :— This petition raises an interesting point of law with regard to the grant of maintenance pendente lite under S. 24 of the Hindu Marriage Act, 1955.

2. The petitioner-husband filed a petition for divorce in the Bombay City Civil Court at Bombay, being M. J. Petition No. 647 of 1977, against the respondent-wife on the ground that the respondent wife after the solemnization of the marriage had treated the petitioner with cruelty. After the filing of the petition the respondent-wife took out a Notice of Motion dated 31-10-1977 against the petitioner-husband for maintenance pendente lite under Section 24 of the said Act, claiming a sum of Rs. 1000/- per month. The Notice of Motion was argued on the footing that the amount of Rs. 1000/- per month was claimed by the respondent-wife not only for maintaining herself but also three daughters of the said marriage, who had attained majority. The learned Judge of the City Civil Court in a detailed judgment dated 9-3-1978 passed an order for maintenance pendente lite of a sum of Rs. 225/- per month for the respondent-wife and a sum of Rs. 175/- per month for each of the three daughters. It may be pointed out that the eldest daughter Sunita was married on 7th September, 1978 i.e. after the passing of the impugned Order. The eldest daughter Sunita was born in 1955, the second daughter Anita

was born in 1957 and the youngest daughter Samita was born in 1960. It is not in dispute between the parties that all three had attained majority at the time when the respondent-wife had taken out her Notice of Motion in the City Civil Court at Bombay on 31-10-1977.

3. Mr. Samant, the learned Advocate appearing on behalf of the petitioner-husband, has challenged the judgment and order of the learned Judge of the City Civil Court only in so far as the learned Judge has ordered the petitioner to pay a sum of Rs. 175/- per month to each of the three daughters. Mr. Samant has not impugned the order in respect of the payment of Rs. 225/- per month to the respondent-wife. Under S. 24 the Court could provide for the maintenance either of the wife or the husband, as the case may be, in the event of either party not having any independent income sufficient for his or her support and necessary expenses of the proceedings. Mr. Samant contended that Section 24 did not provide for an order of maintenance of children either minor or adult. Provision for the maintenance of minor children was made under Section 26 of the said Act both pendente lite as also after the passing of the decree. According to Mr. Samant the learned Judge of the City Civil Court by granting maintenance for the three adult daughters had traversed beyond the scope of Sections 25 and 26 of the said Act. Sections 25 and 26 of the said Act, provide :—

“25. (1) Any Court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

(2) If the Court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the Court may deem just.

(3) If the Court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the Court may deem just."

"26. In any proceeding under this Act, the Court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the Court may also from time to time revoke, suspend or vary any such orders and provisions previously made."

4. Mr. Samant relied upon the judgment of the Gujarat High Court in the case of Patel Dharamshi Premji v. Bai Sakar Kanji, reported in AIR 1968 Guj 150 wherein the Division Bench was pleased to observe (at p. 155):—

"The lower appellate Court, however, seems to have committed an error in taking into account the needs and requirements of the son in determining the amount of permanent alimony to be awarded to the respondent. We do not think that in fixing the amount of permanent alimony the lower appellate Court was entitled to take into consideration the amount of maintenance which would be necessary for the purpose of meeting the needs and requirements of the son and in doing so the lower appellate Court clearly took into account an extraneous or irrelevant factor. This is not to say that the respondent would not be entitled to claim maintenance for the minor son from the appellant but the needs and requirements of the son could not be taken into account in determining what should be the amount of permanent alimony to be awarded to the respondent. The order of the lower appellate Court increasing the amount of permanent alimony from Rs. 20 to Rs. 28 per month was, therefore, vitiated by an error of law."

5. Mr. Samant also relied upon a judgment of the Patna High Court in the case of

Bankim Chandra Roy v. Smt. Anjali Roy reported in AIR 1972 Pat 80, wherein the learned single Judge of that Court was pleased to observe (at p. 81):—

"It would thus be seen that an order can be made if the petitioner has no independent income sufficient for her or his support. No monthly allowance can be granted under Sec. 24 for the support of the children. That being so, the grant of monthly allowance of Rs. 325/- not only for the support of the respondent but also for the support of the three children is contrary to law and has been made by committing an illegality in exercise of the jurisdiction of the Court under S. 24 of the Act."

6. Mr. Nain, the learned Advocate appearing on behalf of the respondent-wife, has raised an initial objection with regard to the maintainability of this Revision Petition. Mr. Nain contended that the powers of the Court sitting in Revision were restricted to the issue of jurisdiction wrongly exercised by the lower Court or the exercising of a jurisdiction which was not vested in the lower Court. Mr. Nain submitted that the present Revision Petition in effect was filed against the quantum of maintenance awarded by the lower Court to the wife, taking into consideration the requirements of the three daughters. Mr. Nain urged that this Court, sitting in Revision, should not interfere with the order of the learned Judge of the City Civil Court since no issue affecting the jurisdiction of that Court under the Act had been raised by the petitioner. Mr. Nain has drawn my attention to a decision of the Supreme Court in the case of Manindra Land and Building Corporation Ltd. v. Bhutnath Banerjee, reported in AIR 1964 SC 1336, wherein their Lordships were pleased to observe (at p. 1338):—

"It is not open to the High Court to question the findings of fact recorded by a subordinate Court in the exercise of its revisional jurisdiction under S. 115 of the Code, which, it is well settled, applies to cases involving questions of jurisdiction, i. e. questions regarding the irregular exercise or non-exercise of jurisdiction or the illegal assumption of jurisdiction by a Court and is not directed against conclusion of law or fact in which questions of jurisdiction are not involved."

7. Mr. Nain relied upon another ruling of the Supreme Court in the case of Vora Abbasbhai Alimahomed v. Haji Gulamnabi Haji Safibhai in the same volume, i. e.

AIR 1964 SC 1341, wherein their Lordships were pleased to observe (at p. 1347):—

“The High Court had, in exercise of its powers under S. 115, Civil P. C., no authority to set aside the order merely because it was of the opinion that the judgment of the District Court was assailable on the ground of error of fact or even of law. * * * The power of the High Court under S. 115, Civil P. C. was not thereby excluded, but the exercise of that power is by the terms of the statute investing it severely restricted. The High Court may exercise its powers in revision only if it appears that in a case decided by a Subordinate Court in which no appeal lies thereto the Subordinate Court has exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction so vested or has acted in the exercise of its jurisdiction illegally or with material irregularity.”

8. Mr. Nain, therefore, contended that in the instant case the petitioner-husband had not succeeded in pointing out that the learned Judge of the City Civil Court had exercised his jurisdiction irregularly or had failed to exercise jurisdiction which had been vested in him nor was any material illegality pointed out.

9. Now, it may be pointed out that on a reading of S. 24, it becomes evident that that section makes provision for granting maintenance pendente lite to a party who has no independent income sufficient for his or her support. This section does not provide for granting maintenance for the children. Section 26 of the said Act provided for interim orders from time to time as also for making provision in the decree with regard to custody, maintenance and education of minor children consistently with their wishes. Section 26, therefore, empowered the Court to provide for the maintenance of minor children. It provided for maintenance both pendente lite as also after the passing of the decree. The learned Judge in granting separate maintenance to each of the three adult daughters had clearly traversed beyond the scope of Section 24 and S. 26 of the said Act. The learned Judge having transgressed beyond the scope of the provision of the sections in exercising his jurisdiction, his order was invalid and contrary to law. That being the case, the petitioner was entitled to approach this Court in revision. I, therefore, negative this submission of Mr. Nain.

10. Mr. Nain then contended that the learned Judge was justified in taking into

consideration the requirements of the maintenance of the three adult daughters for the reason that in deciding the quantum of maintenance to a wife he had to take into consideration the overall financial position of the wife and the husband and their necessities having regard not merely to their income but their property, debts, liabilities and obligations. Mr. Nain argued that it would be unreasonable to state that the mother was no longer called upon to maintain her three daughters just because they had attained majority. I am unable to agree with the submission made by Mr. Nain. The adult daughters were entitled to have recourse for seeking maintenance from their father under S. 20 of the Hindu Adoptions and Maintenance Act, 1956. The learned Judge in awarding maintenance pendente lite to the three adult daughters in an application under S. 24 of the said Act, had clearly transgressed beyond the scope of the section and the resultant order is, to my mind, vitiated by an error of law. It is, therefore, necessary that the order to the extent that it awarded maintenance to the three adult daughters at the rate of Rs. 175/- per month to each of them must be set aside.

11. In the result Rule is made partially absolute. The order of the learned Judge dated 9-3-1978 to the extent of granting maintenance pendente lite to the three adult daughters at the rate of Rs. 175/- per month to each of them is set aside. The rest of the order is confirmed. There will be no order as to the costs of this petition.

Order accordingly.

AIR 1982 BOMBAY 17

KANADE, J.

Kazi Cumruddin Hussein, Petitioner v. Rajendrakumar Maneklal and another, Respondents.

Spl. Civil Appln. No. 2776 of 1975, D/- 15-7-1980.

(A) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 15 (1) — “But subject to any contract to the contrary” — Meaning.

In the present case, the defendant-tenant to whom the open plot was leased out constructed a superstructure on it at his own cost and leased it out to a sub-tenant. Previous to the present suit, there were cross

BY/BY/B130/81/MBR

suits, one by the landlord and the other by the tenant against each other. The parties arrived at the compromise in both the suits and a consent decree was passed. Under the consent decree, the landlord admitted and approved of the fact of subletting and the parties agreed that the tenant to pay to the landlord the increased municipal taxes by reason of the subletting. The tenant was ready to pay the arrears of rent according to the consent decree, but the landlord did not accept the amount and filed the present suit for recovery of possession of the suit land on the ground of alleged subletting without consent.

Held that having regard to the words "but subject to any contract to the contrary" and having regard to the fact that plaintiff-landlord had given a right to the defendant-tenant to sublet the superstructure, the alleged sub-tenancy would not be unlawful within the meaning of S. 15. Taking into consideration the terms in the consent decree, it did not appear that the plaintiff-landlord put a restriction on the defendant-tenant to sublet the suit premises.

(Para 11)

(B) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 13 (1) (e) — Unlawful subletting — Lease in respect of open land — Tenant constructing superstructure on it and letting it out — It would not amount to unlawful subletting within meaning of S. 13 (1) (e). AIR 1973 Bom 214 and Decision in Civil Revn. Appln. No. 1511 of 1960, D/- 21-11-1962 (Bom), Foll. (Para 12)

Cases Referred: Chronological Paras
AIR 1973 Bom 214: 75 Bom LR 24

- | | |
|--|---------------|
| | 9, 10, 12, 13 |
| (1970) Spl. Civil Appln. No. 1191 of 1967,
D/- 10-3-1970 (Bom), Dina Manekji Mody
v. Malshi Bharmal | 12 |
| (1966) Spl. Civil Appln. No. 1 of 1966, D/-
2-3-1966 (Bom), Ibrahim Ahmed Welder
v. Ramesh Janardan Shroff | 12 |
| (1962) Civil Revn. Appln. No. 1511 of 1960,
D/- 21-11-1962 (Bom) | 9 |

Raju S. Mohite for M. A. Rane, for Petitioner; Ramchandra K. Shah with A. R. Pandit, for Respondent No. 1.

ORDER:— This application under Article 227 of the Constitution of India has been filed by the petitioner-tenant challenging the judgments and orders passed by the lower Courts.

2. Few facts leading to this application are as under:

A piece of land admeasuring 1500 sq. feet from City Survey No. 1789 situated at Bom-

bay Parel-Sewree Division Municipal Street No. 89, Tokersey Jivraj Road, Sewree, Bombay-400 015 was leased out to the petitioner somewhere in the year 1924. The respondents are admittedly the owners of the said piece of land. It is also an admitted fact that the petitioner raised a structure on the said piece of land at his own costs.

3. Respondents-plaintiffs filed Suit No. 2257 of 1955 against the petitioner and one Mohmed Gafoor in the City Civil Court at Bombay for a declaration that the petitioner and others trespassed on the suit land. The said suit was contested by the petitioner denying the claim of the respondents. The petitioner also filed Suit No. 63 of 1957 against the respondents and the said Mohmed Gafoor in the City Civil Court at Bombay for a declaration that he was the tenant of the suit land and the shed thereon and for injunction restraining them from disturbing his possession of the suit land and the structure thereon.

4. Both the suits were ordered to be heard together and the parties arrived at the compromise in both the suits and a decree in terms of the compromise was passed on Nov. 9, 1959 in both the suits. It was decreed that the petitioner was the monthly tenant of suit land admeasuring 1500 sq. ft. on a monthly rent of Rs. 35/-. The petitioner agreed to pay to the respondents-defendants Nos. 1 and 2 in the Suit No. 63 of 1957 Rs. 35/- per month as monthly rent and also the permitted increases under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the "Bombay Rent Act"). It was further agreed and decreed that the petitioner shall pay to the respondents herein the increased municipal taxes levied and to be levied by the Bombay Municipality by reasons of the petitioner having sublet a portion to Babu Vasudeo who was carrying on business of Bidies and Tobacco. The petitioner also agreed to pay to the defendants-respondents herein all the arrears of rent and permitted increases as well as the municipal taxes levied by the Bombay Municipality by reason of the petitioner having kept sub-tenant as from Sept. 1, 1948. It was further agreed:

"The said dispute between the parties shall be referred to Mr. G. R. Ganatra, Advocate as the sole arbitrator and the parties hereto agree to be bound by his award as final and binding upon them."

The petitioner in the last paragraph of the consent terms agreed not to dispose of the

demised premises or his business until the amounts due to the respondents as per Cls. 4 and 5 are paid off by the petitioner to the respondents herein.

5. It is, therefore, the respondents filed R. A. E. Suit No. 2146 of 1963 against the petitioner in the Court of Small Causes at Bombay for recovery of possession of the suit land on the allegation that the petitioner unlawfully sublet the suit land and parted with possession or transferred interest in the suit land without their consent.

6. The said suit was resisted by the petitioner. He filed his points of defences and denied the allegation of unlawful subletting of the suit land. The petitioner denied the legality of the notice to quit. It is also denied that he has illegally sublet, assigned and/or parted with the possession and/or transferred his interest as alleged. Lastly it is contended that by the consent terms filed in the City Civil Court in Suit No. 63 of 1957, the petitioner-defendant only agreed not to dispose of the demised premises.

7. The learned trial Court recorded the evidence adduced by the parties and after careful consideration of the evidence on record was pleased to pass a decree for possession by the judgment and decree, dated March 9, 1967 and directed the petitioner to deliver possession of the suit land. It was held that the petitioner has unlawfully sublet the suit premises.

8. The petitioner feeling aggrieved by the said judgment and decree passed by the trial Court preferred an appeal being Appeal No. 198 of 1967 to the Bench of the Small Causes Court at Bombay. The Appellate Court on consideration of the evidence confirmed the findings recorded by the trial Court and dismissed the appeal by the judgment and decree, dated Sept. 6, 1975. Against the said judgment and decree passed by the Bench of the Small Causes Court at Bombay, the petitioner has filed the present Special Civil Application under Art. 227 of the Constitution of India challenging the legality and correctness of the said appellate Court's judgment and decree.

9. Shri Raju S. Mohite, the learned counsel appearing on behalf of the petitioner, submitted that the consent decree passed by the City Civil Court in Suit No. 63 of 1957 has been misconstrued by both the Courts below. It is argued that both the Courts below had cast the burden on the petitioner to prove that the suit land has not been illegally sublet to the sub-

tenant. He pointed out that the admissions of the petitioner relied upon by the lower Courts are not the admissions. In fact, the transfer of the interest in the suit land has not been effected by the petitioner or that he has not transferred his interest in the open land to the sub-tenant. It is further argued that the sub-tenants inducted on the superstructure on the land are not inducted as unlawful sub-tenants. Lastly, it is argued by Shri Mohite that in any case, there is no transfer of interest so far as the open land is concerned. What has been let out is the superstructure and the landlords have no interest in the superstructure and it is therefore there is no transfer of interest in the immoveable property belonging to the respondents or that there is no unlawful tenancy created by the petitioner giving rise to a right to the landlords to get a decree for eviction on the ground of subletting as provided by the provisions of S. 13 (1) (e) of the Bombay Rent Act. Shri Mohite very strongly relied upon the unreported judgment of the Division Bench of this Court in Civil Revn. Appln. No. 1511 of 1960 decided by D. V. Patel and K. K. Desai, JJ. on Nov. 21, 1962. He also cited reported judgment of this Court in Vasant Ramchandra Sharma v. Narayanibai Mulchand, (1973) 75 Bom LR 24: (AIR 1973 Bom 214). While relying upon the said two judgments of this Court, Shri Mohite contended that since the petitioner was merely a tenant of the open plot and the superstructure was built by him, it cannot be said that he has sublet the open piece of land.

10. Shri Hemchandra K. Shah, the learned counsel appearing on behalf of the respondents submitted that while entertaining an application under Art. 227 of the Constitution of India, this Court will not be justified in reappreciating the evidence on record and disturb the finding recorded by both the Courts below. He further pointed out that it was alleged in the plaint that the petitioner-defendant had unlawfully sublet the suit premises and this fact has not been specifically denied by the tenant in the written statement. He brought to my notice the averment made in para 4 of the plaint and in para 3 of the written statement of the petitioner. According to Shri Shah, there is no specific denial of the fact that the petitioner-defendant has unlawfully sublet the suit premises. It is further argued that the petitioner-defendant has categorically admitted the transfer of interest in favour of the sub-tenant. Shri Shah strongly relied upon the later part of the judgment of Jus-

tice Vaidya, referred to above in (1973) 75 Bom LR 24 : (AIR 1973 Bom 214) and contended if this Court comes to the conclusion that there is no unlawful subletting, then admittedly the petitioner had inducted sub-tenants on the superstructure and thereby assigned or transferred his interest in the said manner, and it is therefore the judgments and decrees by the Courts below are correct in law.

11. Having heard the learned counsel appearing on behalf of both the sides, it appears that both the Courts below have misdirected themselves on the question of law as well as on the question of facts of this case. It is not a disputed fact in the present case that the open plot was leased out to the petitioner. It is also not disputed that the superstructure was built at the cost of the petitioner-tenant. It also appears from the record that the petitioner had let out the superstructure to Bapu Vasudeo who conducted a business of bidies and tobacco. In para 3 of the consent decree, the landlords admitted and approved this fact of subletting and the parties agreed that the petitioner to pay to the respondents herein the increased municipal taxes levied and to be levied by the Bombay Municipality by reasons of the petitioner having sublet a portion to Bapu Vasudeo who does the business of Bidies and Tobacco. In para 6 of the consent decree it is stated that the petitioner herein agreed not to dispose of the demised premises or his business until the amounts due to the defendants Nos. 1 and 2 — the respondents herein as per Cls. 4 and 5 of the consent terms are paid off by the petitioner to the respondents herein. The petitioner has stated that he had paid part of arrears of rent to the respondents as per the consent terms, by money order. Respondents did not accept Money Order sent by him after consent terms. Taking into consideration the terms in the consent decree, it does not appear that the landlords put a restriction on the petitioner to sublet the suit premises. As stated above, it appears that they have admitted the fact that the petitioner-tenant was entitled to sublet the suit premises. In view of these facts, it cannot be said that the tenant has unlawfully sublet the suit premises. The provision of S. 15 (1) of the Bombay Rent Act provides :

"15 (1). Notwithstanding anything contained in any law, but subject to any contract to the contrary, it shall not be lawful after the coming into operation of this Act for any tenant to sublet the whole or any part

of the premises let to him or to assign or transfer in any other manner his interest therein and after the date of commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1973, for any tenant to give on licence the whole or part of such premises."

The words "but subject to any contract to the contrary" have been inserted and shall be deemed always to have been inserted by Bombay Act No. 49 of 1959. Having regard to the said amendment to Section 15 and having regard to the fact that the landholder had given a right to the tenant to sublet the superstructure, the alleged sub-tenancy shall not be unlawful within the meaning of S. 15 of the Bombay Rent Act. It is in this view of the matter, the decree of eviction passed by the lower Courts will have to be set aside.

12. On another ground also, the decrees for possession passed by the lower Courts are erroneous. The Division Bench of this Court consisting of D. V. Patel and K. K. Desai, JJ. on the facts of that case observed as under :—

"As held by the learned trial Judge, with whom we agree, since the petitioner was merely a tenant of the superstructure belonging to opponent No. 2, it cannot be said that by that reason alone he was also a sub-tenant in respect of the open piece of the plot. As the learned Judge says, it only means that he was a licensee of the land and a tenant of the superstructure. Once it is held that he was merely a licensee of the land, there can be no question of application either of S. 14 or of Ordinance III of 1949 or the subsequent amended Section 15 of the Rent Restriction Act."

It is clearly held by the Division Bench of this Court that if there is a lease in respect of the open land and the superstructure is built by the tenant, the tenant occupying the superstructure cannot be said to be the sub-tenant in respect of open piece of the plot. It only means that the sub-tenant was a licensee of the land and not tenant of the superstructure (sic). The said Division Bench Judgment is binding on me. In view of the ratio laid down in the said case, it means that the lower Courts have committed an error in coming to the conclusion that the superstructure was unlawfully sublet by the tenant-petitioner. In subsequent judgment, Vaidya, J. in (1973) 75 Bom LR 24 : (AIR 1973 Bom 214) (supra) considered the observations of the Division Bench of this Court and also two more unreported judgments of this Court, delivered in

Ibrahim Ahmed Welder v. Ramesh Janardan Shroff, Spl. Civil Appln. No. 1 of 1966, decided by Pal J., on March 2, 1966 and in Dina Manekji Mody v. Malshi Bharmal, Spl. Civil Appln. No. 1191 of 1967 decided by Bhasme J., on Mar. 10, 1970. Vaidya, J. observed that as stated above, the decision of Division Bench of this Court is binding on him and it is unnecessary for him to consider the validity of the view taken by Bhasme, J. It is further observed by Vaidya, J. (at p. 221 of AIR):—

“With respect, what Patel and K. K. Desai, JJ. decided was also in the context of the question before them as to whether the obstructionist could be regarded as a sub-tenant under the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 of the plot of land in dispute in that case. It is clear that they have laid down that the tenant of a structure built by a tenant could never claim the sub-tenancy in respect of the plot of land.”

In view of the aforesaid two judgments of this Court, it must be held that there was no unlawful subletting by the petitioner in respect of the superstructure built by the petitioner-tenant. In that view of the matter, the decisions rendered by both the Courts below are not correct in law and therefore deserve to be set aside.

13. Shri Shah strongly relied upon the later part of the judgment of Vaidya, J. in (1973) 75 Bom LR 24: (AIR 1973 Bom 214). He argued that under the provisions of S. 13 (1) (e) of the Bombay Rent Act unlawful subletting is not the only ground but there is another ground viz. if the tenant assigns or transfers in any other manner his interest therein. Relying upon this ground, Shri Shah contended that the petitioner has inducted M/s. Metal Works Tin Wood Manufacturing Company and thereby assigned and transferred the tenant's interest in the said land without plaintiffs'-respondents' consent. It is true in the later part of the judgment Vaidya, J. has observed (at p. 221 of AIR):

“If the landlord establishes any other assignment or transfer of any interest of the tenant other than unlawful subletting, he is entitled to succeed under S. 13 (1) (e).” It is further observed that the words “in any other manner” have reference to the unlawful subletting referred to earlier, however, in certain circumstances, such other manner may be even creation of a sort of irrevocable licence. In the said case, it appears that after the termination of the

tenancy of the tenant by the landlord, the tenant inducted defendant Nos. 2, 9, 13 and 17. It was considered in that case that it was a transfer or assignment “in any other manner of his interest” within the meaning of Sec. 13 (1) (e) of the Bombay Rent Act. In that case, the tenant became a statutory tenant after the termination of his tenancy by a quit notice. In view of that fact, Vaidya, J. held that there was a transfer or assignment “in any other manner of his interest”, within the meaning of S. 13 (1) (e). Accordingly, in the said case, it was held that the landlord's case against respondents must fail as they were mere licensees and the landlord if became entitled to recover possession from defendant No. 1, the decree for eviction can be executed against other defendants also. In the present case, the facts are quite different. It is not stated in the plaint by the landlords-respondents as to when M/s. Metal Works Tin Wood Manufacturing Company was inducted as tenant or sub-tenant on the superstructure. It is stated in para 4 of the plaint:

“The plaintiffs say that the defendant is not ready and willing to observe and perform the terms of tenancy inasmuch as he has illegally sublet or assigned and/or parted with possession and/or transferred his interest in the said land without the plaintiffs' knowledge and consent in writing and contrary to the provisions of Bombay Rent Act and in breach of the consent terms filed in the City Civil Court Suit No. 63 of 1967 to one M/s. Metal Works Tin Wood Manufacturing Company.”

Admittedly by quit notice, the landlords terminated the tenancy of the petitioner by letter, dated Dec. 15, 1962. There is nothing in evidence of the plaintiffs as to when the said Metal Works Tin Wood Manufacturing Company was put in possession of the superstructure. In the absence of such evidence on record, it is not possible to come to the conclusion that the tenant had assigned or transferred “in any other manner his interest” within the meaning of Section 13 (1) (e) of the Bombay Rent Act.

14. Shri Shah very strongly argued that this Court will not be justified to interfere with the finding of fact recorded by both the Courts below, while entertaining an application under Art. 227 of the Constitution of India. It is true the powers of this Court under Art. 227 of the Constitution are limited. This Court cannot convert itself into a Court of appeal and reappreciate the evidence on record and record a finding

reversing the finding recorded by the appellate Court. It is, however, the duty of this Court to see that the subordinate Courts acted within the bounds of law. In the present case, the consent terms have been misconstrued or there is no proper application of mind to the consent terms. So-called admissions have no support in the evidence. Stray sentences have been picked up without the reference to such sentences. In the last para of deposition of the petitioner, he has stated as under :—

“I have given the premises as sub-tenant to tin factory. I again say, I gave chapra on leave licence basis to tin factory.”

From this admission, the lower Court, picked up first sentence and arrived at the conclusion that the tenant has admitted that the suit premises have been sublet to Tin factory. Careful reading of that part of the evidence shows that there was no admission whatsoever by the tenant that he had sublet the open plot to the said factory. Similarly, evidence of the Manager Makarand has not been properly appreciated and considered. Admittedly, Makarand could not be present at the time of letting out to the said company. That piece of evidence of Makarand cannot be availed of by the landlords to prove what were the terms between the petitioner-tenant and respondents. The entire approach of both the Courts below is misdirected and one may say that the findings recorded by both the Courts below are perverse or without any evidence on record, and accordingly cannot be sustained. In the said circumstances, this Court will be justified to reverse the said findings as the said findings are not based upon the evidence available on record. From the tenor of both the judgments of the Courts below they have failed to follow the principle laid down by this Court in the judgment of the Division Bench referred to above. It appears that both the Courts below misunderstood the ratio of the case laid down by Vaidya, J. in the case referred to above. In this context and in view of the facts and circumstances, the judgment and decree cannot be sustained.

15. In the result, Rule in this Special Civil Application is made absolute. The judgment and decree passed by the Bench of the Small Cause Court at Bombay dated Sept. 16, 1975 in Appeal No. 198 of 1967 confirming the judgment and decree passed by the Judge of the Small Cause Court at Bombay, dated March 9, 1967 in R. A. E. Suit No. 2146 of 1963 is set aside and the

plaintiff's suit for possession is dismissed with costs throughout.

Rule made absolute.

AIR 1982 BOMBAY 22

DESHPANDE AND MODY, JJ.

Roosi K. Modi and another, Petitioners
v. Union of India and others, Respondents.

Writ Petn. No. 2864 of 1979, D/- 4-3-1980.

Land Acquisition Act (1 of 1894), Ss. 6 and 48 — Notification under S. 6 — Part of land however subsequently acquired under S. 10 (3) of Urban Land (Ceiling and Regulation) Act, 1976 — Section 6 notification to the extent of remaining land remains unimpaired and could be acted upon to that extent. (Urban Land (Ceiling and Regulation) Act (1976), Ss. 10 (3) and 42).

Section 42 of the U. L. C. Act gives overriding effect to the provisions thereof, notwithstanding anything contrary in any enactment or contract etc. Even the notification and orders passed thereunder are bound to have such overriding effect on the notification or orders passed under any other such enactment, provisions of which have to yield to the provisions of the Urban Land Ceiling Act in terms of the mandate of Section 42. The notification thus issued under Section 10 (3) of the Urban Land Ceiling Act acquiring a portion of the land sought to be acquired under the Land Acquisition Act is bound to have such overriding effect on the earlier notification under S. 6 of the L. A. Act, because of its patent inconsistency and consequentially the latter notification becomes ineffective to the extent of the portion of the land acquired under the Urban Ceiling Act. The notification under Section 6 of the L. A. Act to the extent of portion not acquired under the Urban Land Ceiling Act remains unimpaired and there is no reason why it could not be acted upon to that extent. (Para 9)

Any question of withdrawing from the acquisition of any part of the land under Sec. 48 of the L. A. Act or cancellation of the notification under S. 6 of the L. A. Act does not arise in such a case. In either of these situations continuation of the acquisition proceedings is not obstructed by any legal impediment, and discontinuation of the proceedings is entirely the choice of the appropriate Government. These considerations can have no application where partial invalidity is the creation of the Statute and

nothing in any such Statute prevents proceeding with the valid part of the declaration and the acquisition proposal. AIR 1966 SC 1593, Rel. on. (Para 10)

Cases Referred :	Chronological	Paras
1979 Mah LJ 786		13
AIR 1968 Ker 325		12
AIR 1966 SC 1408		12
AIR 1966 SC 1593		10, 12
(1965) 6 Guj LR 569		12
AIR 1963 SC 1019		12

S. H. Kapadia, for M/s. Gagrut & Co., for Petitioners; C. J. Sawant, Addl. Govt. Pleader with D. P. Hegde, Asstt. Govt. Pleader, for Respondent Nos. 2 and 3.

DESHPANDE, J.:— The petitioners in this writ petition under Arts. 226 and 227 of the Constitution, challenge the validity of the award dated 23-11-1979 made by the Land Acquisition Officer under S. 11 of the Land Acquisition Act, hereinafter referred to as "the L. A. Act". The award fixes the compensation for an area measuring 5,967.12 sq. metres out of C. S. No. 42 known as "Ashley House" situated at Bund Garden and Sassoon Road, Pune-1. The petitioners have become the owners of this property under a Settlement Deed dated 7-7-1960 and a Transfer Deed dated 26-3-1974. A notification under S. 4 of the L. A. Act was issued by the Commissioner on 1-9-1962 indicating Government's proposal to acquire the entire land measuring in all 47,396 sq. metres for the public purpose of the construction of the residential quarters for the employees in the Income-tax and Excise Department of the Central Government and office building for the Excise Department. The proposal was then finalised and a notification under S. 6 was issued on 14-5-1963 after disposal of the objections of the interested persons. The trustees of the property instituted a suit being Suit No. 27 of 1966 during petitioners' minority, challenging the validity of the said acquisition proceedings. This suit was decreed by the trial Court on 12-3-1972 but dismissed in appeal (F. A. No. 529 of 1972) by a Division Bench of this Court on 18-3-1973. A leave to appeal petition under Art. 136 of the Constitution was rejected by the Supreme Court on 25-11-1974. The present petitioners, on whom the property was settled, became its absolute owners on attaining majority on 28-8-1974. The petitioners then instituted another suit on 13-8-1975 along with one Thrity Modi challenging the said land acquisition proceedings again in a Suit No. 1497 of 1975. This suit was dis-

missed on 16-7-1977 as also the appeal against the same.

2. In the meanwhile the Urban Land (Ceiling and Regulation) Act, 1976 herein-after referred to as "the U. L. C. Act" was enforced on 17-2-1976 placing a ceiling limit on the holdings of vacant land as defined under the said Act. The Act contemplated enquiry into the total holdings of each one of the holders and for that purpose holders were required to submit a statement of the holding under Sec. 6 of the U. L. C. Act. The petitioners also submitted such statement on 13-8-1976. The competent authority declared the petitioners to be a surplus holder to the extent of 41,396.83 sq. metres by his order dated 29-9-1977, their total holding having been found to be 49,396.83 sq. metres including C. S. No. 42 and another piece of land. Petitioners' appeal against the same was dismissed on 20-1-1979. A notification under S. 10 (3) of the U. L. C. Act was issued eventually on 7-6-1979 for the acquisition of the surplus holdings of the petitioners measuring 41,396.83 sq. metres out of C. S. No. 42 as per the details indicated in the notification excluding the remaining area of 5,967.12 sq. metres of C. S. No. 42 covered by old residential quarters.

3. Immediately after the issuance of Section 6 notification on 14-5-1963 under L. A. Act, notices under S. 9 of the Act were served and the trial of the claim for compensation at the market rate as on 1-9-1962 was concluded by the time, U. L. C. Act was enforced. The passing of the award was withheld due to the proceedings under the U. L. C. Act. Consequent on the acquisition of surplus 41,396.83 sq. metres of the land of C. S. No. 42 under S. 10 (3) of the U. L. C. Act, only residential area of 5,967 sq. metres of C. S. No. 42 was left for acquisition in the pending proceedings under the L. A. Act. The Land Acquisition Officer proceeded to fix the price of this remaining area of the land, namely, 5,967.82 sq. metres and take further necessary steps. He did not think it necessary to issue fresh notice under S. 9 of the L. A. Act to the present petitioners as the Trustees had already appeared before him after notice under Sec. 9 and had set up their claim of compensation and led evidence in support thereof. He accordingly fixed compensation and passed the award. After the award was pronounced on 23-11-1979, a notice was issued by him on that very day calling upon the petitioners to deliver possession of the land to him. The petitioners thereupon

filed this writ application on 3-12-1979 and obtained the stay of further proceedings.

4. Mr. Kapadia, the learned Advocate appearing for the petitioners contends that the award is void and invalid on the following grounds :—

(i) Land Acquisition Officer being merely the agent of the appropriate Government, he cannot himself proceed to pass award for any lesser area than the one indicated in the notification under S. 6 of the L. A. Act.

(ii) No authority from appropriate Government for making award for any lesser area can be effective, without first withdrawing from the acquisition proceedings under Section 48 of the L. A. Act or cancelling the earlier notification under S. 6 of the L. A. Act and issuing fresh notification thereunder in respect of the reduced area.

(iii) Acquisition proceedings under L. A. Act become ineffective and invalid in their entirety due to their inconsistency with U. L. C. Act, after finalisation of the statement of surplus land under S. 9 and acquisition thereof under S. 10 (3) thereunder.

(iv) Such reduction in the available area for acquisition is destructive of the original public purpose and invalidates the notification under S. 6 of the L. A. Act based thereon.

(v) Fresh notice under S. 9 and opportunity to the owner of the land to claim compensation in the changed situation, was obligatory.

5. Now Mr. Kapadia may be right in contending that, it is for the Central Government at whose instance the land is being acquired for construction of quarters and not for the L. A. Officer to decide whether, reduced area, would still serve the purpose and further steps in acquisition proceedings should be taken after the non-availability of the major portion of the intended area due to the notification under S. 10 (3) of the U. L. C. Act. The Land Acquisition Officer is empowered under the L. A. Act firstly to take the measurements, hear the objections of the interested parties and report to the competent authorities the result of his investigation and, proceed to determine the claims of compensation after notice to the interested parties, pass the award and implement the proposal of acquisition finally under S. 6 of the L. A. Act. The Land Acquisition Officer thus cannot of his own decide to restrict or expand the area of acquisition. That decision is left to the appropriate Government under the Land Acquisition Act.

6. The assumption, however, of Mr. Kapadia that, the Land Acquisition Officer, in this behalf acted on his own initiative is not well founded. The affidavit in reply sworn in by the Land Acquisition Officer shows that he was instructed by the State Government, after consultation with the Central Government, to proceed further with the acquisition proceedings of the area of 5,967.82 sq. metres out of C. S. No. 42 left with the petitioners, after, acquisition of the major portion thereof under Section 10 (3) of the U. L. C. Act. In fact Mr. C. J. Sawant had brought the file of the correspondence between the State Government, the Central Government, and the Land Acquisition Officer in this behalf, and had offered the same for our inspection. It is clear to us that situation arising out of the acquisition of the land under S. 10 (3) of the U. L. C. Act and reduction in the size of the area available for the acquisition under the L. A. Act, was brought to the notice of the Central Government and the Central Government ultimately decided to proceed with the acquisition proceedings even of the smaller area in terms of its earlier decision to acquire the same.

7. It is pertinent to note that the Central Government is empowered to delegate its statutory functions to the State Government or its officers under Art. 258 of the Constitution. Mr. C. J. Sawant, the learned Additional Government Pleader drew our attention to, (1) a notification in this behalf under which its functions under the L. A. Act are delegated to the State Government and its officers by reference to Art. 258 of the Constitution r/w. S. 3 (ee) of the L. A. Act, (2) as also to the provisions of the Bombay Commissioners of the Divisions Act, 1957 under which Commissioners can perform the functions of the State Government. We are unable to see any illegality or infirmity in this procedure adopted by the Land Acquisition Officer after the notification under S. 10 (3) of the U. L. C. Act.

8. Coming to the second contention of Mr. Kapadia it is true that, the extent of the area to be acquired is one of the main ingredients of any acquisition proposal and the eventual notification under S. 6 of the L. A. Act. The existence of the need and the public purpose with reference thereto, cannot be divorced from such extent of the area to be acquired. Requirements of any notification under S. 6 (2) of the Act have to be weighed in this context. Relying on this, Mr. Kapadia contends that the proceedings for acquisition for the remaining

area of 5,967 sq. metres cannot be valid unless the earlier notification dated 14-5-1963 is completely nullified and fresh one covering the area of 5,967 sq. metres is issued after holding enquiry under Sec. 5-A of the L. A. Act. According to Mr. Kapadia, the earlier notification being only partly invalidated it can be nullified only by cancelling it or withdrawing from it under Section 48 of the L. A. Act. De novo proceedings from the stage of S. 5-A enquiry are indispensable for any valid award for the reduced area.

9. This contention appears to us to be wholly untenable. It is necessary to bear in mind that reduction of the area of acquisition from 47,396 to 5,967 sq. metres is the direct consequence of the notification issued under S. 10 (3) of the U. L. C. Act and not of any act or omission involving any violation on the part of the appropriate Government. Section 42 of the U. L. C. Act gives overriding effect to the provisions thereof, notwithstanding anything contrary in any enactment or contract etc. Even the notification and orders passed thereunder are bound to have such overriding effect on the notification or orders passed under any other such enactment, provisions of which have to yield to the provisions of this Act in terms of the mandate of S. 42. The notification thus issued under S. 10 (3) of the U. L. C. Act acquiring 41,396 sq. metres out of C. S. No. 42, is bound to have such overriding effect on the earlier notification dated 14-5-1963 under S. 6 of the L. A. Act, because of its patent inconsistency and consequentially the latter becomes ineffective to the extent of such 41,396 sq. metres. It is this inconsistency and consequential partial invalidity that has driven the authorities acting under the Land Acquisition Act to restrict the acquisition proceedings thereunder only to the area of 5,967 sq. metres left untouched by the acquisition under S. 10 (3) of the U. L. C. Act. The notification dated 14-5-1963 to the extent of 5,967 sq. metres remains still unimpaired and there is no reason why it could not be acted upon to that extent.

10. Any question of withdrawing from the acquisition of any part of the land under Sec. 48 of the L. A. Act or cancellation of the notification dated 14-5-1963 does not arise in such a case. In either of these situations continuation of the acquisition proceedings is not obstructed by any legal impediment, and discontinuation of the proceedings is entirely the choice of the appropriate Government. These considerations

can have no application where partial invalidity is the creation of the Statute and nothing in any such Statute prevents proceeding with the valid part of the declaration and the acquisition proposal. That withdrawing from proceedings under Sec. 48 of the L. A. Act is not the only way of relieving the Government of its rights and obligations under S. 6 notification is emphasised by the Supreme Court in the judgment of the Supreme Court in *State of M. P. v. Vishnu Prasad*, AIR 1966 SC 1593. In that case the notification had become invalid consequent to the decision of the Court to that effect. Invalidity resulting from the operation of an overriding provision of any other enactment, in our opinion, does differ in quality.

11. This again is not a case where the appropriate Government is called upon to consider any question of fresh acquisition or reduction of the area of acquisition already decided. As discussed earlier the reduction in the area is the result of the impact of another order under another overriding enactment. The appropriate Government is driven to give effect to the partial invalidity created thereby. It had only to decide if acquisition of the remaining area under the valid and subsisting part of the notification still serves its purpose to any extent or not. It seems to have thought that it does. It, therefore, directed the L. A. Officer to proceed ahead with the fixation of the compensation with regard to the portion of the land left untouched by the notification under S. 10 (3) of the U. L. C. Act. This obviously does not involve any process of fresh proposal and fresh investigation or issuance of such notification under S. 6 of the Act. It is merely a question of implementing the valid part of the notification already issued on 14-5-1963 unaffected by the notification under S. 10 (3) of the U. L. C. Act. Question therefore of issuing any fresh notification under S. 6 of the Act cannot arise in the present case. The contentions raised by Mr. Kapadia in this behalf appear to us to be thoroughly misconceived and unacceptable.

12. Mr. Kapadia drew our attention to the judgments reported in the cases of *Girdharilal v. State of Gujarat*, reported in AIR 1966 SC 1408, *State of M. P. v. Vishnu Prasad*, reported in AIR 1966 SC 1593; *Mahendra Lal v. State of U. P.*, AIR 1963 SC 1019; *Sreenivasa Shenoy v. State of Kerala*, AIR 1968 Ker 325; *Girdharilal v. State of Gujarat*, (1965) 6 Guj LR 569. We are unable to see any relevance of the

points decided therein to the point under consideration. Girdharilal's case (*supra*) is an authority for the proposition that withdrawal from the land acquisition proceedings under Sec. 48 of the L. A. Act is not the only way, to put S. 4 notification out of the way. The same object can be achieved by cancelling it and power to cancel can be traced in S. 21 of the General Clauses Act. Vishnu Prasad Sharma's case (*supra*) lays down that if under S. 6 notification, lesser area is acquired than is indicated in Sec. 4 notification the appropriate Government cannot proceed to acquire remaining portion of the land treating S. 4 notification as reservoir, and a decision to abandon acquisition of the remaining land can be inferred from such notification. The authority of this judgment is now shaken due to the subsequent amendment of the L. A. Act. In Mahendra Lal's case (*supra*) it is held that mere intention indicated in the correspondence between the Government Officers, to drop any part of the land covered by S. 4 notification cannot have the effect of modifying the S. 4 notification in any manner whatsoever unless fresh notification under S. 4 is issued afresh so modifying the earlier notification. In Shenoy's case (*supra*), the Kerala High Court held that withdrawal from the proceeding only of a portion of the land notified for acquisition is not permissible under S. 52 of the Local Act corresponding to S. 48 of the Central L. A. Act. In Girdharilal's case the Gujarat High Court held that fresh notification under S. 6 of the L. A. Act is permissible if the earlier such notification is found to be legally invalid. It is not necessary to initiate proceedings afresh with S. 4 notification in that case. There is nothing in any of these cases, militating against what we have held earlier.

13. It is true that in the case Ganesh v. Spl. Land Acqui. Officer, Pune reported in 1979 Mah LJ 786 a Division Bench of this Court has held that proceedings under the Land Acquisition Act become inconsistent with the proceedings under the U. L. C. Act as soon as the statement under S. 9 is finalised and the area of the surplus land is ascertained for acquisition under S. 10 (3) of the U. L. Act and it includes the land sought to be acquired under the L. A. Act. But the judgment also makes it clear that inconsistency is restricted only to the area of the land sought to be acquired under S. 10 (3) of the U. L. C. Act. In other words this judgment is no authority for the proposition, sought to be canvassed before us by Mr. Kapadia, that the finalised statement under S. 9 or notifica-

tion under S. 10 (3) of the U. L. C. Act results in invalidating L. A. proceedings in their entirety. There is nothing in the U. L. C. Act to prevent the Land Acquisition Officer from proceeding with the acquisition proceedings under the L. A. Act in respect of the land or any portion thereof not covered by the statement under S. 9 or notification under S. 10 (3) therefor.

14. It is true that the land was sought to be acquired for raising quarters for office of the Excise Department and quarters for income-tax and excise department servants on the entire C. S. No. 42 measuring 47396 sq. metres. This was the public purpose for which acquisition proceedings were initiated in 1962. The objections of the interested persons in the course of hearing under Section 5-A of the Act were overruled by reference to this public purpose. No property can be acquired compulsorily without the existence of any such public purpose. Mr. Kapadia relies on this and contends that the reduction in the area, available for acquisition from 47396 to 5967.82 sq. metres must necessarily result in making achievement of the notified public purpose impossible and that continuation of the proceedings under the L. A. Act has become illegal.

15. This contention of Mr. Kapadia is no doubt attractively plausible. It is, however, not permissible for any Court at this last stage to go behind the declaration under S. 6 of the L. A. Act which has become final for all purposes. The stage of any such challenge in enquiry under S. 5-A of the L. A. Act was crossed long back when notification under S. 6 was issued on 14-5-1963. The L. A. Act neither contemplates any challenge to the existence of the public purpose at any later stage nor does it contemplate taking notice of the subsequent developments on this count. The failure of the challenges thereto in the two successive suit proceedings also further confirmed their finality as far as this case is concerned. This apart, it cannot be said that residential quarters cannot be raised on the reduced area of 5967.82 sq. metres in the manner in which the same could have been raised on the larger area of 47,396.83 sq. metres. The fact that smaller area may not be sufficient to satisfy the needs to the same extent as the area 47,396.83 sq. metres could have done, is altogether a different matter. The purpose can still be fulfilled to a limited extent and cannot be said to have become impossible of fulfilment as urged by Mr. Kapadia. The contention raised by Mr. Kapadia is thus untenable.

16. Mr. Kapadia lastly contends, that it was obligatory on the L. A. Officer to issue notices under S. 9 of the L. A. Act to the petitioners when he was directed to determine the compensation of lesser area of 5946 sq. metres. According to Mr. Kapadia, the reduction in the area, enables the owners to claim compensation at higher rates and also additional compensation on account of damages caused by severance. Unfortunately the petition does not disclose the necessary details to enable us to get any idea as to the basis for higher compensation. In the absence of any of these particulars and specific details, it is difficult to appreciate what the basis of additional claim could be. The question of compensation on account of severance cannot arise in this case as severance was effected by acquisition under Section 10 (3) of the U. L. C. Act and entire land left thereafter is being acquired under L. A. Act. It is also not in dispute that the petitioners have already made an application for reference under S. 18 of the L. A. Act after the impugned award was notified to the petitioners and the same is still pending before the L. A. Officer. We are unable to see why petitioners cannot raise all these claims therein. Mr. Kapadia's fear, however, is that S. 25 (2) of the L. A. Act will prevent the petitioners from claiming any higher compensation on any basis which was not and could not be set up by them before the Land Acquisition Officer. This also does not appear to be correct. Section 25 (2) merely prohibits claiming higher amount than claimed and does not prohibit furnishing additional basis for the same. Market price in either case is liable to be determined by reference to the prices that prevailed on 1-9-1962 when S. 4 notification was issued and not by reference to the prices on 7-6-1979 when area stood reduced due to notification under Section 10 (3) of U. L. C. Act.

17. Mr. Kapadia, however, contends that he has already made applications for exemption under S. 21 of the U. L. C. Act and though the same is rejected by the competent Officer on 13-8-1979, an appeal against the same is still pending. Mr. Kapadia, therefore, contends that possibility of his exemption application being granted, and the notification under S. 10 (3) of U. L. C. Act being cancelled consequentially, cannot be ruled out outright at this stage. Petitioners in that case would not lose the area of 41,657.09 sq. metres and acquisition of a pocket of 5967 sq. metres may assume a different complexion enabling the claimant to demand compensation at higher rate. We do not think it proper to set aside the award

on this highly speculative contingency. The claim of the petitioners for any such higher compensation, assuming the claim to be well founded, can be protected otherwise than by setting aside the award. Mr. C. J. Sawant the learned Additional Government Pleader made a statement at the Bar that in the event of, such exemption applied for being allowed and any occasion arising for claiming additional compensation on that account, the Government would waive those objections under Section 25 (2) of the L. A. Act and will not oppose the reference or the claim in the Court on the basis of Section 25 (2) of the L. A. Act without prejudice to Government's other objections thereto. We also direct that in the event of petitioners' application for exemption being granted, and petitioners raising any claim for additional compensation on account of the situation arising out of the same, the authority or the Court entertaining the same will not deny it on account of the petitioners' failure to set up such claim under S. 25 (2) of the Land Acquisition Act. The result is that the application fails. Rule is accordingly discharged. There will be no order as to costs in the circumstances of the case.

18. Mr. Kapadia applies for leave to appeal to the Supreme Court under Art. 133 of the Constitution. Leave refused. Mr. Kapadia requests that the operation of the judgment delivered by us should be stayed for three weeks from today. We direct that the operation of this judgment will be stayed for three weeks from today.

Order accordingly.

AIR 1982 BOMBAY* 27

DESHPANDE AND MEHTA, JJ.

Mohamed Shafi Suleman Kazi and etc. etc.,
Appellants v. Dr. Vilas Dhondu Kayishwar
and others, Respondents.

First Appeals Nos. 123, 144 and 217 of
1973, D/- 21-10-1980.

Constitution of India, Art. 300 — Suits on torts — Negligence of hospital employees — Running of hospitals is not part of regal functions of State — State is liable for acts of negligence committed by its employees in course of their employment in such hospitals. (Torts — Negligence — Liability of Government for acts of its servants). AIR 1960 SC 610 and AIR 1978 SC 548, Rel. on; AIR

* Only portions approved for reporting by
High Court are reported here.

IY/IY/D969/81/HR/RSK

1962 SC 933, AIR 1965 SC 1039; (1861) 5 Bom HCR App A 1 and AIR 1969 Bom 13, Refd.; AIR 1939 Mad 663, Held impliedly Overruled by AIR 1960 SC 610; ILR (1980) Bom 660, Held no longer good law in view of AIR 1978 SC 548. (Para 13)

Cases Referred: Chronological Paras

ILR (1980) Bom 660	6, 13
AIR 1978 SC 548 : 1978 Lab IC 467	7-8, 12, 13
AIR 1970 SC 1407 : 1970 Lab IC 1172	6, 7-8, 12, 13
AIR 1969 Bom 13 : 70 Bom LR 212	6, 13
AIR 1965 SC 1039 : (1965) 2 Cri LJ 144	6, 10, 13
AIR 1962 SC 933	6, 10, 11, 13
AIR 1960 SC 610	6
AIR 1939 Mad 663	6
(1861) 5 Bom HCR App A 1	9, 10

B. P. Apte, for Appellants; M. S. Nargolkar and M. R. Kotwal, Govt. Pleader, for Respondents.

DESHPANDE, J.:— 1 to 5. x x x

6. Shri M. R. Kotwal, the learned Government Pleader, appearing for the appellant-State, apart from challenging the finding as to negligence of Defendant No. 1, contended that running of hospitals is part of the regal functions of the State and the State can never be held liable for the tortious acts of its servants when the complained acts of negligence are claimed to have been committed by the servants in the discharge of such regal functions. Reliance is placed on a Division Bench judgment of this Court (Vaidya & Naik, JJ.), in First Appeal No. 620 of 1968 with First Appeal No. 852 of 1968 dated 15-4-1977.* The judgment no doubt, supports his contention. One Chandrikabai in that case died in the Government owned hospital after her delivery and sterilisation operation. The two doctors attending to her operation were alleged to have sutured the wound without caring to remove the cotton swab inserted during the operation. Her death was attributed to this negligence of the doctors. Her husband and children claimed compensation for these tortious acts from the doctors and also from the Government for its vicarious liability for the negligence of its servants. The trial Court held the doctors to be guilty of negligence and passed a decree against the doctors and the Government. The Division Bench, however, did not find evidence enough to sustain the finding of negligence. The question of any liability for compensation of either of the defendants for any such negli-

gence, obviously could not arise on this finding. Further question whether running hospitals was part of its regal functions and whether Government could not be vicariously liable for the negligence of its servants also could not arise for decision. Even so, the learned Judges discussed this point in paras 238 to 253 of their judgment and held that running the hospital was part of the regal functions of the Government and the Government can never be held liable for the tortious acts of its servants in the discharge of any such delegated regal functions. Amongst others, the learned Judges relied on the judgment of the Madras High Court in the case of Etti v. Secretary of State, reported in AIR 1939 Mad 663 and the judgment of the Supreme Court in the case of Management of Safdar Jung Hospital, New Delhi v. Kuldip Singh Sethi, reported in AIR 1970 SC 1407. Ratio of the earlier Supreme Court judgment in Hospital Mazdoor Sabha's case reported in AIR 1960 SC 610 was found to have been overruled. The Division Bench also seems to have thought the ratio in Safdar Jung Hospital case had the effect of making the Supreme Court judgment in the case of State of Rajasthan v. Mst. Vidhyawati reported in AIR 1962 SC 933 and Kasturi Lal v. State of U. P. reported in AIR 1965 SC 1039 and Division Bench judgment in the case of Union of India v. Sugrabai reported in (1968) 70 Bom LR 212 : (AIR 1969 Bom 13), irrelevant. The Division Bench also thought that the Government has to run such hospitals to comply with the directive principles of the Constitution and functions required to be so discharged in compliance with the Constitution, cannot but be held to be regal.

7-8. Shri B. P. Apte, the learned Advocate appearing for the plaintiff, however, relied on a subsequent judgment of the larger Bench of the Supreme Court (Seven Judges) in the case of Bangalore Water Supply v. Rajappa reported in AIR 1978 SC 548 in which ratio of its judgment in Mazdoor Sabha's case is affirmed and that of Safdar Jung Hospital's case is overruled, and contended that ratio of the Division Bench judgment, based on Safdar Jung Hospital case, is no more a good and binding law. This contention appears to us to be well founded.

9. Immunity of the Government from any claim for damages against the "act of the State" is based on the English Common Law doctrine that the King could do no wrong. The extent of its application to India was considered by a Full Bench of the then

* Reported in ILR (1980) Bom 660.

Supreme Court of Calcutta in its classic judgment in the case of *Peninsular Oriental Steam Navigation Co. v. Secretary of State*, reported in (1861) 5 Bom HCR App A 1 hereinafter referred to as "the Calcutta Supreme Court case". The case pinpoints the distinction between the acts of the State committed in discharge of its sovereign or regal functions and other acts falling beyond the limits of such functions and which can be performed by any private individual.

10. The law laid down in this case has been uniformly followed by the Privy Council and all the High Courts in India. The Supreme Court had an occasion to consider the impact of the Constitution thereon in the light of Art. 300 of the Constitution in the case of *State of Rajasthan v. Vidhyawati* reported in AIR 1962 SC 933 and in the case of *Kasturi Lal v. State of U. P.* reported in AIR 1965 SC 1039. The State was held liable in the former for tortious act of its employee-driver in driving the truck negligently, while it was held not so liable for seizure of the goods negligently in the course of its regal function of investigating an offence. In the latter case Gajendragadkar, C. J. approvingly summarised the ratio of the Calcutta Supreme Court judgment as follows (at p. 1046):—

"Thus, it is clear that this case recognises a material distinction between acts committed by the servants employed by the State where such acts are referable to the exercise of sovereign powers delegated to public servants, and acts committed by public servants which are not referable to the delegation of any sovereign powers. If a tortious act is committed by a public servant and gives rise to a claim for damages, the question to ask is: was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie."

11. The learned Judge then emphasised the importance of such distinction in the post Constitution era in India in the following words (at p. 1048):—

"It is not difficult to realize the significance and importance of making such a distinction particularly at the present time when, in pur-

suit of their welfare ideal, the Government of the States as well as the Government of India naturally and legitimately enter into many commercial and other undertakings and activities which have no relation with the traditional concept of governmental activities in which the exercise of sovereign power is involved. It is necessary to limit the area of these affairs of the State in relation to the exercise of sovereign power, so that if acts are committed by Government employees in relation to other activities which may be conveniently described as non-governmental or non-sovereign, citizens who have a cause of action for damages should not be precluded from making their claim against the State. That is the basis on which the area of the State immunity against such claims must be limited; and this is exactly what has been done by this Court in its decision in the case of *State of Rajasthan* (AIR 1962 SC 933)."

12. In *Hind Mazdoor Sabha*, the question that directly fell for consideration was if hospital run by the Government could be an industry within its definition under S. 2 (j) of the Industrial Disputes Act. It was argued that Government had to establish and run hospitals in compliance with the directive principles of the Constitution, and running of the hospital would be a part of its regal functions as a Welfare State. The Court observed that, "Negatively stated, the activities of Government which can properly be described as regal or sovereign activities are outside the scope of Section 2 (j)."

The contention, that activities indulged in by the State to comply with the directive principles or in pursuit of its welfare policies could be such regal activities, was turned down on the ground that they cannot be said to be "primary and inalienable functions of a Constitutional Government" and are not such that "no private citizen can undertake the same". Test laid down in the above Calcutta Supreme Court's case must have been in the mind of the learned Judges while making the above observations, though the case does not make any direct reference to the same. The Court further held that the words "industry" or "trade" or "business" must be interpreted in a broad manner to include the hospitals run by the Government or charitable institutions. It was held that inclusive second part of the definition had this effect. *Hidayatullah, C. J.* did not agree with this view in the *Safdar Jung Hospital* case (AIR 1970 SC 1407) and held that hospital cannot be an "industry" unless it is run on commercial lines. This view is now overruled in *Bangalore*

Water Works case (AIR 1978 SC 548) virtually confirming the ratio of Mazdoor Sabha's case.

13. Thus, in the first place, the decision of the Division Bench* is obiter in that the question had not cropped up for consideration. Secondly the basis of its judgment, namely the ratio of Safdar Jung Hospital case, is itself now knocked out. Thirdly, view of the Supreme Court in Mazdoor Sabha's case that activities undertaken by the Government in pursuit of welfare policies, and in compliance with the directive principles, were not part of the regal functions of the State, was not dissented in Safdar Jung Hospital's case. In fact, difference of view centred round how to interpret the second part of the definition in S. 2 (j) of the Act. With respect, Division Bench was not right in ignoring the ratio of Mazdoor Sabha's case and preferring to rely on the Madras High Court case whose reasoning is impliedly overruled in Mazdoor Sabha's case. Fourthly, and far more importantly, question of the extent of the State's vicarious liability for the torious acts of its employees had not arisen at all in the case either of Hind Mazdoor Sabha, Safdar Jung Hospital or Bangalore Water Works. It had directly arisen in Vidyawati and Kasturi Lal's cases. The ratio of these cases was followed by a Division Bench of this Court earlier in the case of Union of India v. Sugrabai Abdul Majid reported in (1968) 70 Bom LR 212 : (AIR 1969 Bom 13). The later Division Bench could not ignore the ratio of the cases directly dealing with the point. The Division Bench* judgment relied on by Shri Kotwal thus cannot be said to have laid down any good and binding law.

14 to 25. x x x x

Appeals dismissed.

* ILR (1980) Bom 660.

AIR 1982 BOMBAY 30 SHARAD MANOHAR, J.

Vishwanath Maharudra Matkari, Appellant
v. Jan Mohammed and another, Respondents

A. F. A. D. No. 563 of 1973, D/- 8-8-1979.*

Civil P. C. (5 of 1908), O. 21, R. 92 — Auction sale confirmed — Judgment debtor found to have no salable interest in property

* Against decision on T. R. Kulkarni, Dist. J., Bhir. in Civil Appeal No. 357 of 1971.

HY/HY/D570/81/JHS/RSK

— Suit by auction purchaser against decree holder for recovery of money paid by him for purchase of property in auction — Not maintainable — Principles underlying S. 65 of Contract Act do not apply — Even principle of money had and received embodied in S. 72 of Contract Act does not apply — Scope of principle of money had and received stated. AIR 1964 Raj 140 (Pt. B), Dissented from. AIR 1950 Bom 313, Followed. (Contract Act (1872), Ss. 65 and 72).

(Paras 24, 28, 30, 31, 33)

Cases Referred :	Chronological	Paras
AIR 1964 Raj 17		25
AIR 1964 Raj 140		7, 17
AIR 1961 Cal 172		17
AIR 1961 Raj 193		17
AIR 1960 Andh Pra 89		17
AIR 1959 SC 135		30
AIR 1956 Trav Co 216		17
(1952) 2 TLR 516		32
AIR 1950 Bom 313	1, 7, 9, 10, 11, 12, 13, 15, 16, 17, 24, 36, 41	
AIR 1940 Rang 1 (FB)		17
AIR 1939 Cal 310		17
AIR 1938 All 593 : 1938 All LJ 955 (FB)		17
AIR 1937 Pat 532		17
AIR 1936 Mad 50 (FB)		17
AIR 1932 Lah 401 (FB)		15, 17
AIR 1930 Oudh 148 (FB)		17
AIR 1923 All 394 : (1923) 21 All LJ 228 (FB)		17
AIR 1922 Bom 205 : ILR 46 Bom 833	10, 11, 12, 13	
(1911) ILR 35 Bom 29		10, 11
(1887) 36 Ch D 145 : 57 LT 61 : 3 TLR 751, Allcard v. Skinner		32
(1883) 23 Ch D 278 : 49 LT 109 : 52 LJ Ch 661, Dutton v. Thompson		32
(1878) 5 Ind App 116 (PC)		14

A. M. Dabir for A. H. Vaishnav, for Appellant; A. B. Naik (for No. 1) and A. G. Godhamgaonkar (for No. 2), for Respondents.

JUDGMENT:— A very interesting and rather important question of law arises in this Second Appeal. The question relates to the right of an auction-purchaser in a Court sale, who has purchased property but has found to his surprise that the judgment-debtor had no saleable interest in the property that he (auction-purchaser) purchased. The question is, whether he can proceed against the decree-holder and/or judgment-debtor for the recovery of the moneys paid by him for the purchase of the property in auction. Normally speaking it would have been enough for me to refer to the Division Bench the judgment of this Court in Santimappa

v. Balbhim Co-operative Credit Society, AIR 1950 Bom 313, and allow the appeal. However, I find that certain aspect of the question which did not fall for consideration of the Division Bench remained undecided in the said decision presumably on account of the peculiar pleadings in that case. I find that without a decision being given on that aspect, the question falling for the consideration of this Court cannot really be said to have been fully decided and this is what has propelled me to give a rather fulsome judgment on the case as a whole.

2. The facts of the case fall within a very narrow compass. For the sake of convenience I will refer to the parties, with reference to their position in the original execution proceedings, that is to say, as judgment-debtor, decree-holder and auction-purchaser. Sometime before the year 1965 one Vishwanath had obtained a money decree against Moiz Gayasuddin, the judgment-debtor. In execution of the decree, he filed Darkhast No. 2 of 1965 and brought the house property, presumably in possession of the judgment-debtor, for sale. On 3rd April, 1965, the said house was purchased by Jan Mohamed, hereinafter referred to as the plaintiff/auction-purchaser, for a sum of Rs. 4,025/-. The said sale was confirmed on 9-7-1965. After this confirmation, out of the amount of the sale proceeds, a sum of Rupees 1,600/- receivable by the decree-holder under the decree was paid to the decree-holder by the Court and the balance of the amount was paid by the Court to the judgment-debtor. A sale certificate was issued in favour of the auction-purchaser, which is Ex. 43 in these proceedings, on 9-7-1965.

3. It appears that either during these proceedings of the sale of the house in auction or immediately after 9-7-1965, Suit No. 145/65 was filed by one Mahemudabi (who was none other than the wife of Gayasuddin, the judgment-debtor himself) for a declaration that it was she who was the owner of the property and that the judgment-debtor had not a title of right to have the property sold for satisfaction of the decree passed against him. She also applied for injunction restraining the decree-holder from interfering with her possession of the suit house. The said suit was decreed on 30-6-1967. The appeal against the said decree came to be dismissed on 11-6-1968. It was in these circumstances that the present Suit No. 229/69 was filed by the auction-purchaser on 29-10-1969 both against the decree-holder as well as the judgment-debtor for recovery of the amount of Rupees 4,025/-, that is to say, the purchase money

which he had paid for the purchase of the house in question. The decree-holder was defendant No. 1 and the judgment-debtor was defendant No. 2 in the said suit. The learned trial Judge came to the conclusion that the plaintiff/auction-purchaser was entitled to recover the amount of purchase money deposited by him in the Court. Question arose as to from whom the plaintiff/auction-purchaser could recover the amount. This aspect of the matter is dealt with by the learned trial Judge very briefly in para 15 of his judgment. He observed therein as follows:—

“15. As I have stated above the defendant No. 1 took necessary precautions before putting the house for auction and there was no mistake committed by him in it and hence he cannot be held liable to return the amount to the plaintiff, but the suit amount is liable to be recovered either from the person or from the property of defendant No. 2. It was he who allowed to put the house for auction knowing or believing it to know that it was of Mahmoodabi and not of his. In my opinion, the suit of the plaintiff is fit to be decreed against defendant No. 2, and hence issues Nos. 4 and 5 are decided into (in the ?) affirmative. His suit is fit to be dismissed against the defendant No. 1. There is no need to go in details how much amount was withdrawn by each of the defendants from the Court. The defendant No. 2 is liable to pay the whole of the suit amount to the plaintiff.”

In the view taken by the learned trial Judge, he decreed the plaintiff's suit against the original judgment-debtor (defendant No. 2) to the extent of Rs. 4,025/- with costs. The suit against defendant No. 1, the decree-holder, was dismissed with no order as to costs.

4. Against the said decree the plaintiff/auction-purchaser himself filed Appeal No. 357/71 to the District Court, Bhir. It is difficult to conjecture as to what motivated the plaintiff/auction-purchaser to file the said appeal. He had already got decree for the entire amount which he had prayed for. We assume that he was faced with some difficulty in the wake of execution of the same against defendant No. 2 and probably that was what actuated him to prefer an appeal for the purpose of getting a decree against defendant No. 1 decree-holder as well. Whatever that may be, the fact remains that such an appeal was filed. In the said appeal, the learned District Judge held that the auction-purchaser had a remedy by way of an independent suit even against the decree-holder on the principles analogous to Section 65 of the Contract

Act. He, therefore, held that a suit by auction-purchaser for recovery of the purchase money from the decree-holder was maintainable. The learned District Judge held that the decree-holder in the present case had recovered a sum of Rs. 1,600/- from out of the amount of Rs. 4,025/- deposited by the auction-purchaser and that, hence, the auction-purchaser was entitled to recover the said amount from the decree-holder. The learned District Judge, therefore, allowed the appeal; but the decretal order that he passed in the appeal is rather peculiar and of rather remarkable character. He set aside the portion of the judgment of the trial Court dismissing the suit against defendant No. 1 decree-holder and decreed the plaintiff's suit against the said decree-holder to the extent of Rs. 1,600/-. It is evident from the decretal order that so far as the decree for Rs. 4,025/- passed against defendant No. 2 the judgment-debtor was concerned, he kept the same intact as it was. We are thus faced with a strange spectacle. The plaintiff auction-purchaser had filed a suit for Rs. 4,025/-; as a result of the judgment of the appellate Court, the decree is passed in his favour totally for a sum of Rs. 4,025/- plus Rs. 1,600/-, that is to say, Rs. 5,625/-. The error contained in this part of the judgment, however, is the evident result of a technical slip. Since I am setting aside the entire decree passed by the appellate Court and since the decree passed by the trial Court against defendant No. 1 has got to be restored because he had filed no appeal against the same, I need not refer to this part of the error, the technical error, committed by the learned District Judge, in this judgment any further.

5. Against the said decree passed by the learned District Judge, the original decree-holder defendant No. 1 in these proceedings, has filed the present Second Appeal.

6. As stated hereinabove, I am referring the plaintiff herein as the auction-purchaser, defendant No. 1 as the decree holder and defendant No. 2 as the judgment-debtor.

7. As regards the correctness of the judgment of the lower appellate Court, I am little unhappy to state that no pains appear to have been taken from the side of the Bar or the side of the Bench either to look up the case law on the point or to examine the first principles upon which the real question falling for determination in the appeal arose. The learned District Judge has relied upon the judgment of the Rajasthan High Court in *Thakkar Lal v. Nathulal*, AIR 1964 Raj 140, to come to his ultimate decision. By following the said decision, he has held that

the decree-holder was liable to pay back the amount received by him to the auction-purchaser under the provisions of S. 65 of the Contract Act. While relying upon the said decision attention of the Court should have been invited to the binding authority of this Court in *Santimmappa's case* (AIR 1950 Bom 313) (supra). The ratio decidendi of the Bombay authority is in direct conflict with that of the Rajasthan authority and it is needless to say that it is the Bombay authority which was binding upon the Court below. It is therefore a manifest error on the part of the learned District Judge to rely upon and follow the ratio of the Rajasthan judgment when the question in issue was finally decided by our own High Court. While making this observation, I am alive to the position that the Bombay judgment of the Division Bench might not have been, nay must not have been, brought to the notice of the learned District Judge. But the rather sorry state of affairs emerges not from the fact that the Bombay judgment was not referred to by the learned Judge because of the want of assistance from the Bar, but the fact is that the Rajasthan High Court judgment, referred to above, itself refers to the Bombay judgment delivered by the Division Bench and the Rajasthan judgment mentions its disagreement with the Bombay view. When the attention of the learned Judge was invited to the Rajasthan judgment he could not have, or rather he should not have, lost sight of the important portion of the judgment where reference is made to the Bombay judgment. I do not wish to go into the matter more deeply, but earnestly hope that this observation will have its own effect for the guidance of the lower judiciary.

8. Coming to the question arising in this Second Appeal, the question really has got to be analysed as follows:—

(1) Whether the auction-purchaser had any right to recover the purchase money deposited by him in the Court for the purpose of purchase of the property brought for sale in the execution proceedings on account of the fact that the judgment-debtor had no saleable interest in the property after the confirmation of the sale.

(2) If he had any such right, who was the person, between the judgment-debtor and the decree-holder, upon whom the corresponding liability could be fastened.

(3) Assuming that by virtue of the right in the auction-purchaser and the corresponding liability upon either of the judgment-debtor or the decree-holder there arose a cause of action in favour of the auction-pur-

chaser, what was his remedy? Whether his remedy lay only within the machinery provided by Order 21 of the Civil P. C. or whether an independent suit was maintainable.

(4) What would be the nature of the suit? That is to say, would it be founded in Torts, Contract, quasi-contract and so on?

9. As stated above, practically all the above questions have been fully answered by the Division Bench of this Court while deciding the case of Santimmappa v. Balbhim Co-op. Credit Society, AIR 1950 Bom 313. As will be presently pointed out, for some reason or the other, the last aspect of the question remained undecided by the Court. Again, as will be presently pointed out by me, the real question in this dispute cannot be said to be fully answered and decided unless even the last mentioned aspect is decided upon. This rather exhaustive judgment on my part is necessitated on account of this peculiar position.

10. This leads me to the judgment of this Court in Santimmappa's case (AIR 1950 Bom 313). The facts of the case were as follows: A co-operative credit society had obtained an Award against its judgment-debtor Basawwa for a sum of Rs. 576/-. In execution of the Award the property belonging to the judgment-debtor was brought to sale in Feb. 1934. There were some other creditors having enforceable rights against the same judgment-debtor; but the facts relating to that aspect of the case are totally irrelevant for our purpose and hence I need not mention the same in this judgment. The relevant fact is that the Co-operative Society brought the suit property belonging to the judgment-debtor for sale and the same was purchased by the auction-purchaser. The auction-purchaser also got possession of the property and the co-operative society got its moneys recovered from the amount paid by the auction-purchaser. Later on the adopted son of Basawwa filed a suit against the auction-purchaser for the recovery of the self-same property contending that the original judgment-debtor had no right, title and interest to alienate the property. His suit was decreed and as a result of the decree the auction-purchaser was dispossessed of the property purchased by him in the auction sale. In these circumstances the auction purchaser filed a suit against the decree-holder, viz. the co-operative society, for refund of the purchase money from the society. The basis of the suit was that the judgment-debtor had absolutely no salable interest in the suit property and that, hence, the decree-holder was

in equity liable to repay the moneys received from the auction-purchaser. The plaintiff/auction-purchaser was non-suited by the trial Court and his appeal in the District Court met with the same fate. The auction-purchaser filed Second Appeal in this Court and it is this Second Appeal which was referred to the Division Bench for consideration. Reference to the Division Bench was necessitated by virtue of the apparent conflict between the two previous judgments of this very Court, viz. in Rustomji Ardeshir v. Vinayak Gangadhar, (1911) ILR 35 Bom 29 and in Balvant Raghunath v. Bala, ILR 46 Bom 833 : (AIR 1922 Bom 205).

11. The Division Bench consisting of Bavdekar and Dixit, JJ. considered practically the entire case law on this point. It firstly came to the conclusion that there was no real conflict between the above mentioned two Bombay authorities. The Division Bench held that the first authority which was decided as early as in the year 1911, reported in (1911) ILR 35 Bom 29, was really based upon the old Civil P. C. of 1882, which had in effect given a specific right to the auction-purchaser to file a suit against a decree-holder for recovery of his purchase money in the event of the failure of the consideration. The Division Bench found that the subsequent Civil P. C., 1908, had made a sharp departure from this legal procedure. The decision of this Court reported in ILR 46 Bom 833 : (AIR 1922 Bom 205) was based upon the new Code of the year 1908. In the latter Bombay authority the Court came to the conclusion that the suit contemplated by the old Code was itself the result of the statute and not the result of any common law right. Further, the Division Bench came to the conclusion that the right to sue, facilitated by the old Code, was taken away by the Civil P. C. of 1908. The Division Bench deciding the question in the year 1950 in Santimmappa's case thus found that there was no real conflict between the two authorities as such.

12. This Court in Santimmappa's case (AIR 1950 Bom 313) proceeded further to consider the question regarding the right of the auction-purchaser in fullness. It considered the various aspects of the question and it held that the judgment of this Court in Balvant Raghunath v. Bala, ILR 46 Bom 833 : (AIR 1922 Bom 205) was a correct judgment. By the said judgment it was held that the auction-purchaser had no right to file an independent suit against the decree-holder after the confirmation of the sale for

the recovery of the purchase money from him on the ground that the original decree-holder (judgment-debtor? Ed.) had no saleable interest in the property in question.

13. But while upholding the said judgment of this Court reported in (Balvant Raghunath v. Bala, 24 Bom LR 308 : ILR 46 Bom 833 : (AIR 1922 Bom 205)) the Division Bench deciding Santimmappa's case (AIR 1950 Bom 313) went further and discussed the various decisions upon which the correct view was based. While doing so this Court had also examined the judgments of the various other High Courts, the conclusions arrived at by whom were at variance with each other. This Court also referred to the judgment of the Privy Council in support of its findings. It is not necessary for me to refer to each of the aspects examined, discussed and adjudicated upon by the Division Bench. Suffice it here to say that the Division Bench has specifically held in Santimmappa's case that neither the judgment-debtor nor the decree-holder gave warranty of title of any kind whatsoever at any time during the course of the auction-sale. Further this Court held that prior to the advent of 1908 Civil P. C., there existed a right available to the auction-purchaser to demand back the purchase money paid by him from the decree-holder, (if the judgment-debtor was found to be having no saleable interest in the property) not only before the confirmation of the sale but even thereafter, that it emanated from the 1882 Code and that in view of the peculiar provisions of the 1882 Code he could do so even by resort to a suit. This Court held that this right was the creature of the specific statute, viz. Civil P. C., 1882, that this right was taken away by the subsequent Code of 1908 and that there ended the right of an auction-purchaser to file a suit for recovering back the purchase moneys paid by him in the given circumstances.

14. It was argued before the Division Bench that a suit would lie upon equitable consideration, viz. that a purchaser who had been misled because of the action of the decree-holder in bringing to sale the property in which the judgment-debtor had no saleable interest is entitled to hold the decree-holder responsible for the loss caused to him. The argument was two-fold. In the first instance it was argued that there was a misrepresentation by the decree-holder and, secondly, it was contended that even otherwise the auction-purchaser was entitled to rescind the sale on the ground of mistake. This Court held that once it is held that no question of the decree-holder giving a warranty

of title arose, no question of misrepresentation could arise. As regards the plea of mistake, this Court observed in para 7 of the judgment (AIR series) as follows:—

"7. Now there is some authority for saying that where it is found subsequent to the auction sale that the judgment-debtor had no saleable interest in the property a suit for money had and received on the ground of total failure of consideration would lie. That such a suit would lie when the officer who held the sale had no authority to do so was pointed out by their Lordships of the Privy Council in the case mentioned above, *Dorab Ally Khan v. Abdul Azeez*, (1878) 5 Ind App 116. We must not go, however, into that question in this case because the action which the plaintiff brought in this case was certainly not an action for money had and received."

The question regarding the auction-purchaser's right to sue on the principle of money had and received was thus left unconsidered and undecided by this Court. Presumably, parties' pleadings in the said case left no scope for the Court to consider the effect of the equitable principle of moneys had and received. But whatever the position may be in that case, so far as the present appeal is concerned, I find no justification to refrain from deciding the right of the auction-purchaser, if any, based upon the principle of moneys had and received. The facts and pleadings obtaining in the present case and the contentions advanced in all the three Courts including this Court compel me to decide this aspect of the case.

15. Moreover, it would be useful referring to the observations of this Court in paragraph 11 of the judgment in Santimmappa's case (AIR 1950 Bom 313) (*supra*). Those observations have been made with reference to the decision of the Full Bench of the Lahore High Court (AIR 1932 Lah 401), which decision was based upon Section 65 of the Contract Act. While dealing with the view of the Lahore High Court this Court observed as follows:

"11. It is true that their Lordships of the Lahore High Court in the Full Bench case which I have mentioned above referred to this section, but they referred to this section as well as to other sections of the Contract Act merely by way of analogy. The ground upon which they based their conclusion, viz. that the auction purchaser was entitled to file a suit for refund of the purchase money, was two-fold; (1) there was a representation by the judgment-creditor when he brought the property to sale that the judgment-debtor had

some interest in the property. They said consequently that there was a misrepresentation by the judgment-debtor for which subsequently the auction purchaser was entitled to avoid the transfer. In the second instance they said that there was also a mistake by both the parties and an action for money had and received would therefore lie. Immediately we hold that there is no representation by the judgment-creditor that the judgment-debtor has some interest in the property, the argument that the sale can be avoided because of misrepresentation fails. In our view, therefore, it is not possible to accept the view that an auction purchaser who has not come to Court to set aside the sale in time had either independently or under the present Code a right of suit other than a suit for money had and received."

16. It will be noticed that even while considering the view of the Lahore High Court, the Division Bench has expressed no opinion on the question of the right of the auction-purchaser to sue on the basis of moneys had and received. It is this aspect of the judgment of the Division Bench that has propelled me, with infinite deference to the Bench, to give this rather fulsome judgment expressing my views regarding the right of the auction-purchaser arising out of the doctrine of moneys had and received. To my mind, it cannot be said that the auction-purchaser's claim is fully adjudicated upon unless his right under the said doctrine of moneys had and received is fully examined; and hence I have devoted some time and space to this aspect of the case in spite of the fact that ultimate conclusion that I have arrived at is the same to which the Division Bench had arrived while deciding Santimmappa's case (AIR 1950 Bom 313).

17. There is another reason why I feel that the examination of the various manifestations of the doctrine of moneys had and received is necessary in the context of the facts of the present case. After the judgment in Santimmappa's case there has been a well considered judgment of the Division Bench of the Rajasthan High Court reliance upon which has been placed by the lower Appellate Court. In the said judgment the Rajasthan High Court has given relief to the auction-purchaser against the decree-holder in identical circumstances by resorting to the principle of moneys had and received. I have no doubt expressed my disapproval of the fact that while following the authority of the Rajasthan High Court, the learned District Judge had overlooked the judgment of the Division Bench of this Court in Santimmappa's case (AIR 1950 Bom 313). That

was because, evidently, the Rajasthan judgment could have only a persuasive effect, whereas the judgment of this Court in Santimmappa's case was a binding authority so far as the lower appellate Court was concerned. But that fact does not obviate the necessity of this Court's considering the correctness of the judgment delivered by the Division Bench of the Rajasthan High Court. This is so for two reasons in particular. Firstly, the decision in Santimmappa's case was examined and followed by a learned single Judge (Jagat Narayan, J.) of the Rajasthan High Court in *Thakar Lal v. Nathulal*, AIR 1961 Raj 193. But this decision was overruled and the Division Bench ruling of this Court in Santimmappa's case was dissented from by the Division Bench of the Rajasthan High Court in the case of *Thakar Lal v. Nathulal*, AIR 1964 Raj 140. Secondly, because, I must say with great respect, their Lordships of the Division Bench of the Rajasthan High Court have summarised the previous case law in a very happy manner. It is stated by their Lordships of the Rajasthan High Court in paragraphs 4, 5, 6 of their judgment (AIR series) as follows :

"4. The principal question which thus emerges for determination in this appeal is whether an auction purchaser is entitled to recover back the purchase money from the decree-holder after the confirmation of the sale in his favour if it is held in a suit brought by a third party that the judgment-debtor had no saleable interest in the property purchased by the auction-purchaser, and, thereafter he is deprived of the possession of such property.

5. As rightly observed by the learned single Judge, there is a divergence of judicial opinion on this point among the various High Courts in India, and, if we may say so, this divergence is further to be found in some cases between the decisions of the same High Court. One view is that an auction-purchaser at a court-sale is not entitled to maintain a suit for the recovery of the purchase money paid by him in the event of the judgment-debtor being proved not to have any title to the property sold after a sale has been confirmed. This view is based on the ratio decidendi that there is no warranty of title in an auction-sale, and the auction-purchaser has, therefore, no right either in law or in equity to recover the purchase price from the decree-holder in case it subsequently turns out that what he has purchased does not belong to the judgment-debtor. Reliance has also been placed in support of this view on the theory that a statutory right was granted

by S. 325 of the C. P. Codes of 1877 and 1882 by which an auction-purchaser was entitled to sue to recover the purchase price under those Codes; but with the repeal of that section in the Code of 1908, that statutory right came to an end, and Rr. 91 to 93 of O. 21 of the present Code do not permit any such thing to be done.

This view is forcefully propounded in a Full Bench decision of the Allahabad High Court in *Amarnath v. Firm Chotelal*, AIR 1938 All 593 (FB), and a Bench decision of the Bombay High Court in *Santimmappa v. Balbhim Co-op. Credit Society*, AIR 1950 Bom 313. To indicate the acuteness of the conflict which has existed on this subject it may be permissible to point out at this place that in an earlier Full Bench decision of the Allahabad High Court in *Bindeshri Parshad Tewari v. Badal Singh*, AIR 1923 All 394 (FB), it was held that an auction-purchaser under a decree which had been set aside after the confirmation of the sale as a result of a separate suit was entitled to recover his purchase money from the decree-holder. It was further held in this case that his remedy lay by an application under S. 47, C. P. C. As other instances of decisions on this side of the line, we may refer to *Kameshwar Singh v. Bansidhar Marwari*, AIR 1937 Pat 532, *Amal Chandra v. Ram Swarup*, AIR 1939 Cal 310 and *Abinash Chandra v. Motilal*, AIR 1961 Cal 172.

6. On the other side of the line are the Full Bench decisions of the Oudh Chief Court and the High Courts of Lahore, Madras and Rangoon in *Bahadur Singh v. Ram Phal*, AIR 1930 Oudh 148 (FB), *Mehar Chand v. Milkhi Ram*, AIR 1932 Lah 401 (FB), *Macha Koundan v. Kottora Koundan*, AIR 1936 Mad 50 (FB) and *Aye Maung Maung v. A. Scott and Co.*, AIR 1940 Rang 1 (FB) respectively, and the High Court of Travancore Cochin in *State v. Padmanabhan Pillai*, AIR 1956 Trav-Co. 216 and of Andhra Pradesh in *P. Malliah v. Brahmaya*, AIR 1960 Andh Pra 89, have also taken the same view. The view taken in these cases, broadly speaking, is that the purchaser of an immovable property at an auction held by the Court in execution of a decree is entitled to maintain a suit for recovery of the price paid by him, if he is deprived of the property subsequent to the confirmation of the sale in his favour, the judgment-debtor having been found to have had no salable interest in it, inasmuch as the sale in such a case is founded on a mutual mistake of fact between the decree-holder and the auction-purchaser or there is a total failure of consideration, or such a claim is

accepted to be maintainable on the basis of money had and received or a like equitable ground. It has been further held in these cases that the object of the Legislature in enacting R. 93 of O. 21, C. P. C. by which an auction-purchaser is entitled to an order for the repayment of the purchase money on the setting aside of a sale before it is confirmed was not to deprive the auction-purchaser of any rights which he otherwise may have had in that connection but was merely to provide him with an unconditional right, capable of being enforced summarily to get back the purchase money if and when the sale is set aside under R. 92 and it is maintained that in other cases, his right to have recourse to the ordinary remedy of instituting a suit for refund and to bring his case within the ambit of the rules of equity or what may be called the general principles of law cannot be held to have been adversely affected."

I do say with great respect that no fault can be found with the summary of the case law regarding both the schools of thought propounded by the various High Courts. After giving the summary of the view expressed by the two schools of thought, the learned Judges observed in para 7 of the report as follows:

"... With respect, we believe that in a matter attended with such divergence of opinion, the best course should be to deal with the controversy on first principles and this is therefore the course which we think fit to adopt. The more so, as we are unable to agree with all the reasons which have been given by even those Courts which favour the view which has commended itself to us."

18. However, after expressing their determination to decide the case on first principles all that their Lordships of the Rajasthan High Court say in this behalf is that there was no cogent reason on the whole, as to why an auction-purchaser who has been deprived of the property purchased by him as a result of a suit filed by third party against him ... should not have the right to recover the purchase money paid by him, on the broad consideration that a purchaser should not be made to lose the property as well as the price he paid for it for no fault of his (emphasis supplied). I emphasise the words "for no fault of his" because, to my mind, those are the words which make the view of the Rajasthan High Court a vulnerable one. This position becomes clear from what is stated by their Lordships of the

Rajasthan High Court in paras 10 and 11 of their judgment. As for instance their Lordships have specifically repelled the view that there was some misrepresentation or fraud practised by the judgment-debtor upon the auction-purchaser. The learned Judges have thus, in effect, found that no right accrued to the auction-purchaser either under the law of Torts or of Contract to claim back the purchase money. However, after having found that there was no justification for assuming any such right in favour of the auction-purchaser on the basis of implied warranty of title or fraud or misrepresentation, their Lordships of the Rajasthan High Court still proceeded to hold that there did vest some kind of right in the auction-purchaser to recover back the moneys. Evidently this view is arrived at by the Court on the lone belief that auction-purchaser was not at fault. But if the auction-purchaser was not at fault so were the decree-holder or judgment-debtor not at fault. Fault could be legitimately imputed to the decree-holder or judgment-debtor if either of them was guilty of misrepresentation or fraud; but we have seen that that ground is not sustainable at all and even the Rajasthan High Court has wholly exonerated the decree-holder as well as the judgment-debtor of that charge. Moreover, it may not be wholly correct to say that the auction-purchaser was at no fault at all. I will refer to this aspect presently, but here I will deal with another aspect of the reasoning of the learned Judges of the Rajasthan High Court. Another basis of their reasoning is that the auction-purchaser "should not be made to lose the property as well as the price he paid for it for no fault of his". If that was so, why should the decree-holder be made to lose the fruits of the decree as well as the sale proceeds received from the Court in satisfaction of the decree?

19. It is necessary to analyse this theory of loss being caused to the auction-purchaser "for no fault of his" as also the theory of double loss to him. If we analyse this aspect we shall have to note that there is a basic difference between a transaction of voluntary sale between two willing parties and transaction of compulsory sale like a Court sale between two parties, one of whom is an unwilling party and the other is a party hoping to get some advantage from the fact that the sale was a compulsory sale. In the normal voluntary sale there is the warranty of title but the *raison d'être* for the warranty itself is that the purchaser has paid full amount that the vendor expects from his property. This is not so in the case of any compulsory

sale, such as the auction sale. It is well known that in the case of an auction sale the auction-purchaser expects and hopes to purchase the property at the price much lower or at least somewhat lower than its market price. This is the principal advantage which the auction-purchaser gets in the compulsory sale such as the Court sale and this is something of which the Court is entitled to and must take judicial notice. This is the reason why the auction-purchaser has got the corresponding disadvantage of subjecting himself to a risk, viz., that, perhaps, he might not get anything whatsoever for the moneys paid by him. The theory that he loses both the moneys and property for no fault of his is, therefore, not quite correct.

20. Moreover, such a position is not unusual even vis-a-vis a private sale. Sec. 55 (2) of the Transfer of Property Act ensures warranty of title to the purchase of immovable property, but even such statutory warranty is subject to a contract to the contrary. A purchaser purchasing any property subject to such a contract to the contrary can never be heard to complain that his vendor has no salable interest in the property in question. It could be readily seen that the position of a purchaser at Court sale is no better than that of a private purchaser such as the above who purchases the property subject to a contract to the contrary. Such private purchaser could not be heard to complain that he was deprived of his purchase money for no fault of his.

21. After formulating the question that fell for their consideration the learned Judges of the Rajasthan High Court have observed as follows (at p. 145):

"... .. and we see no reason why such wrong should be allowed to go altogether unredressed. The right to recover money that has been paid for a certain consideration, which has absolutely failed, and which is the sale of the property of which the auction-purchaser has been completely dispossessed is, in our opinion, a right of a civil nature"

22. The above reasoning of the Division Bench of the Rajasthan High Court assumes, (a) that there was a right vesting in the auction-purchaser to recover back the purchase money if the consideration paid by him absolutely failed; (b) consequently there was a wrong done to him.

23. The question then arose as to what is the source of the said right vesting in the auction-purchaser. The learned Judges there-

fore proceeded to find out the source of this right from (i) the doctrine of frustration finding place in S. 65 of the Contract Act; (ii) doctrine of moneys had and received obtaining in the English law.

24. So far as the provisions of S. 65 of the Contract Act are concerned, that aspect of the question is already considered and disposed of by the Division Bench of this Court in Santimmappa's case (AIR 1950 Bom 313) (supra) and hence it is not necessary for me to re-examine that aspect of the case. It is sufficient for me to say with great respect that I am fully in agreement with what is expressed by their Lordships, viz., that the principles underlying Section 65 of the Contract Act can have no application whatsoever to the kind of transaction, such as the instant one.

25. It is the second source of the auction-purchaser's right, doctrine of moneys had and received, relied upon by the Rajasthan High Court, that necessitates closer examination. This question is dealt with in para 18 onwards in the said judgment. But I am somewhat surprised that instead of examining the same with reference to the basic principles of common law or equity, the learned Judges have examined the same mainly with reference to and have decided the same mainly by reliance upon the provisions of Article 62 of the Limitation Act. This is what they observe:—

"18. We should also like to mention that a right like this may also be founded on the principle of money had and received which has been recognised under the English law and to which effect has been given under the Indian Law also as would appear from the language of Art. 62 of the Indian Limitation Act. It has been observed that when this article speaks of a suit for money received by the defendant for the plaintiff's use, it points to the well-known English action in that form and consequently it applies where the defendant has received money which in justice and equity belongs to the plaintiff under circumstances which in law renders the receipt of it a receipt by the defendant to the use of the plaintiff. Thus where money is paid by the plaintiff to the defendant under an agreement which is void or which is discovered to be void, the money would be money received by the defendant for the use of the plaintiff within the meaning of this article. We have had occasion to consider the scope and ambit of Article 62 of the Limitation Act in Jain Brothers and Co., Bundi v. State of Rajasthan (Civil Reference No. 64 of 1961, D/- 19-8-1963 : (AIR 1964

Raj 17) to which both of us were parties) and what we held there may be briefly reproduced in the following extract (at pp. 20-21):

"Our conclusion, therefore, on a most careful and earnest consideration that we are able to give to this vexed matter is that we find it difficult to escape the view, on the whole, that the correct interpretation to be put on the key words in Art. 62 is the one which should conform to the meaning of these words in the English cases and that a simple or literal interpretation of these words which appear to us to be clearly technical as discussed above would not be correct. That being so, it must follow that Art. 62 governs suits for money had and received, not only where the defendant may have actually received money for the use of the plaintiff as his agent or in a like capacity, but it also governs suits for money whereof it can be rightly postulated that the defendant has received money which he had no right to receive and the receipt whereof by the defendant therefore amounts in law or by a legal fiction to a receipt by him for the plaintiff's use'."

26. In this connection I must state at the very outset that the Limitation Act (Art. 27 thereof — corresponding to Art. 28 of the old Act) does not create any substantive right in favour of any party. The right of the plaintiff/auction-purchaser could not, therefore, be said to be flowing from any of the provisions of the Limitation Act. It is true that the Limitation Act does give an indication of certain causes of action arising out of certain substantive law. But the Limitation Act by itself does not create any new right from which a cause of action stems. That Act can hardly be considered as a source of right.

27. All the same, let us examine the provisions of Article 62 of the old Limitation Act, which provided as follows:

Description of suit.	Period of limitation.	Time from which period begins to run.
62. For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.	three years.	When the money is received.

Let us now examine whether the cause of action for the plaintiff's present suit can be said to be governed by the said Article 62.

In order that the Article may so govern the plaintiff's cause of action, it must be shown that the decree-holder received moneys from the auction-purchaser and the moneys were received by him for the auction-purchaser's use. It is difficult to see how the cause of action of the plaintiff-auction-purchaser's suit in the instant case could be said to be of the description given in column 1 of the said Article 62. The decree-holder did not receive moneys from the auction-purchaser. He received it from the Court where the auction-purchaser had deposited the same. There was absolutely no privity between the decree-holder and the auction-purchaser. Further, it is difficult to see as to by what principle of common law or equity the decree-holder could be said to have received the same to the auction-purchaser's "use". This is one of the aspects of the matter, which shows that the plaintiff cannot be said to be having any conceivable cause of action against the decree-holder.

28. I would like to probe the matter a little deeper. Does Article 62 enact any substantive law? No. It provides only a period of limitation in respect of a cause of action which is the result of the substantive law. The substantive law as such is to be found elsewhere. In the instant case it will be found principally in S. 72 of the Contract Act. Unfortunately, the attention of the learned Judges of the Rajasthan High Court was not invited to the said S. 72 of the Contract Act. To my mind, the correct legal position is that the said S. 72 of the Contract Act exhausts all the categories of cases of moneys had and received so far as the law in force in India is concerned. Section 72 of the Contract Act may, therefore, be set out verbatim :

"72. A person to whom money has been paid or anything delivered by mistake or under coercion, must repay or return it."

Since, to my mind, the said S. 72 embraces all the aspects of the doctrine of moneys had and received so far as the law applicable in India is concerned, I will first analyse this section and see whether the plaintiff's suit could be said to be governed by this section. I will thereafter proceed to give my reasons for holding that this section is exhaustive as regards the suit based on the doctrine of money had and received.

29. Coming to the analysis of this section vis-a-vis the facts of the present case, what the section provides is that the person who receives money from another person must pay back to himself. One cannot read the section as follows :

"A person who is paid money or has delivered anything by mistake or under coercion, receive the same."

I am stressing this aspect of the case because it must be seen that in cases such as the instant case the auction-purchaser has not paid moneys to the decree-holder at all. The moneys were deposited by him in the Court. The moneys were received by the decree-holder from the Court. On a plain analysis of S. 72, therefore, the principle underlying the said section can have no application to the supposed rights of auction-purchaser to recover back his money on account of failure of consideration. If this section does not apply, it follows that Art. 62 of the Limitation Act would be equally inapplicable. Reliance upon the said article for spelling out the liability of the decree-holder towards the auction-purchaser is, therefore, not justified.

30. Let us now consider the question as to whether S. 72 of the Contract Act is exhaustive in its character. It is well-known that the principle embodied in the said Section 72 is equitable principle, although it has now become a part of the English Common Law. It may be that the principle has received more amplification and is of wider amplitude in English law. But the framers of the Indian Contract Act have chosen to give to the same statutory shape in the form of S. 72 of the Contract Act. It is well-known that when a principle of common law is embodied in a statute it is not open for a Court to rely upon the principle of common law merely because the provision of the statute does not cover or govern the case before them. (See AIR 1959 SC 135 headnotes (c) and (d)).

31. But assuming that I am not right in holding that S. 72 of the Contract Act is exhaustive in this behalf and even assuming that the principle of moneys had and received has some other source as well on the general principles of English law. I must point out that even applying the principles of English law the auction-purchaser could not be said to be having any equity in his favour.

32. Reference in this behalf may be made to most relevant principle that equity cannot come to the rescue of any person who suffers any detriment to himself with open eyes. Reference in this behalf may be made to *Dutton v. Thompson*, (1883) 23 Ch D 278 at 281, where it is held :

"It is not the province of a Court of justice to decide on what terms or conditions a

man of competent understanding may choose to dispose of his property. If he thoroughly understands what he is about, it is not the duty of a Court of Justice to set aside a settlement which he chooses to execute on the ground that it contains clauses which are not proper."

(Cited with approval by Snell's Principles of Equity at page 126, 27th Edition.)

Reference may also be equally made of the recognised principle of equity, viz. that equity does not save people from consequences of their own folly, but will save them from being victimised by other people (see (1887) 36 Ch D 145 at pp. 182, 183 and (1952) 2 TLR 516 at p. 519). (See Snell's Principles of Equity page 546).

33. If we appreciate the fact that the auction-purchaser has exposed himself to a risk with open eyes it can be safely said that there can be no equity in his favour and hence not even any independent principle analogous to the one embodied in Section 72 of the Contract Act can be invoked by the plaintiff/auction-purchaser. Assuming therefore that S. 72 of the Contract Act is not exhaustive, still I find there is no cause of action accruing to the plaintiff/auction-purchaser for refund of purchase money.

34. In any event no cause of action can be said to have accrued to the plaintiff as against decree-holder. I set out this position particularly to point out that even assuming that the auction-purchaser has got some kind of equity in him, at least he has no equity higher than the one had by the decree-holder. In the case before us the decree-holder has as much equity as the auction-purchaser has, if not more. After all it is he who has parted with the moneys in favour of the judgment-debtor, had wasted his time, money and energy for instituting the litigation and had obtained a decree against the judgment-debtor. It is not, as if he had given any invitation to the auction-purchaser to purchase the property. It has been held by this Court and even by the Rajasthan High Court that he gave no warranty of title to the auction-purchaser when the auction-purchaser paid for the purchase of the property in auction. The equities are, therefore, at least equal in this case, if not higher as against the auction-purchaser. It is well-known that when equities are equal the first in time shall prevail. In the present case the equity in favour of the decree-holder is undoubtedly first in point of time and, therefore, it must prevail and therefore the auction-purchaser cannot

be said to be having any right against the decree-holder at all.

35. The Division Bench of the Rajasthan High Court has also observed and held that right of the plaintiff is of a civil nature contemplated by S. 9 of the Civil Procedure Code. But to my mind this approach rests upon a basically erroneous postulate. Section 9 of the Civil Procedure Code does not create any right in favour of any party at all. All that S. 9 of the said Code says is that if any person has a right of civil character he can enforce it in a Court of civil law unless the same is barred by any statute or otherwise. For finding out as to whether the plaintiff has got any cause of action or not, one has to turn not to Section 9 of the Civil Procedure Code but to the substantive law and the substantive law does not seem to have devised any right for an auction-purchaser, in the case such as the present one. While making this observation I am ignoring the cases where the auction-purchaser's claim is founded upon fraud or misrepresentation. The claim of the auction-purchaser such as that would be clearly governed by the law of torts. But I find that there is no right in the auction-purchaser against the decree-holder and hence Sec. 9 of the Civil Procedure Code cannot be invoked at all.

36. In this connection I may very briefly analyse the various sources of substantive rights of persons which may give them cause of action for filing suits against other persons. Under the common law, a right can be founded either in torts or contract. Thereafter there come rights arising out of the various statutes. It is well-known that equity stepped in thereafter and rights which were not recognised by common law were recognised and enforced in Courts of Equity. It is thus that we find rights in the nature of trusts, etc. Lastly, we find rights arising out of the provisions of the Constitution of the various countries which may fall in a class of their own. I have pointed out that the plaintiff/auction-purchaser can have no right in contract. He cannot fasten any tortious liability upon the decree-holder. By no stretch of imagination it can be conceived that a decree-holder holds moneys in trust for the auction-purchaser. This is for the very simple reason that there cannot be conceived any relationship between the plaintiff/auction-purchaser and decree-holder. All that we are left with, then is right under the statute. A brief examination of the history of Civil Procedure Code in this behalf would show that the plaintiff/auction-

purchaser's rights are extended by the provisions of the Code and they have no place outside the Code. This Court had considered this aspect of the question while considering Santimmappa's case. This Court had come to the conclusion that 1882 Code created a right in favour of auction-purchaser to recover the moneys. This Court also held that the right could be exercised not only by filing application in the execution proceedings, but the remedy of the auction-purchaser lay even in an independent suit and that too even after the confirmation of the sale. This Court further held that the amendment brought about in his position by the 1908 Code did away with this extra right of the auction-purchaser to file a suit for refund of money even after the confirmation of sale. This Court left the question open whether an independent suit on moneys had and received was maintainable or not. But this Court has specifically overruled any contention regarding maintainability of an independent suit under any provisions or principles of law. I have held here that the principle of money had and received cannot be invoked by the auction-purchaser in the context of the facts of the present case.

37. It would be somewhat enlightening and illuminating to have a look at the course that Civil Procedure Code has now adopted by virtue of the latest amendment. From the latest amendment it is clear that the procedure under O. 21 of the Code is an extensive and self-contained Code for the purpose of rights of the auction-purchaser for recovering back of his purchase moneys.

38. Reference may be made in this connection to the old provisions of the unamended Civil Procedure Code contained in O. 21, R. 103. These provisions specifically provided for independent suit, but even that suit related to the title of the judgment-debtor to the property in question. An auction-purchaser could not file a suit against either the judgment-debtor or a decree-holder for recovery of the purchase money deposited by him in Court. Under the amended Civil Procedure Code, which is in force at present, the entire provision for an independent suit is done away with and a self-contained machinery is provided whereby, if a judgment-debtor has no saleable interest in the property sought to be purchased by the auction-purchaser, he can recover back the purchase money deposited by him in the Court. Having regard to this scheme of these various Codes, I find no reason for holding that the unamended Civil Procedure Code, 1908 envisaged a suit being filed by

the auction-purchaser against the decree-holder for refund of purchase money deposited by him in the Court.

39. I may mention here that I have considered the question of the right of the auction-purchaser only against the decree-holder. I have not expressed any opinion as regards the auction-purchaser's right against the judgment-debtor, as such. Prima facie it appears to me that since it is not a voluntary sale by the judgment-debtor, the same principle should hold the field; but I need not express any opinion on that point since the same does not arise in this appeal.

40. However, in the present case the trial Court had passed a decree against the judgment-debtor for the full amount claimed by the auction-purchaser and he had filed no appeal against the same. The decree passed against him has therefore become final. The decision in the present appeal can have no effect upon the said decree obtained by the decree-holder against the original judgment-debtor.

41. I have delivered rather a fulsome judgment in this case because I find that this question arises with too much of frequency before the Courts and because the important aspect of the case was undecided by this Court in Santimmappa's case (AIR 1950 Bom 313).

42. In view of the position discussed by me above, the appeal filed by the decree-holder must be allowed. The decree passed by the lower Court is set aside and the one passed by the trial Court is restored. The appeal is allowed with costs against the plaintiff.

Appeal allowed.

AIR 1982 BOMBAY 41

(AT NAGPUR)

**GINWALA AND Smt. SUJATA
MANOHAR, JJ.**

All India Reporter Ltd., Nagpur and another, Petitioners v. Union of India, Respondent.

Special Civil Appln. No. 160 of 1979,
D/- 27-11-1981.*

(A) Companies Act (1955), Ss. 314 (1-B), 637-A and 637-AA — Application to Central Government for approval of increase in salary of manager's relatives

*To set aside order passed by Govt. of India at New Delhi, D/- 25-10-1978.

LY/LY/F785/81/MVJ

— Grant of approval — Cannot be arbitrary — Condition cannot be imposed on basis of Government policy contemplated by S. 637-AA.

Under S. 314 (1-B) of the Act no relative of the General Manager of the Company can hold any office or place of profit in the Company, which carries a total monthly remuneration of not less than three thousand rupees, except with the prior consent of the Company by a special resolution and the approval of the Central Government. When on the basis of a resolution an application is filed before the Central Government, under Section 637-A, the Central Government can accord its approval to the appointment and impose a restriction on the salary that may be paid to the employee. However, this power to impose a ceiling on the salary payable cannot be exercised in an arbitrary manner. Further, Section 637-AA does not apply to approvals for an increase in the remuneration of relatives of managers under S. 314 (1-B) of the Act. AIR 1977 SC 831, Ref. to.

(Paras 5, 6, 8)

S. 637-AA in terms only applies to approval under Ss. 309, 310, 311 or S. 387. These sections pertain to the remuneration of Directors, including any Managing or whole time Director and the remuneration of a Manager. Under S. 637-AA, in granting its approval, the Central Government has to take into account the financial position of the Company and other factors which are enumerated in that section. These include public policy relating to the removal of disparities in income. Since this section does not apply to approval under S. 314 (1-B), the only relevant section for the purpose of approval under S. 314 (1-B) is S. 637-A. Under S. 637-A no such factors as in S. 637-AA have been enumerated which are required to be considered by the Central Government. This does not, however, mean that it is open to the Central Government to grant its approval or withhold such approval arbitrarily. Nor is it open to the Central Government to impose any condition arbitrarily while according its approval. If any conditions are sought to be imposed, they must be imposed on the basis of relevant material pertaining to the Company which seeks such an approval. In view of Form No. 24-A which has been prescribed by the Central Government for making applications inter alia under S. 314 (1-B), the financial condition of the Company, its management structure, its capital struc-

ture, nature of the services to be rendered by the person concerned, his qualifications, the number of employees who are in receipt of a salary over Rs. 3000 and other relevant information pertaining to the relative mentioned in it, are all relevant for considering the application for approval of an increase in remuneration of the relatives of the Manager. While S. 637-AA refers to an additional factor to be taken into consideration viz., public policy for removal of disparities in income, there is no reference to such a public policy under S. 637-A. Thus the Central Government is not under any statutory obligation to consider a public policy (if formulated) for removal of disparities in income while considering applications for approval under S. 314 (1-B), much less any Government policy. It must consider the relevant information supplied to it under Form No. 24-B in deciding upon the conditions, if any, subject to which it proposes to grant its approval under S. 314 (1-B). It is difficult to see how it can arrive at any decision simply on the basis of any policy of the Government unconnected with the relevant material pertaining to the Company in question and the person whose salary is to be increased. In the absence of any provision in the Companies Act, 1956, it is difficult to uphold any policy fetters on the exercise of discretion by the Central Government. (Para 8)

In the instant case, the second petitioner is the younger brother of the General Manager of the Company, the first petitioner. The second petitioner holds a very important post viz., the post of Manager, Sales and Circulation. According to the first petitioners, he also assists the General Manager. He is in charge of the sales and circulation and sales promotional activities of the company's publications both in India and abroad. He is also responsible for bringing out various commentaries, digests and other publications. It is also the case of the first petitioners that as a result of the work done by the second petitioner and the General Manager the turnover and the net profits have substantially increased. In a meeting held on 14-1-1978 a resolution was passed sanctioning the pay scale of Rs. 5000-250-6250 to the second petitioner with effect from 1-7-1977. The first petitioner forwarded to the Central Government necessary information in prescribed form and enclosed all necessary documents for obtaining approval. The Government sanctioned the appoint-

ment but fixed the salary of Rs. 4100 p.m. in the pay scale of Rs. 4100-100-4500 and only one yearly increment was sanctioned. On a subsequent representation by the first petitioners, the Central Government substituted a fixed salary of Rs. 4500, other conditions remaining the same. The increase was sanctioned with effect from 1-2-1978.

Held, that the order of the Central Government was arbitrary and the date from which the increases are to be granted has also been selected arbitrarily.

(Para 7)

In the present case, the orders do not indicate that all the relevant factors were considered by the Central Government while imposing the condition relating to salary. On the contrary, there is some indication in the orders that the conditional approval which was granted was based on Government's policy a factor irrelevant under S. 637-A. There is nothing in those orders which would indicate on what basis originally the salary of Rupees 4100 in the pay-scale of Rs. 4100-100-4500 was prescribed and thereafter the same was revised to a fixed salary of Rs. 4500. The revised order retains other conditions prescribed by the previous order. These are referable only to a salary scale. Granting approval to a fixed salary while retaining conditions which are applicable only to a salary scale shows non-application of mind by the Government to the relevant material. The date from which the increase is granted is also fixed arbitrarily. The orders, therefore, are passed without any application of mind by the Central Government and are clearly bad in law.

(Para 9)

(B) Companies Act (1956), Ss. 314 (1-B) and 637-A — Approval of Central Government — Duty of Central Government.

It was held by the Court that it was not necessary in the case in question to examine whether the approval granted under S. 314 (1-B) read with S. 637-A is in the exercise of quasi-judicial powers or not, though prima facie it would appear that such an approval has to be granted taking into account the relevant material relating to financial structure of the Company and its managerial structure. 1980 Tax LR 2098 (Guj) and 1980 TLR 2132 (Delhi) and AIR 1969 SC 414, Ref. to.

(Para 10)

Cases Referred: Chronological Paras

1980 Tax LR 2132 (Delhi) 10
1980 Tax LR 2098: 21 Guj LR 825 10

AIR 1977 SC 831: 1977 UJ (SC) 79 5
AIR 1970 SC 1789: (1970) 2 SCJ 89 10
AIR 1969 SC 414: 1969 Cri LJ 663: (1969) 1 SCJ 835 10

V. R. Manohar and A. B. Oka, for Petitioners; M. G. Bhangade, for Respondent.

SUJATA MANOHAR, J.— The first petitioners are a well known law publishing house known as All India Reporter Limited. They are a public limited company registered under the Companies Act and have a registered office at Bombay and a branch office at Nagpur. The first petitioners publish monthly journals, commentaries on various Central Statutes, various types of digests, manuals etc. They also have their own printing press. The second petitioner is the Manager, Sales and Circulation, of the first petitioners from 1-4-1967. He is an Arts Graduate and holds an LL. B. Degree also. The second petitioner is the younger brother of the General Manager of the first petitioners. By a resolution passed by the Board of Directors on 30-4-1967 the second petitioner was designated as Manager, Sales and Circulation, with effect from 1-4-1967 and his remuneration was fixed at Rs. 2500 in the pay-scale of Rs. 2500-150-3250. The second petitioner reached the maximum in his pay-scale, namely, Rs. 3250 on 1-1-1973. Thereafter it seems that the first petitioners granted with effect from 1-9-1973 a general rise in the salary of all the employees of the petitioner Company to the extent of 25% of their salary. As a result, the second petitioner started drawing a salary of Rs. 4063 per month with effect from 1-9-1973. With the coming into effect of the new Section 314 (1-B) of the Companies Act, 1956, which was introduced by the Companies (Amendment) Act 41 of 1974, it became necessary for the first petitioners to obtain the approval of the Central Government for granting to the second petitioner the remuneration of Rs. 4063 per month because the second petitioner was the younger brother of the General Manager of the petitioner Company and drew a salary exceeding Rs. 3000 per month. The first petitioners accordingly applied to the Central Government for approval under Section 314 (1-B) of the Companies Act. The Central Government, by its order dated 22-1-1976, granted its approval. The second petitioner continued to draw his salary of Rs. 4063 per month thereafter. In the Extraordinary General Meeting of the first petitioner Company held on 14-1-1978 it was unanimously re-

solved that subject to the approval of the Central Government, the first petitioner approved and accorded sanction to a revision of pay-scale of the second petitioner with effect from 1-7-1977 in the pay scale of Rs. 5000-250-6250, plus provident fund and gratuity admissible as per the Rules.

2. The first petitioners by their letter dated 31-1-1978 forwarded to the Central Government the necessary information in the prescribed form and enclosed all the necessary documents required for obtaining the approval of the Central Government to the employment of the second petitioner in the first petitioners Company on the terms fixed by the special resolution dated 14-1-1978. Thereafter the first petitioners received a communication from the Central Government dated 29-6-1978 which is Annexure I. By this communication the Central Government approved the continuance of the second petitioner as Manager, Sales and Circulation, in terms of the special resolution passed by the Company at its Extraordinary General Meeting held on 14-1-1978 but on the following remuneration with effect from 1-2-1978:—

(a) Salary of Rs. 4100 per month in the pay-scale of Rs. 4100-100-4500.

There were other terms relating to perquisites with which we are not concerned at present. It was further provided that the approval was subject to the following conditions, limitations, or restrictions:—

(a) that not more than one increment will be allowed in a year;

(b) that any other increase in remuneration by way of salary etc. except as in para (1) of the letter will be subject to the approval of the Central Government;

(c) that the incumbent shall not be employed in any other company in any capacity.

It was further stated that the above approval had been accorded without prejudice to any changes in the Government's policy or any action that may be taken in pursuance of the provisions of the Companies Act, 1956, or of any amendments thereto that may be enacted by Parliament from time to time. On receipt of this communication the first petitioner wrote a letter dated 14-8-1978 addressed to the Secretary, Ministry of Law, Justice & Company Affairs, setting out in detail the financial position of the Company and asking the Central Government to grant approval to the Company's

resolution for increase in the remuneration. Thereafter by its letter dated 25-10-1978 addressed to the Company, the Central Government wrote as follows:

"With reference to your letter of August 14, 1978, on the above subject, I am directed to say that the Central Government has carefully considered the representation of the company in the light of submissions made therein and has been pleased to amend this Department's Letter No. 1 (45) CL. VII. 78 (ii) dated 29th June, 1978 in respect of Shri W. W. Chitale as follows:—

1. For the existing sub-para (a) of para (1) the "Salary of Rs. 4500 (Rupees four thousand & five hundred)" may be substituted.

2. The other terms and conditions of the said letter shall remain unaltered.

3. This letter is issued by order and in the name of the President of India."

3. Being aggrieved by this communication of the Central Government, the petitioners have filed the present petition challenging the orders passed by the Central Government dated 29-6-1978 and 25-10-1978. According to the first petitioners, the second petitioner is performing very important duties. He is in charge of the sales and circulation and sales promotional activities of the Company's publications both in India and abroad. He assists the General Manager of the Company. He is also responsible for bringing out various commentaries, digests and other publications. He makes substantial contributions to the work of the first petitioners. The first petitioners have also contended that as a result of the work done by the second petitioner and the General Manager of the Company, the turnover of the Company had increased from Rs. 1,06,03,290 in 1974 to Rs. 1,51,12,604 in 1976, and to Rs. 1,58,51,307 in 1977. The net profits of the Company have increased from Rupees 5,17,145 in 1974 to Rs. 26,87,287 in 1977. According to the petitioners, the second petitioner has been drawing a fixed monthly remuneration of Rs. 4063 from 1-9-1973 onwards. Looking to the increase in the turnover and profits of the Company, the first petitioners submit that they are entitled to grant to the second petitioner the increased salary in the pay-scale of Rs. 5000-250-6250 with effect from 1-7-1977.

4. Before we examine the contentions raised by the petitioners, it is necessary to examine the provisions of the Compa-

nies Act, 1956, in this connection. Section 314 (1-B) provides as follows:

"(1-B). Notwithstanding anything contained in sub-section (1),—

(a) no partner or relative of a director or manager,

(b) no firm in which such director or manager, or relative of either, is a partner,

(c) no private company of which such a director or manager, or relative of either, is a director or member, shall hold any office or place of profit in the company which carries a total monthly remuneration of not less than three thousand rupees, except with the prior consent of the company by a special resolution and the approval of the Central Government:

Provided that in a case where no office of profit could have been held in the company by a person if this Section had been in force at the time when the appointment or re-appointment to such office of profit was made, the company shall, within a period of six months from the commencement of the Companies (Amendment) Act, 1974, obtain the approval of the company in general meeting and of the Central Government for the holding by such person of the office of profit."

Section 637-A provides as follows:

"637-A. Power of Central Government or Company Law Board to accord approval, etc., subject to conditions and to prescribe fees on applications.— (1) Where the Central Government or Company Law Board is required or authorised by any provision of this Act,—

(a) to accord approval, sanction, consent, confirmation or recognition to or in relation to any matter;

(b) to give any direction in relation to any matter; or

(c) to grant any exemption in relation to any matter,

then, in the absence of anything to the contrary contained in such or any other provision of this Act, the Central Government or Company Law Board may accord, give or grant such approval, sanction, consent, confirmation, recognition, direction or exemption subject to such conditions, limitations or restrictions as it may think fit to impose and may, in the case of contravention of any such condition, limitation or restriction, rescind or withdraw such approval, sanction, consent, confirmation, recognition, direction or exemption."

By virtue of Section 314 (1-B) no relative of the Manager shall hold any office or place of profit in the Company which carries a total monthly remuneration of not less than three thousand rupees, except with the prior consent of the Company by a special resolution and the approval of the Central Government. It is not in dispute before us that the requisite resolution under Section 314 (1-B) has been passed by the first petitioner Company. The question before us is whether the conditional approval which is granted by the Central Government to increase the monthly remuneration of the second petitioner is valid or not.

5. Under Section 637-A of the Companies Act, where the Central Government is required under the provisions of the Companies Act to accord its approval in relation to any matter, it can accord such approval subject to such conditions, limitations or restrictions as it may think fit to impose. The Supreme Court in the case of *Company Law Board v. Upper Doab Sugar Mills Ltd.* reported in AIR 1977 SC 831, has interpreted the provisions of Section 637-A, and has held that in exercise of its powers under S. 637-A it is open to the Central Government to impose a condition relating to a limit on the salary that may be paid to the person concerned in the Company. Thus, under Section 637-A the Central Government can accord its approval to the appointment of the second petitioner and impose a restriction on the salary that may be paid to the second petitioner.

6. This power, however, to impose a ceiling on the salary payable cannot be exercised in an arbitrary manner. In the present case, the petitioner Company had forwarded to the Central Government their balance-sheets and profit and loss accounts for the calendar years 1974, 1975 and 1976. They had also sent to the Central Government all relevant information required to be set out in Form No. 24-B prescribed under the Companies (Central Government) General Rules and Forms, 1956, setting out the nominal and paid-up capital of the Company, its management structure, details of its capital structure, its turnover, and net profits for the last three financial years, the nature of services rendered by the second petitioner, his age, qualifications and experience, and particulars regarding other employees in receipt of a salary above Rs. 3000. Under the Companies (Central Government) General Rules and Forms, this information is required to be supplied.

ed by the Company whenever it applies for sanction for an increase in remuneration under the provisions of the Companies Act. Presumably this information is sought for because it is to be taken into account by the Central Government while according its sanction or approval to the increase in the remuneration. In the present case, if we examine the first order dated 29-6-1978 there is nothing in the order which would indicate that the material supplied by the first petitioner Company had been considered in reducing the proposed salary from Rs. 5000-250-6250 to Rs. 4100-100-4500. Even in the return filed by the respondents the basis for fixing this revised pay-scale is not disclosed. The only portion of the order which indicates some reason for the revised pay scale is paragraph 2 where it is stated: "The above approval has been accorded without prejudice to any changes in the Government's policy." In view of the above statement the best inference that can be drawn in favour of the respondents is that they had prescribed the salary scale Rs. 4100-100-4500 in pursuance of the Government's policy. This order is revised by the order dated 25-10-1978 by which a fixed salary of Rs. 4500 has been substituted for the salary of Rs. 4100 per month in the pay-scale of Rs. 4100-100-4500. The revised order provides that the other conditions of the said order shall remain unaltered. Once again, the basis for altering the salary and substituting a fixed salary for a salary scale is not indicated anywhere in the order.

7. There is much substance in the submission made by learned counsel for the petitioners that both these orders are passed without application of mind by the Central Government. Under the revised order a fixed salary of Rs. 4500 has been sanctioned. The order, however, provides that the other terms and conditions of the original order would remain unchanged. One of the terms and conditions of approval in the original order provides that not more than one increment will be allowed in a year. Clearly if no pay-scale is sanctioned by the Central Government, there can be no question of any increment being granted. In revising the order, therefore, the respondents do not appear to have considered the terms and conditions laid down in their previous order, much less the material supplied by the petitioners. Secondly, the first petitioner Company had sought the approval of the Central Gov-

ernment to the increase in salary of the second petitioner with effect from 1-7-1977. The Central Government has sanctioned the increase with effect from 1-2-1978. There is nothing in the order which indicates how the date 1-2-1978 has been selected by the Central Government and on what basis the date proposed by the first petitioner Company has been disapproved. At the same Extraordinary General Meeting the first petitioner Company had passed a resolution to increase the salary of its Administrative Officer with effect from 1-7-1977. The Central Government has sanctioned a reduced increase in his case with effect from 1-7-1977. In the case of the second petitioner, however, the increase is sanctioned as from 1-2-1978. In the absence of anything in the orders or even the return to indicate the basis for such differentiation, it must be held that the dates from which these increases are to be granted have been selected arbitrarily by the Central Government.

8. As earlier pointed out, there is a reference to the approval having been accorded without prejudice to any changes in the Government's policy. Presumably, therefore, the approval granted has some nexus with some Government policy. It is not known what the policy of the Government is for approving an increase in the remuneration of the relatives of the Managers of the Companies. It is also not known whether this Government policy is similar to the public policy for removal of disparities in income referred to in Section 637-AA. In this connection, it is necessary to bear in mind that Section 637-AA, which was inserted by the Companies (Amendment) Act of 1974, does not apply to applications for approval of an increase in the remuneration to relatives of Managers. Section 637-AA lays down certain factors which have to be taken into account while granting approvals under that section. This section, however, does not apply to approvals for an increase in the remuneration of relatives of Managers under Section 314 (1-B). Such a sanction became necessary for the first time by reason of the Companies (Amendment) Act, 1974, which, inter alia, introduced Section 314 (1-B) in the Companies Act, 1956. Under Section 637-AA it is provided as follows:—

"637-AA. Power of Central Government to fix a limit with regard to remuneration.—Notwithstanding anything contained in Section 198, Section 309 or Sec-

tion 637-A, the Central Government may, while according its approval under Section 269 to any appointment or to any remuneration under Section 309, Sec. 310, Section 311 or Section 387, fix the remuneration of the person so appointed or the remuneration, as the case may be, within the limits specified in this Act, at such amount or percentage of profits of the company, as it may deem fit and while fixing the remuneration, the Central Government shall have regard to—

(a) the financial position of the company;

(b) the remuneration or commission drawn by the individual concerned in any other capacity including his capacity as a sole selling agent.

(c) the remuneration or commission drawn by him from any other company;

(d) professional qualifications and experience of the individual concerned;

(e) public policy relating to the removal of disparities in income."

Section 637-AA in terms only applies to approval under Sections 309, 310, 311 or Section 387. These sections pertain to the remuneration of Directors, including any Managing or whole time Director and the remuneration of a Manager. Under Section 637-AA, in granting its approval, the Central Government has to take into account the financial position of the Company and other factors which are enumerated in that section. These include public policy relating to the removal of disparities in income. Since this section does not apply to approvals under Section 314 (1-B), the only relevant section for the purpose of approval under Section 314 (1-B) is Section 637-A. Under Section 637-A no such factors as in Section 637-AA have been enumerated which are required to be considered by the Central Government. This does not, however, mean that it is open to the Central Government to grant its approval or withhold such approval arbitrarily. Nor is it open to the Central Government to impose any condition arbitrarily while according its approval. If any conditions are sought to be imposed, they must be imposed on the basis of relevant material pertaining to the Company which seeks such an approval. In view of Form No. 24-B which has been prescribed by the Central Government for making applications inter alia under Section 314 (1-B), the financial condition of the Company, its management structure, its capital structure, nature of the services to be rendered by the person concerned, his

qualifications, the number of employees who are in receipt of a salary over Rupees 3000 and other relevant information pertaining to the relative mentioned in it, are all relevant for considering the application for approval of an increase in remuneration of the relatives of the Manager. While Section 637-AA refers to an additional factor to be taken into consideration viz., public policy for removal of disparities in income, there is no reference to such a public policy under Section 637-A. Thus the Central Government is not under any statutory obligation to consider a public policy (if formulated) for removal of disparities in income while considering applications for approval under Section 314 (1-B), much less any Government policy. It must consider the relevant information supplied to it under Form No. 24-B in deciding upon the conditions, if any, subject to which it proposes to grant its approval under Section 314 (1-B). It is difficult to see how it can arrive at any decision simply on the basis of any policy of the Government unconnected with the relevant material pertaining to the Company in question and the person whose salary is to be increased. In the absence of any provision in the Companies Act, 1956, it is difficult to uphold any policy fetters on the exercise of discretion by the Central Government.

9. In the present case, the orders do not indicate that all the relevant factors were considered by the Central Government while imposing the condition relating to salary. On the contrary, there is some indication in the orders that the conditional approval which was granted was based on Government's policy a factor irrelevant under Section 637-A. There is nothing in those orders which would indicate on what basis originally the salary of Rs. 4100 in the pay-scale of Rs. 4100-100-4500 was prescribed and thereafter the same was revised to a fixed salary of Rs. 4500. The revised order retains other conditions prescribed by the previous order. These, as earlier stated, are referable only to a salary scale. Granting approval to a fixed salary while retaining conditions which are applicable only to a salary scale shows non-application of mind by the respondents to the relevant material. The date from which the increase is granted also is fixed arbitrarily. The orders, therefore, are passed without any application of mind by the Central Government and are clearly bad in law.

10. Shri V. R. Manohar, learned counsel for the petitioners, has also challenged the orders on the ground that the orders passed under Section 314 (1-B) read with Section 637-A of the Companies Act are quasi-judicial orders. He has submitted that such orders must disclose the reasons for passing them. In the absence of disclosure of such reasons both in the orders as also in the return filed by the respondents, the orders must be considered as bad in law. He relied upon the observations of the Gujarat High Court in the case of Cibatul Ltd. v. Union of India reported in 1980 Tax LR 2098. In that case the Gujarat High Court was required to consider the guidelines issued by the Government of India in 1969 in respect of ceiling on remuneration inter alia, of Managing Directors. While striking down the guidelines the Gujarat High Court held that the Central Government's exercise of power in granting such approval was an exercise of quasi-judicial powers. The Gujarat High Court relied upon the ratio of the judgment of the Supreme Court in R. D. & Chemical Co. Ltd. v. Company Law Board, New Delhi reported in AIR 1970 SC 1789, where the Supreme Court held that the Central Government's powers to accord approval to the payment of Managing Agents under Section 326 was a power which carried with it a duty to act judicially, that is to say, to hold an inquiry in the manner consistent with the rules of natural justice, to consider all relevant matters, ignore irrelevant matters, and to reach a conclusion without bias, without predilection and without prejudice. Learned counsel for the petitioners also drew our attention to a decision of the Delhi High Court in the case of Mahindra & Mahindra Ltd. v. Union of India reported in 1980 Tax LR 2132, in which the guidelines of 1978 issued by the Central Government were also struck down. On the other hand, Shri Bhangade, learned counsel for the respondents, strongly urged that the power to grant approval under Section 314 (1-B) was a purely administrative power and there was no duty cast on the Central Government to give any reasons or to explain in any manner the reasons for its order of approval. He relied upon the observations of the Supreme Court in the case of Som Datt v. Union of India, reported in AIR 1969 SC 414 to the effect that there is no rule of natural justice which requires a statutory tribunal to give in every case reasons in support of its decision. It is, how-

ever, not necessary in the present case to examine whether the approval granted under Section 314 (1-B) read with Section 637-A is in the exercise of quasi-judicial powers or not, though prima facie it would appear that such an approval has to be granted taking into account the relevant material relating to financial structure of the Company and its managerial structure. We need not go into this aspect of the matter to determine whether the order of approval should indicate reasons for imposing conditions on approval since the orders in the present case ex facie disclose non-application of mind by the Government to the matter at issue and the material which was required to be considered by it in arriving at its decision.

11. We accordingly set aside the orders dated 29-6-1978 and 25-10-1978 passed by the Central Government and direct it to consider the application of the first petitioners after taking into account all relevant material supplied by the first petitioner. Rule is made absolute accordingly. The respondents to pay the costs of this petition to the petitioners.

Rule made absolute.

AIR 1982 BOMBAY 48

(AT NAGPUR)

**GINWALA AND Smt. SUJATA
MANOHAR, JJ.**

All India Reporter Ltd., Nagpur and another, Petitioners v. Union of India, Respondent.

Special Civil Appln. No. 161 of 1979,
D/- 27-11-1981.*

Companies Act (1956), Ss. 314 (1-B) and 637-A — Application for approval to payment of salary exceeding Rs. 3000 to Manager's relatives — Grant of — Validity — Approval sought for scale of Rs. 4000-250-5250 — Sanction granted for payment of Rs. 2500 initially and to payment of fixed salary of Rs. 3000 by revised order on representation — Orders liable to be set aside for non-application of mind.

Where the Company sought approval of the Central Government for appointment of the younger brother of the Gene-

*To set aside order passed by Govt. of India at New Delhi, D/- 25-10-1978.

LY/LY/F786/81/SNV.

ral Manager of the Company as Administrative Officer in the pay scale of Rupees 4000-250-5250 i.e. on a salary exceeding Rs. 3000, but the Central Government had sanctioned salary of Rs. 2500 in the pay scale of Rs. 2500-50-3000 in the first instance and subsequently, on representation being made, granted approval to a fixed salary of Rs. 3000, both the orders were liable to be set aside on ground of absence of application of mind on the part of Central Government. Under S. 314 (1-B) approval of the Central Government is required only if the salary that is proposed to be paid to a relative of the Manager is not less than Rs. 3000. In the initial order which was passed in the present case, the Central Government approved the salary of Rupees 2500 in the pay scale of Rs. 2500-50-3000. Clearly for such a salary scale, there is no need to obtain the sanction of the Central Government. While passing the initial order the Central Government did not take into account even the provisions of S. 314 (1-B) of the Act. (Para 2) **Cases Referred: Chronological Paras** AIR 1982 Bom 41 1, 2, 3

V. R. Manohar and A. B. Oka, for Petitioners; M. G. Bhangade, for Respondent.

SMT. SUJATA MANOHAR, J.:— In this petition the first petitioners have sought approval under the provisions of S. 314 (1-B) of the Companies Act to the appointment of the second petitioner as Administrative Officer of the first petitioner Company on a salary of Rs. 4000 in the pay-scale of Rs. 4000-250-5250. The second petitioner is the younger brother of the General Manager of the first petitioner Company and accordingly sanction is required for his being appointed as Administrative Officer in the pay scale of Rs. 4000-250-5250. The second petitioner is a graduate. He is working with the first petitioner since 1954. He was designated as Assistant Manager with effect from 1-4-1967 and his remuneration was fixed at Rs. 1500 per month in the pay-scale of Rs. 1500-100-2000 with effect from 1-4-1967. He reached the maximum in the scale on 1-4-1972. Thereafter on account of the 25% increase in the salary which was granted by the first petitioner to all its employees, he started drawing a monthly salary of Rs. 2500 with effect from 1-9-1973. By a special resolution passed by the Company on 14-1-1978 he was appointed Administrative Officer and he was given a salary of Rs. 4000 in the

pay scale of Rs. 4000-250-5250 with effect from 1-7-1977. Thereafter by its letter dated 31-1-1978 the first petitioner applied to the Central Government for its approval to the above appointment giving all relevant material. By its order dated 29-6-1978 the Central Government granted its approval to the second petitioner being appointed as Administrative Officer. However, it accorded its sanction to a reduced increase in the salary of the second petitioner. It sanctioned a salary of Rs. 2500 per month in the pay-scale of Rs. 2500-50-3000, effective from 1-7-1977. The other terms and conditions imposed by this order were similar to the terms and conditions imposed in the order in Special Civil Appln. No. 160 of 1979: (Reported in AIR 1982 Bom 41). Thereafter on the application of the first petitioners, this order was revised by the Central Government by its order dated 25-10-1978. By the revised order the Central Government granted its approval to a fixed salary of Rs. 3000 and other terms and conditions of the previous letter were to remain unaltered.

2. For the reasons set out in our judgment in Special Civil Appln. No. 160 of 1979: (Reported in AIR 1982 Bom 41), these two orders which are in terms identical with the orders in Special Civil Appln. No. 160 of 1979, except for the quantum of salary, are also passed without application of mind. In the present case, there is another additional factor which also further strengthens the conclusion that the orders are passed without application of mind. Under S. 314 (1-B) of the Companies Act, approval of the Central Government is required only if the salary that is proposed to be paid to a relative of the Manager is not less than Rs. 3000. In the initial order which was passed in the present case, the Central Government approved the salary of Rs. 2500 in the pay-scale of Rs. 2500-50-3000. Clearly for such a salary scale, there is no need to obtain the sanction of the Central Government. While passing the initial order the Central Government did not take into account even the provisions of S. 314 (1-B) of the Companies Act, much less the relevant material supplied by the petitioner Company. In the case of the second petitioner in this petition his salary increase has been approved with effect from 1-7-1977 while in the case of the second petitioner in Special Civil Appln. No. 160 of 1979 the increase in salary is approved only with effect

from 1-2-1978. There is nothing in the orders to indicate why such a distinction has been made between the two sets of orders by the Central Government.

3. For the reasons set out above as also in our judgment in Special Civil Appln. No. 160 of 1979: (Reported in AIR 1982 Bom 41), the present petition is allowed. The orders of the Central Government dated 29-6-1978 and 25-10-1978 with reference to the second petitioner are set aside and the respondent is directed to issue fresh orders under S. 314 (1-B) read with S. 637-A of the Companies Act after taking into consideration the material supplied by the first petitioners. The respondent will pay to the petitioners the costs of this petition.

Petition allowed.

AIR 1982 BOMBAY 50

DESAI AND LENTIN, JJ.

J. Satyavrata and another, Petitioners v. Mohamedbhai Abdulhussen Sadiq Bahreinwalla and others, Respondents.

Special Civil Appln. No. 2350 of 1977, D/- 24/25-3-1980.

(A) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 24 — Word “withhold” — Connotes withdrawal or deprivation of essential supply or service by some indirect or negative act on part of landlord, i.e., by his failing to do what he was bound to do and what was within his power and control to do. 1973 Cri LJ 1848 (Bom), Overruled. (Rent Control — Withdrawal or deprivation of essential supply or service).

There is nothing in S. 24 or in Explan. II for that matter, to warrant the conclusion that Explan. II can be said to limit the scope and ambit of the word ‘withhold’ in sub-section (1) or the word ‘withheld’ in sub-sec. (3). Also, the words ‘cut-off’ and ‘withheld’ do not have the same shade of meaning. They have different meanings with well-marked and distinct connotations and, cannot be read ejusdem generis with each other. The word “withhold” in S. 24 (1) connotes the withdrawal or deprivation of an essential supply or service by some indirect means or act on the part of the landlord. Thus, where a landlord wrongfully fails to do something, whereby he indirectly deprives the tenants of the essential supply or service enjoyed by them and which they are entitled to enjoy,

the landlord can be said to have withheld such essential supply or service, even though he may have done no direct act to that end. The various shades and nuances of the meaning of the word ‘withhold’ disclose the holding or keeping back or refraining on the part of the landlord the granting or continuing to grant to the tenants the essential supply or service, which it is within the power and control of the landlord to make available to the tenants. Thus, while the word ‘cut-off’ is positive and applies where the withdrawal or deprivation of the essential supply or service is brought about by some direct and positive act or means on the part of the landlord, the word ‘withhold’ connotes some negation on the part of the landlord which results in the essential supply or service not being made available to the tenants even though it is within the landlord’s power and control to make available.

(Para 14)

Despite the fact that the essential service has come to an end not on account of any act directly done by the landlord but on account of an act done by a third party or by reason of some factor over which the landlord had no direct control, even so, he can be said to have withheld the supply or service if it was within his power and control to get the same restored and despite that, failed to do so.

(Para 16)

The instances given in Explan. II are merely illustrative and not exhaustive as is apparent from the use of the words “shall include” in the Explanation and a landlord can be said to withhold an essential supply or service even without the intervention of the local or competent authority, if the act or omission is “attributable to the landlord”. In such a case, while the landlord no doubt may do no direct or overt act resulting in the cessation of the essential supply or service, he can certainly be said to have withheld it by some indirect or negative act, namely, by his failing to do what he was bound to do and what was within his power and control to do. AIR 1978 Guj 121 and AIR 1958 SC 444, Rel. on; Criminal Appeal No. 123 of 1966, D/- 1-5-1968 (SC), Refd.; (1960) 62 Bom LR 380, Explained; 1973 Cri LJ 1848 (Bom), Overruled.

(Para 14)

(B) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 24 — “Just or sufficient cause” — A cause is “just or sufficient” if it is reasonable, bona fide and substantial and does not allow a landlord to take advantage of or perpetuate his own wrong.

The liability of the landlord not to cut off or withhold an essential supply or service is concomitant with the right of the tenant to receive it. That right, however, is not absolute in all sets of circumstances. In a given case, it would be open to the landlord to establish that he is absolved from his liability provided he makes out a just or sufficient cause. This would, of course, apply only in cases where the landlord himself, or anyone acting or purporting to act on his behalf, has not wrongfully done any direct or overt act or failed to do something he was bound to do, thereby resulting in wanton deprivation of such essential supply or service. No landlord can deliberately or wantonly create a situation and then claim just or sufficient cause in extenuation of his liability arising out of a situation of his own creation. What is just or sufficient cause must necessarily depend upon the facts and circumstances of each case. Several factors may arise for consideration, to wit, the degree of the essentiality and nature of the supply or service, namely conservancy and sanitation, water, electricity, lift and so forth. In a fit case, the amount which the landlord would have to spend in restoring such supply or service may also be taken into consideration, provided, of course, the deprivation of such supply or service is not the result of some wanton act or omission on the part of the landlord himself. In brief, a cause is "just or sufficient" when it can be said to be reasonable, bona fide and substantial and which does not allow a landlord to take advantage of or perpetuate his own wrong. (Para 17)

Held, in the instant case, the defects pointed out by the Inspector of Lifts arose out of the direct act or default on the part of the landlords themselves in not maintaining the lift in a proper condition which they were bound to do. Therefore, the landlords could not be allowed to take advantage of their own wrongful conduct in not keeping the lift in proper order and maintenance and thereafter plead an alleged expenditure of Rs. 20,000/- as a just or sufficient cause for not setting right the defects, which it was within their power to do and which would not have arisen in the first place but for their utter neglect of this essential service. (Para 21)

Cases Referred : Chronological Paras

AIR 1978 Guj 121 12, 15, 16
1973 Cri LJ 1848 : 75 Bom LR 245
1, 3, 4, 8, 9, 11, 12, 13, 14,
15, 18, 24

(1968) Cri. Appeal No. 123 of 1966, D/- 1-5-1968 (SC), Bai Phoolvati v. Krishna Babu 8, 11
(1960) 62 Bom LR 380 3, 4, 8, 9,
10, 11, 13, 15, 18
AIR 1958 SC 444 : 60 Bom LR 929
8, 10, 11, 13, 14, 15

V. T. Walwalkar with J. J. Miranda and Narendra Walwalkar, for Petitioners; K. J. Abhyankar, for Respondents.

LENTIN, J.:— The two petitioners before us are the tenants of flats on the 2nd and 4th floors of New Readymoney Building (renamed Alhafiz Building) situate at Clare Road, Byculla, Bombay. The respondents are the present landlords of this building which comprises of a ground and four upper floors and has in all 55 tenants. The tenants were in enjoyment of the service of a lift in this building. It appears that in 1974 the respondents' predecessors-in-title had partially withdrawn the lift facility by restricting the working hours of the lift from 10.00 a.m. to 2.00 p.m. and from 4.30 p.m. till 8.30 p.m. in the place of the original working hours, viz. from 9.00 a.m. till 9.00 p.m. Criminal proceedings were thereupon initiated against the respondents' predecessor-in-title by the tenants which resulted in the restoration of the lift service to the original hours, viz. from 9.00 a.m. to 9.00 p.m. and the concomitant withdrawal of the criminal proceedings. On 1st April, 1975, the respondents became the owners of New Readymoney Building, whereafter, according to the petitioners, the respondents started harassing the tenants in various ways, with the result that the tenants filed proceedings against the landlords in the Court of Small Causes for fixation of standard rent and for a permanent injunction restraining the respondents from cutting off the electric supply. In Dec., 1975, the lift facility was totally withdrawn by the landlords and despite the tenants' requests to them, the same was not restored. Thereupon in March, 1976 the present petitioners and another tenant, one Mrs. Mendes, residing on the 3rd floor, filed an Application No. 424/RES of 1976 in the Court of Small Causes against the landlords under S. 24 (3) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (referred to hereafter as "the Rent Act"), for restoration of the lift facility. In those proceedings, no reply was filed by the landlords themselves. However, their Rent Farmer one Shoeb (Shaikh) Hashim Contractor filed a reply denying that the landlords had cut off or withheld the lift service either directly or indirectly

and urged that if they had done so, it was for just or sufficient cause on the ground that the lift having been installed prior to 1940 had outlived its utility; that the cost of repairs would be in the vicinity of Rupees 20,000/- which the landlords could ill-afford; and that even if repairs were carried out to the lift, no useful purpose would be served as the repairs would not last for any length of time. In those proceedings, the petitioners and other tenants gave evidence. The landlords however did not step into the witness-box but contented themselves by leading the evidence of their Rent Farming Contractor. The trial Court passed its impugned order on 7th Dec., 1976. Following the decision of the learned single Judge of this Court in *Dhanrajmal Gobindram & Co. Pvt. Ltd. v. The State of Maharashtra*, 75 Bom LR 245: (1973 Cri LJ 1848), the trial Court upheld the landlords' contentions and dismissed the tenants' application, holding that it had not been established that the landlords had cut off or withheld the lift service and that if they had done so, it was for just or sufficient cause. The petitioners thereupon preferred a revision application to the appellate side of the Court of Small Causes. Relying on the decision in *Dhanrajmal's case*, the lower appellate Court held that while it was the landlords' case that the repairs required to be carried out by the Lift Inspector would come to Rs. 20,000/- (Rupees twenty thousand), the landlords had failed to adduce any reliable evidence that the cost of the repairs would be that much. It was further held that on the showing of the tenants themselves the cost of repairs would come to Rs. 2,000/- (Rupees two thousand) but even that expenditure the landlords could not be asked to incur as rents are controlled by the Rent Act. With the observation that—

"..... it is difficult to see that how in this case it can be said with certainty that the respondents had done a particular act or deliberately omitted to do an act which they were bound to do and which has resulted in the stoppage of the lift. The only thing that can be definitely said against the respondents is that they have not carried out the repairs as informed by the Lift Inspector in his letter at Ext. 4", the lower appellate Court dismissed the petitioners' revision application on 31st Aug., 1977.

2. Hence the present Special Civil Application was filed by the present petitioners for setting aside the impugned orders dated 7th Dec., 1976 and 31st August, 1977 passed by the trial Court and the lower appel-

late Court respectively, and for restoration of the lift service from 10.00 a.m. to 2.00 p.m. and from 4.00 p.m. to 8.30 p.m.

3. This Special Civil Application came up before our learned Brother Dharmadhikari, before whom it was urged on behalf of the petitioners that the lower Courts were in error in following the decision of the learned single Judge in *Dhanrajmal's case* (1973 Cri LJ 1848) (Bom) in preference to an earlier decision of another learned single Judge of this Court in the case of *Bombay Bullion Association Ltd. v. Jivatlal Pratapsi*, (1960) 62 Bom LR 380. To the contrary were the submissions urged on behalf of the respondents. In view of the apparently conflicting decisions of the two learned single Judges of this Court in *Dhanrajmal's case* and the *Bombay Bullion case*, Dharmadhikari, J. was of the view that the matter should be placed before a Division Bench and accordingly reported the matter to the learned Chief Justice. It is in these circumstances that the present Special Civil Application has come up before us.

4. In challenging the impugned orders, Mr. Walwalkar, the learned counsel appearing on behalf of the petitioners, urged that the lower Courts were in error in applying the ratio laid down by the learned single Judge in *Dhanrajmal's case* (1973 Cri LJ 1848) (Bom), instead of following the ratio laid down by another learned single Judge in the earlier *Bombay Bullion case* (1960-62 Bom LR 380). On the other hand, in supporting the impugned orders, Mr. Abhyankar, the learned counsel appearing on behalf of the landlords, urged that the earlier decision in the *Bombay Bullion case* had been considered and disapproved by the learned single Judge in *Dhanrajmal's case* and that being a later decision the lower Courts were correct in following the ratio laid down in *Dhanrajmal's case* which was the authoritative law on the subject and binding on the lower Courts. Such is the crux of the present controversy before us.

5. At this stage, it would be pertinent to recapitulate S. 24 of the Rent Act, which reads as under:—

"(1) No landlord either himself or through any person acting or purporting to act on his behalf shall without just or sufficient cause cut off or withhold any essential supply or service enjoyed by the tenant in respect of the premises let to him.

"(2) A tenant in occupation of the premises may, if the landlord has contravened the provisions of sub-sec. (1), make an applica-

tion to the Court for a direction to restore such supply or service.

"(3) If the Court on inquiry finds that the tenant has been in enjoyment of the essential supply or service and that it was cut off or withheld by the landlord without just or sufficient cause, the Court shall make an order directing the landlord to restore such supply or service before a date to be specified in the order. Any landlord who fails to restore the supply or service before the date so specified shall for such day during which the default continues thereafter be liable upon a further direction by the Court to that effect to fine which may extend to one hundred rupees.

"(4) Any landlord, who contravenes the provisions of sub-sec. (1) shall, on conviction, be punishable with imprisonment for a term which may extend to three months or with fine or with both."

"Explanation I: In this section essential supply or service includes supply of water, electricity, lights in passages and on staircases, lifts and conservancy or sanitary service."

"Explanation II: For the purposes of this section, withholding any essential supply or service shall include acts or omissions attributable to the landlord on account of which the essential supply or service is cut off by the local authority or any other competent authority." (The underlining is ours to highlight the scope of the present controversy before us.)

6. A plain reading of S. 24 reveals 6 broad ingredients, namely, (i) that there must exist the relationship of landlord and tenant between the parties qua the premises; (ii) that the supply or service in question must be an essential supply or service; (iii) that such essential supply or service was enjoyed by the tenants; (iv) that it was cut off or withheld; (v) that the cutting off or withholding was by the landlord himself or through any person acting or purporting to act on his behalf; and (vi) that the cutting off or withholding of such essential service was without just or sufficient cause.

7. In the present case, there is no controversy regarding the first three ingredients of Sec. 24 for it is nobody's case that they are not satisfied. Also not in dispute is the fact that this essential lift service was enjoyed by the tenants but is no longer available to them. The question that arises is whether this essential service was "cut-off"

or "withheld" by the landlords and, if so, whether such cutting off or withholding was "without just or sufficient cause". The burden of establishing the cutting off or withholding the essential supply or service would undoubtedly be on the tenant. The Court would then have to ascertain whether the cutting off or withholding was "without just or sufficient cause". The tenant cannot be expected to establish the negative, viz. that the cutting off or withholding by the landlord was "without just or sufficient cause." In order to escape inculpation, the burden would be on the landlord to establish the positive, viz. that the cutting off or withholding of the essential supply or service was for "just or sufficient cause". That is for the landlord to establish and the burden is heavily upon him to do so.

8. With these introductory remarks, we shall advert to two decisions of the Supreme Court before analysing the two decisions of the learned single Judges of this Court in the Bombay Bullion case ((1960) 62 Bom LR 380) and Dhanrajmal's case (1973 Cri LJ 1848). In Kanaivalal Chandulal v. Indumati, 60 Bom LR 929 : (AIR 1958 SC 444), the facts were that the landlord's predecessor-in-title had made a default in the payment of municipal taxes, with the result that water supply was cut-off by the Municipality. The tenants called upon the landlord to get water connection restored with a threat of prosecution under Section 24 of the Rent Act if the landlord failed to do so. The landlord refused or neglected to have the water connections restored by making payment of Rs. 11-4-0 to the Municipality, with the result that the tenant filed a complaint under Section 24 of the Rent Act. On these facts, it was held by the Supreme Court that while the landlord may not have been directly responsible for cutting off the supply of municipal water and that it was within his power to get the supply restored by paying the prescribed fee, the tenant had not shown that she had enjoyed the amenity of the supply of the tap water from the Municipality at any time after the Act came into force, with the result that it could not be said that the offence under Section 24 (1) had been brought home to the landlord. In the unreported case of Bai Phoolvati Dharambir Agarwala v. Krishna Babu Kanchan, (1968) Criminal Appeal No. 123 of 1966, decided by the Supreme Court on 1st May, 1968, the facts were that a certain estate known as Morbaug belonged to one Morwala. Out of this estate, one open plot was leased out by Morwala to one Parab who constructed a chawl on this plot and had

let it out to different tenants. Parab had his own property in which the electric meter was installed and during the period that Parab was the tenant of this plot and the landlord of his tenants in the chawl from 23rd Dec., 1949 to 20th Dec., 1963, he supplied electricity to all his tenants from his meter. On 10th Oct., 1963, Parab surrendered his leasehold rights and the chawl constructed by him was purchased by a third party. As a result thereof, with effect from 20th Dec., 1963, the electric supply to all the tenants stood cut-off and withheld. All the tenants of the chawl attorned tenancy to the new purchaser. One of the tenants filed a complaint against the purchaser for cutting off or withholding the electric supply within the meaning of subsections (1) and (4) of Section 24 of the Rent Act. The learned Magistrate convicted her and the conviction was upheld by the Bombay High Court. The Supreme Court observed as under :—

“Dr. V. D. Mahajan, learned counsel for the respondents, relied on the decision of this Court, in *Kanaiyalal Chandulal Monim v. Indumati T. Potdar* (AIR 1958 SC 444) where this Court had held that though the landlord may not have been directly responsible for cutting off supply of municipal water, nevertheless, it was within his power to get the supply restored, on payment of the prescribed fee, and any inaction in that regard, by the landlord would amount to an omission, within Explanation II to Section 24 of the Act. In this case, counsel points out that it is the duty of the appellant, after she became the owner of the property, to arrange for continuous supply of electricity in the same manner, as it was done, prior to her purchase.

“In our opinion, the finding arrived at by the trial Court as well as by the High Court are not based upon the evidence in the case and even the inferences drawn by the Courts do not flow from the facts. We have already referred to the evidence of P. Ws. 1 and 2, who have both admitted that they were not personally aware of the appellant cutting off electricity supply. It is also clear from their evidence that they were getting the supply of electricity, on payment of separate charges from Parab, through a meter, situated within his premises. Neither of the witnesses has spoken to the appellant having any right to compel Parab to supply electricity to the premises of the complainant. The casual statement made in the letter sent by the appellant, Ex. D, that in any event she was not bound to supply electricity has been taken out of its context by the Court to draw an inference that the appellant herself impliedly recognized

her obligation in that regard. Reading the letter, as a whole and, if the letter is read in its entirety, no such inference or conclusion is possible. On the other hand, the appellant specifically pleads that she has not cut off electricity at all, and that statement of hers finds support from the evidence of P. Ws. 1 and 2. Nor can the letter dated April 18, 1964, written nearly four months after the complaint had been filed, be taken into account for holding that the appellant was adopting coercive methods, for instance, by cutting off supply of electricity on December 20, 1963 for getting vacant possession of the property. As we have already pointed out, the supply of electricity to the complainant was being done from a meter, situated in a property which was still in the possession of Parab. Whether the appellant has got any rights in respect of that meter or any right to get supply of electricity, from that meter, are all matters on which there is absolutely no evidence on record.

“The decision of this Court relied on by Dr. Mahajan does not help the respondents. That was a case where this Court held that it was within the power of the landlord to get supply of water restored, by payment being made to the Municipality. But in the case before us it has not been established that it was within the power of the appellant to get supply restored from the meter which was in the premises owned by Parab”

9. With these two decisions of the Supreme Court in the forefront, we shall advert to the decisions of the two learned single Judges of this Court in the *Bombay Bullion* case and *Dhanrajamal's* case, reported in (1960) 62 Bom LR 380 and 75 Bom LR 245 : (1973 Cri LJ 1848) which have raised the dust of the present controversy before us.

10. In the *Bombay Bullion* case, (1960) 62 Bom LR 380, the facts were that since 1939 the opponent, one Jivatlal Pratapsi, was the tenant of the 5th floor of a certain building owned by the petitioners. When the opponent took the premises on lease in 1939, there was no lift installed in the building but it was his case that the arrangement for the lift had already been made even before he came on the premises as the tenant of the petitioners and that it had been agreed between him and the landlords at the time of the lease that as a condition of the lease he would be supplied with the service of the lift when installed. In 1942, the lift was installed and the tenant used it for about 18 years until it went out of order in February, 1959. In April, 1959, the tenant made an application to the Court of Small Causes under Section 24 of the Rent

Act complaining that he had been deprived of the service of the lift which he enjoyed for 18 years till February 1959 as the landlords had omitted to put the lift in working order and prayed for a direction from the Court for restoration of the lift service to him. The landlords' contention was that the amenity of the lift had neither been withdrawn nor withheld by them but that the lift was not working owing to circumstances over which they had no control. It was the case of the landlords that the lift had become worn out and was incapable of being restored and that it was not possible for the landlords to replace it by a new lift for want of financial means. On these facts, it was urged on behalf of the landlords that Section 24 of the Rent Act was not attracted as there was no withholding of any essential supply or service within the meaning of that section and that the mere omission on the part of the landlords to repair the lift which was worn out and had fallen into disuse would not amount to withholding of any essential amenity enjoyed by the tenant. Reliance was also placed on Explanation II in support of these contentions. It was observed by the learned single Judge (Datar J.) that it was not quite clear how Explanation II supported the landlords' contention, inasmuch as that Explanation is only an inclusive explanation, and far from supporting the landlords' contention, appeared to indicate clearly that withholding of any essential supply or service included not merely those acts or omissions expressly described in that Explanation but also all other acts or omissions which resulted in such supply or service being withheld. At page 381 of the Report, it was further observed as under:—

"... . If the landlord locks the lift and makes it unavailable to his tenant, he has withheld an essential supply or service to him within the meaning of Section 24. If the landlord omits to effect necessary repairs to his lift or otherwise fails to keep it in working order and thus makes the lift unavailable, even then the result is the same; he has in fact withheld an essential supply or service to his tenant within the meaning of that section."

(The underlining is ours to emphasise the applicability of these observations to the facts of the matter before us, as will appear later in this judgment).

Before Datar J. in the *Bombay Bullion* case, reliance was placed on behalf of the landlords on the following observations of the

Supreme Court in *Kanaiyalal's case* (AIR 1958 SC 444 at p. 447) (supra):—

"It may also be pointed out that it is doubtful whether, before the second Explanation was inserted into the section, as aforesaid in 1953, the cutting off of the water supply by the Municipality, or the omission of the landlord to take steps to have the connection restored, would have come within the mischief of the penal section. Supposing the second Explanation was not there, could the prosecution attribute the cutting off of the connection by the Municipality and the subsequent refusal of the landlord to get the connection restored, as an act or omission of the landlord within the meaning of S. 24 (1)?" Datar J. observed as under:—

"The argument is that it is only by reason of the Explanation certain omissions as described therein were included in the word 'withhold' and the omission to effect repairs and put the lift in working condition being not any such omission as is mentioned in the Explanation cannot amount to withholding any essential supply or service within the meaning of Section 24. I do not think there is any substance whatever in this argument. As I have already stated, the Explanation only refers to certain acts or omissions and does not mean that acts or omissions which themselves result in the withholding of an essential supply or service are not to be included in the word 'withhold'. In fact, even in the passage from the judgment of the Supreme Court quoted above, their Lordships have described the expressions 'cutting off' or 'withhold' (paraphrased as refusal to get the connection restored) as an act or omission of the landlord within the meaning of S. 24 (1)." (The underlining is ours)

11. Coming to the later decision of learned single Judge in *Dhanrajmal's case*, 75 Bom LR 245: (1973 Cri LJ 1848), the facts in that case were that a three-storeyed building known as "Calcot House" once belonged to Sir Cawasji Jahangir. The respondents were in occupation of the entire third floor as tenants from 1936 at a monthly rent of Rs. 188.71. A lift had been installed in this building even before the respondents became the tenants from 13th Dec., 1965, the lift stopped working by which time Sir Cawasji Jahangir had ceased to be the owner and one M/s. Onkar Investments and Properties Ltd. had become owners of the building. The respondents called upon the landlords to repair the lift and to restore its opera-

tion. The landlords pleaded their inability to do so on the ground that it involved an expenditure of about Rs. 10,000/- which they wanted the tenant to share. The latter was however not agreeable to do so and insisted that the lift being essential service, he was entitled to get it restored under the provisions of the Rent Act. In the meanwhile accused No. 1 company purchased the property on 1st June, 1968. Accused Nos. 2 to 5 were the Directors of accused No. 1 company. Thereafter the respondents also called upon the accused to restore the lift service and on their failure to do so, lodged a complaint before the learned Presidency Magistrate under Section 24 (1) read with sub-sec. (4) of the Rent Act and in the Court of Small Causes under Section 24 (2) and (3) for restoration of the lift service. Amongst the defences taken by the accused before the learned Presidency Magistrate were that they had neither cut-off nor withheld the lift service, that the operation of lift was stopped due to a mechanical defect, and also by reason of the switch-over of the D. C. current to A. C. current by B. E. S. T. since 1965. On these admitted facts, it was observed by the learned single Judge at p. 247 (of Bom. L. R.) : (at pp. 1849, 1850 of Cri. L. J.) of the Report as under :—

“... .. it should be difficult to hold that the landlord cut-off or withheld the essential service of lift and deprived the tenant of such service by any act or omission on his or their part. The lift stopped working due to none of their acts or omissions. Some act of volition is implicit in the phraseology of the words “cut off” or “withhold”. Without any conscious, deliberate and voluntary act or omission on the part of the landlord, essential service of lift cannot be said to have been “cut off” or “withheld” by the accused. He cannot be held liable where stoppage of lift is due to the mechanical defect or to wear and tear of the machinery in the ordinary course or to the change of policy of the B. E. S. T. with regard to the supply of electrical energy..... Before the landlord is held guilty, some act or omission of his own volition must be found to have taken place which can be said to have caused the stoppage of the lift. This by itself was sufficient to acquit the accused and hold that the accused had not either cut off or withheld the essential service with regard to the lift and the question of conviction of the accused on these admitted facts and the plain wording of Section 24 (1) of the Act should not have arisen.” (The underlining is ours.)

It may also be stated, to complete the narration of facts, that it was also the contention of the accused in that case that the service of the lift could not be restored without the old worn out lift being replaced by a new lift involving an expenditure of about Rupees 50,000/- which they could not afford.

Construing the word “withhold” in S. 24 (1) of the Rent Act, the learned single Judge in Dhanrajmal's case (75 Bom LR 245) : (1973 Cri LJ 1848) observed at page 247 (of Bom LR) : (at p. 1850 of Cri LJ) of the Report as under :—

“... .. The word ‘withhold’ in this sub-section (1) of Section 24 is preceded by the word ‘cut off’, and necessarily must get its colour therefrom. It is difficult to conceive of any process of cutting off without the volition of the person so cutting. The same must be said to be true of the word ‘withhold’. One can withhold only that which one was holding out or giving out or supplying. The very expression connotes voluntarily stopping of something which was being supplied voluntarily. But where, as here, operation of the lift gets blocked or stopped independently of any act or omission on the part of the landlord, due to the operation of some extraneous factor or factors, the landlord cannot be said to have ‘withheld’ the lift. His mere omission to repair the same or replace the same or ensure its continuance cannot be brought within the scope of its ordinary and natural connotation in the present context. In fact, the word ‘withhold’ is not susceptible of such wide connotation in view of the setting in which this word has been employed The section speaks of, (1) either the landlord himself cutting off or withholding such service or, (2) cutting off or withholding such service ‘through any person acting or purporting to act on his behalf’. Deprivation of such service due to any third factor or extraneous reason is plainly excluded from the sweep of this section in view of its peculiar phraseology”

(The underlining is ours.)

After comparing the phraseology of S. 23 with that of S. 24 of the Rent Act, the learned single Judge observed that as against the positive obligation of the landlord to keep the premises in good and tenantable repair under S. 23, the phraseology of S. 24 (1) contemplates imposing a negative obligation and that the manner in which S. 24 (1) was couched, did not admit of imposing a positive obligation on the landlord to continue essen-

tial supply and services in any building, the operation of which was found to have been stopped due to some factor not attributable to any act or omission on the part of the landlord. After observing that S. 24 is a penal provision enjoining the landlord not to cut-off or withhold any essential supply or service on pain of imprisonment and fine, the learned single Judge continued that it was inconceivable that the legislature could have intended to make it obligatory on the part of the landlord to restore such essential supply or service in respect of the premises let, in the event of the machinery or apparatus pertaining thereto getting worn out in the ordinary course, on pain of penalty and imprisonment, when it had not cast any obligation on him to reconstruct the worn out premises let and had chosen to restrict his liability to keep it in tenatable repairs alone. At page 249 (of Bom LR) : (at pp. 1851, 1852 of Cri LJ) of the Report, it was further observed as under :—

“... .. Section 24 seems to have been aimed at ensuring that the landlord does not render the protection afforded to the tenant illusory by compelling him to vacate by deliberately depriving him of any essential supply or services or by some positive acts of omission and commission to that effect. Ensuring the continuance of such essential supplies and services to the tenant appears to be beyond the scope of the section. It will, therefore, not be permissible to import into S. 24 an obligation on the landlord, in the absence of any clearer language to that effect, to restore the essential supplies or services enjoyed by the tenant in respect of the premises, even when the same are lost to the tenant due to no fault of his.

(The underlining is ours.)

The learned single Judge thereafter referred to the Supreme Court decision in Kanaiyalal's case (AIR 1958 SC 444) and the following observations therein, namely (at p. 447),

“It may also be pointed out that it is doubtful whether, before the second Explanation was inserted into the section, as aforesaid, in 1953, the cutting off of the water supply by the municipality, or the omission of the landlord to take steps to have the connection restored, would have come within the mischief of the penal section. Supposing the second Explanation was not there, could the prosecution attribute the cutting off of the connection by the municipality and the subsequent refusal of the landlord to get the connection restored, as an act or omission of the landlord within the meaning of S. 24 (1) ?”

Considering those observations, the learned single Judge opined that they unmistakably indicate that but for the expanded connotation of the word ‘withhold’ incorporated in Explanation II, such act or omission on the part of the landlord could not have attracted the penal consequences under S. 24 (4) and that it was possible to contend that Explanation II is only a clarificatory piece of legislation which did not in any manner detract from the above observations of the Supreme Court. It was further observed by the learned single Judge that Explanation II only sought to specify the acts or omissions of the landlord implicit in the section itself in view of this clarificatory amendment and that the true import and implication of the above observation were that the natural connotation of the word ‘withhold’ in the context is a restricted one, intended to cover only some positive acts or omissions resulting in the loss of amenities to the tenant. The learned single Judge also referred to the earlier decision of Datar J. in the Bombay Bullion case (1960-62 Bom LR 380) observing that while the ratio of that judgment undoubtedly supported the tenant in Dhanrajmal's case (75 Bom LR 245 : 1973 Cri LJ 1848) it ran counter to the specific observations quoted earlier by the Supreme Court in Kanaiyalal's case. The learned single Judge further observed as under at page 252 (of Bom LR) : (at p. 1853 of Cri LJ) of the Report :—

“... .. If the matter were to rest there, it would have been necessary for me to consider referring this case to the Division Bench. I, however, find that the approach adopted by the learned Judge is not approved by the Supreme Court which is clear from its another judgment in Bai Phoolvati Dharambir Agarwala v. Krishna Babu Kanchan, ((1968) Criminal Appeal No. 123 of 1966, decided on 1st May, 1968).”

Quoting the following observations of Vaidialingam, J. in Phoolvati's case, namely, ...

“In our opinion, the findings, arrived at, by the trial Court, as well as, by the High Court, are not based upon the evidence, in the case, and even the inferences, drawn by the Courts, do the flow from the established facts. We have already referred to the evidence of P. Ws. 1 and 2, who have both admitted that they were not personally aware of the appellant cutting off electricity supply.” the learned single Judge observed :

“It is thus clear from the above observations as well as the discussion in the earlier parts of the judgment that the question posed

by the Supreme Court was: whether cutting off of the electricity supply or withholding was done by the accused himself? and not: whether accused had exposed himself to penalty by not continuing to supply electricity by installing a fresh meter? On behalf of the tenant reliance was placed on the Supreme Court judgment in *Kanaiyalal Chandulal v. Indumati*, (AIR 1958 SC 444) and it was argued that it was the duty of the landlord, after she became the owner of the property to arrange for continuance of supply of electricity in the same manner it was done prior to her purchase. This contention was negatived by pointing out that electricity was supplied from a property which still was in the possession of ex-landlord Parab and there was no evidence of the new landlord having any rights in respect of that meter or any right to get the supply of electricity from that meter. The learned Judges then observed that the ratio of the earlier judgment of the Supreme Court was not applicable as in that case it was within the power of the landlord to get supply of water restored by payment of tax arrears to the Municipality. Their Lordships then observed:

“... in the case before us, it has not been established that it was within the power of the appellant, to get supply restored, from the meter which was in the premises owned by Parab.”

Construing the phraseology from the judgment of the Supreme Court “when it speaks of the supply of electricity being ‘within the power of the appellant’”, the learned single Judge concluded with the following observations at page 253 (75 Bom LR): (at pp. 1854-1855 of 1973 Cri LJ) of the Report:—

“... In the context the words ‘within the power’ can have no reference whatsoever to the financial capacity of the landlord. These words have been employed by the learned Judges to repel the contention of the complainant that the landlord had withheld the supply of electricity and it was answered by saying that the landlord cannot be said to have withheld the supply inasmuch as the meter located in the premises of Parab, who had ceased to be the landlord, is not proved to have been at the disposal of the new purchaser of the property. In my opinion, the emphasis laid by the learned Judges of the Supreme Court, on the absence of evidence of the new landlord having cut off the electricity, time and again, in the course of the judgment, and observation that before the landlord can be held guilty of withholding the supply, it shall have to be established

that it was within his power to do so, thoroughly negatives the contention of Mr. Andhyarujina that the word ‘withhold’ in sub-section (1) of Section 24 should be so broadly construed as to mean even the conscious omission of the landlord to effect repairs in the lift or restore the lift or to replace the lift even when it became unworkable due to no fault of his.”

The learned single Judge set out the ratio in *Dhanrajmal's case* (1973 Cri LJ 1848) by the following observations:—

“... The precise extent of liability of the landlord under any such implied obligation to keep the machinery and apparatus, from which essential supplies and services are made available to the tenant during the currency of contractual or statutory tenancy, shall have to be worked out in a properly instituted action in a competent Civil Court. Section 28 of the Rent Act is wide enough to deal with any such claim or question arising out of this Act or any of its provisions. I do not find it possible to spell out any such absolute liability of the landlord in this penal provision of Section 24 to continue the essential supplies and services to the tenant in respect of the premises let out to him, even when the tenant stands deprived thereof as a result of some extraneous factor with which the landlord had nothing to do either directly or indirectly.”

(The underlining is ours).

12. All these decisions referred to by us, including *Dhanrajmal's case* (1973 Cri LJ 1848) (Bom) were considered by the Division Bench of the Gujarat High Court in *State v. Sunderlal*, AIR 1978 Guj 121. In that case, the question which arose before the Division Bench of the Gujarat High Court was whether the landlord was bound to restore the essential supply or service when it was within his power to do so and whether his failure to do so amounted to withholding of the essential supply or service enjoyed by the tenant as contemplated by S. 24 (1) and made punishable under sub-sec. (4) of S. 24. The facts in that case were that two prosecutions were launched by two tenants against two landlords in the Court of the learned Judicial Magistrate under S. 24 (1) of the Act, the case of the tenants being that their respective premises had a facility of attached basket type latrines which were cleansed by sweepers employed by the Nagar Panchayat. In pursuance of a decision taken by Government to do away with manual sweeping of refuse, the local authorities issued a circular

pursuant whereto the Nagar Panchayat of Dwarka directed the landlords to convert the basket type latrines into flush type latrines by a specified date. Both the landlords failed to do so. The Nagar Panchayat stopped providing services of sweepers for cleansing basket type latrines. The result was that the conservancy service provided to the tenants in both the cases came to an end. The tenants thereupon gave notice to the landlords calling upon them to restore the conservancy service which the landlords failed to do on the plea that it was not they who had cut off or withheld the essential service but that the same had come to an end as a result of the decision taken by the Nagar Panchayat in not providing the sweeping of latrines by human labour. Thus the landlords contended that there was no act or omission on their part which resulted in the cutting off or withholding of the essential service in question. The learned Magistrate rejected the landlords' plea as not being just or sufficient and convicted the landlords under S. 24 (4) read with sub-sec. (1) of the Act and sentenced them to a fine of Rs. 50/- and simple imprisonment for 10 days in case of default. Against that conviction and sentence, the landlords preferred revisional applications to the learned Sessions Judge who set aside the orders of conviction and sentence. Against the acquittals the State approached the High Court in appeal which appeals were decided by the Division Bench of the Gujarat High Court, which allowed the appeals and upheld the convictions and sentence on the landlords.

13. The Division Bench of the Gujarat High Court considered the Supreme Court decisions and the decisions of the Bombay High Court in the Bombay Bullion case (1960-62 Bom LR 380) and Dhanrajmal's case (1973 Cri LJ 1848) and after reproducing the observations of the Supreme Court in Kanaiyalal's case (AIR 1958 SC 444) and of the learned single Judge in Dhanrajmal's case, dissented from the latter with the following observations at page 126 of the Report :—

"The learned single Judge said that their Lordships have described the expressions 'cutting off' or 'withhold' (paraphrased as refusal to get the connection restored) as an act or omission of the landlord within the meaning of Section 24 (1). One thing is quite clear. The aforesaid observations do not purport to lay down that Explanation II is exhaustive of the acts or omissions attributable to the landlord which may result in withholding of essential supply or service. The learned single Judge in the later Bom-

bay decision in Dhanrajmal's case, however, dissented from the earlier decision of the Bombay High Court in the Bombay Bullion Association's case and observed as under :

"With great respect to the learned Judge, I do not think that his judgment adequately explains or even attempts to explain the ratio of the Supreme Court passage quoted by me above'.

"With great respect, it is not possible to agree with the view of the learned single Judge in Dhanrajmal's case (supra) in view of the reason given above by us."

(The underlining is ours.)

Applying the ratio laid down by the Supreme Court in Kanaiyalal's case and citing with approval the decision of the learned single Judge of this Court in the Bombay Bullion case, the Division Bench of the Gujarat High Court concluded with the following observations (at p. 126) :—

"... .. Applying the ratio laid down by the Supreme Court in Kanaiyalal's case mentioned above and applying the correct connotation of the word 'withhold', it is clear that it was within the power of the landlords to get this conservancy service restored either by getting the latrine converted into aqua privy or water closet or by providing for its cleansing privately through human labour. No just or sufficient cause was made out in the trial Court for the omission to do so. Therefore, the conviction of the two landlords in the facts of this case was quite correct and proper."

(The underlining is ours.)

14. With this ratio laid down by the Gujarat High Court (with which we are in respectful agreement) in the forefront, we are of opinion that in the facts of the matter before us, it is not possible to give to the word 'withhold' in Section 24 (1) the restricted meaning attributed to that word by the learned single Judge in Dhanrajmal's case (1973 Cri LJ 1848) (Bom). A plain reading of S. 24 reveals that the legislature intended that a tenant in enjoyment of an essential service must get the protection of the law. It is in view thereof that S. 24 enjoins the landlord not to cut off and prohibits him from cutting off such essential service by some direct or overt act on his part. The words 'cut' or 'cut-off' have not been defined in the Act itself. Their dictionary meaning in the Random House Dictionary is as under :

"Cut 5. to hew or saw down; fell :... .. 18. to stop; half the running of Cut off the water 19 to cease; discontinue 20, to suspend

or terminate ... 27. to switch off ... 38. to interfere."

"Cut-off. 1. an act or instance of cutting off, 2. something that cuts off ..."

Shorter Oxford Dictionary defines 'cut' and 'cut-off' as under:—

"Cut. The act of cutting ... To penetrate so as to sever the continuity of with an edged instrument ... To reduce by cutting; to trim, shear; to prune cut-off. An act of cutting off or portion cut off ... A stopping of a continuance or flow ..."

The fact that an act must be positive or direct is manifest from the positive phraseology 'cut-off' in sub-sections (1) and (3). In other words, the act which leads to the consequence complained of must necessarily be a positive or overt act on the part of the landlord, as for instance a landlord putting his lock to the lift or to the water pump or switching off the electric current and thereby depriving the tenants of the essential supply or service in question by a direct and overt act on his part. On the other hand, the word 'withhold' in S. 24 (1) connotes the withdrawal or deprivation of the essential supply or service by some indirect means or act on the part of the landlord, as for instance, when the electricity is cut-off by the supplier as a result of the default on the part of the landlord in paying electric bills or where an essential service like a lift ceases to be available to the tenants due to the wrongful failure on the part of the landlord to carry out necessary repairs, or undertake adequate maintenance, or effect replacement of parts, or due to the closing down of the lift facility by the Lift Inspector by reason of the wrongful failure on the part of the landlord to carry out requisitions. These are but a few illustrations when a landlord can be said to withhold an essential supply or service. Thus where a landlord wrongfully fails to do something, whereby he indirectly deprives the tenants of the essential supply or service enjoyed by them and which they are entitled to enjoy, the landlord can be said to have withheld such essential supply or service, even though he may have done no direct act to that end. Nowhere is the definition of the word "withhold" to be found in the Act. Shorter Oxford Dictionary defines 'withhold' as ...

"to hold back; to keep back; or refrain from granting or giving."

Random House Dictionary defines 'withhold' as ...

"to hold back; restrain or check, to refrain from giving or granting; to withhold payment to hold back; refrain."

Thus the various shades and nuances of the meaning of the word 'withhold' disclose the holding or keeping back or refraining on the part of the landlord the granting or continuing to grant to the tenants the essential supply or service, which it is within the power and control of the landlord to make available to the tenants. Thus while the word 'cut-off' is positive and applies where the withdrawal or deprivation of the essential supply or service is brought about by some direct and positive act or means on the part of the landlord, the word 'withhold' connotes some negation on the part of the landlord which results in the essential supply or service not being made available to the tenants even though it is within the landlord's power and control to make available. To illustrate, if by reason say of load-shedding or a power-cut, which are circumstances over which the landlord has no possible control, the essential supply or service cannot be made available to the tenants during certain hours, it is inconceivable that the tenants can be allowed to make any grievance on that score, because the load-shedding or the power-cut are certainly not circumstances within the power and control of the landlord and cannot be attributed to him. It is manifest that the instances given in Explanation II are merely illustrative and not exhaustive as is apparent from the words "shall include" in Explan. II. Thus a landlord can be said to withhold an essential supply or service not only in the manner illustrated in Explan. II but also in a variety of ways even without the intervention of the local or competent authority, provided, however, in any event, the act or omission is "attributable to the landlord". One instance would be the contumacious failure on the part of the landlord to carry out repairs or replace worn out or defective parts or failure to undertake regular maintenance of the essential service resulting after a lapse of time in the essential service becoming useless for the purpose it was meant to serve. Such failure is "attributable to the landlord" and is within his power and control to prevent. In such a case, while the landlord no doubt may do no direct or overt act resulting in the cessation of the essential supply or service, he can certainly be said to have withheld it by some indirect or negative act, namely, by his failing to do what he was bound to do and what was within his power and control to do. It is within the power and control, and for that matter it is a landlord's duty, to keep the essential supply or service available to the tenants by carrying out regular repairs and

undertaking regular maintenance and by doing such other acts as would not result in the wanton deprivation of this facility to the tenants. No landlord can be heard to say — "I shall carry out no repairs. I shall undertake no maintenance. I shall not replace even a nut or a bolt. Let the service, be it essential, go to rack and ruin. I shall do nothing". If, as a result of such attitude, sooner or later the essential service or supply grinds to a halt, and is no longer available to the tenants for no fault of theirs, a landlord can be said to have withheld the essential supply or service in question by wantonly bringing about a state of affairs which it was in his power and control to have prevented in the first place. Thus no landlord can be permitted to take advantage of his own wrong and then be heard to plead that he has withheld nothing after wantonly creating a situation of his own making. In such a case, while a landlord may not have cut-off the essential supply or service, he can certainly be said to have withheld it, if it was within his power and control to have made available to the tenants. There is nothing in S. 24 or in Explanation II for that matter, to warrant the conclusion that Expln. II can be said to limit the scope and ambit of the word 'withhold' in sub-section (1) or the word 'withheld' in sub-section (3). On the plain reading of Section 24 and Expln. II, we are unable to hold that a limited or restricted meaning should be given to the word 'withhold'. The words 'cut-off' and 'withheld' do not have the same shade of meaning. They have different meanings with well-marked and distinct connotations and, in our opinion, cannot be read ejusdem generis with each other. This is brought to the forefront by the observations of the Supreme Court in Kanaiyalal's case (60 Bom LR 929): (AIR 1958 SC 444): at p. 930 (of Bom LR): (at p. 446 of AIR) of the Report as under:—

"..... It may be that the appellant was not to blame for the default in payment of municipal dues, but it was open to him to pay Rs. 11-4-0 and have the water connection restored. He may not have been directly responsible for the cutting off of the supply of municipal water, but it was within his power to get the supply restored by the municipality on payment of the prescribed fee. Hence, in so far as the appellant omitted to do so, such an omission is attributable to him within the meaning of Expln. II which was inserted into the Act in 1953. There can, therefore, be no doubt, that the appellant was continuing to withhold an es-

sential supply within the meaning of S. 24, as it stood in 1953."

(The underlining is ours.)

15. The above discussion and the observations of the Supreme Court in Kanaiyalal's case (AIR 1958 SC 444) make demonstrably clear that even where a landlord is not directly responsible for the deprivation of an essential service he would still be liable if he omits to get such service restored provided it is within his power and control to do so. In such circumstances, his failure to do so would amount to his withholding the essential supply or service. The above observations of the Supreme Court enunciating the correct test have been followed by the learned single Judge in the Bombay Bullion case (1960-62 Bom LR 380). However, with respect, it appears that in the later Dhanrajmal's case (1973 Cri LJ 1848) (Bom) those observations of the Supreme Court do not appear to have been given their due weight in preference to other observations in that case, viz. (at p. 447):

"It may also be pointed out that it is doubtful whether, before the second Explanation was inserted into the section, as aforesaid, in 1953, the cutting off of the water supply by the municipality or the omission of the landlord to take steps to have the connection restored, would have come within the mischief of the penal section. Supposing the second Explanation was not there, could the prosecution attribute the cutting off of the connection by the municipality and the subsequent refusal of the landlord to get the connection restored, as an act or omission of the landlord within the meaning of S. 24 (1)?"

This aspect has been dealt with by the Division Bench of the Gujarat High Court in Sunderlal's case (AIR 1978 Guj 121) by the observations indented in para 13 of this judgment.

16. Thus the test is — was it within the power and control of the landlord to have the essential supply or service restored even though he himself may not have been responsible directly for its discontinuance. Despite the fact that the essential service has come to an end not on account of any act directly done by the landlord but on account of an act done by a third party or by reason of some factor over which the landlord has no direct control, even so, he can be said to have withheld the supply or service if it is within his power and control to get the same restored and despite that, fails to do so. Thereby the landlord refrains

from restoring and making available to the tenants the essential supply or service even though it is within his power and control to restore and make available to them. For instance, if the electric current is cut off by the supplier for failure of the landlord to pay electricity bills the landlord can be said to have withheld the essential supply or service because it is within his power and control to have the electricity restored and thereby making the essential supply or service in question available to the tenants by the expedient of paying the electricity bills which it was the landlords' obligation to do in the first place. In brief, applying the "power and control" test, even though a landlord may not be directly responsible for cutting off the essential supply or service, if it is within his power and control to get the same restored, and even so, fails to do so, his act would amount to withholding the essential supply or service. In coming to this conclusion we are fortified by the observations of the Gujarat High Court in Sunderlal's case (AIR 1978 'Guj 121) at page 125 of the Report as under:—

"where the landlord is not directly responsible for the deprivation of the tenant of the essential supply or service, if it is within his power to get the supply or service restored and he omits to do so, such an omission would amount to withholding of the essential supply or service by the landlord. This is because, by this omission he is refraining from granting or giving the privilege of the supply or service to the tenant though it is within his power to restore the same. Looking to the context in which the word 'withhold' occurs and keeping in mind the legislative object, we find no difficulty in coming to the conclusion that in a case where the essential service or supply has come to an end not on account of any direct act done by the landlord but on account of the act done by a third party, or on account of any factor over which the landlord had no control, the landlord can be said to have withheld the supply or service if he omits to get it restored though it is within his power to do so. His omission in such a case amounts to refraining from granting or giving the privilege of the supply or service to the tenant The test is that even though the landlord may not be directly responsible for cutting off of the supply or service, if it was within his

power to get the same restored and he omits to do so, that act of his amounts to withholding supply or service"

(The underlining is ours.)

We are in respectful agreement with these observations of the Division Bench of the Gujarat High Court in Sunderlal's case.

17. The question that next arises is, what is the meaning and implication of the words "just or sufficient" in sub-sections (1) and (3). The liability of the landlord not to cut off or withhold an essential supply or service is concomitant with the right of the tenant to receive it. That right, however, is not absolute in all sets of circumstances. In a given case, it would be open to the landlord to establish that he is absolved from his liability provided he makes out a just or sufficient cause. This would, of course, apply only in cases where the landlord himself, or anyone acting or purporting to act on his behalf, has not wrongfully done any direct or overt act or failed to do something he was bound to do, thereby resulting in wanton deprivation of such essential supply or service. No landlord can deliberately or wantonly create a situation and then claim just or sufficient cause in extenuation of his liability arising out of a situation of his own creation. No landlord can be heard to plead just or sufficient cause of what he himself has been responsible directly or indirectly by bringing about a situation of his own making. He does so at his peril. To illustrate, no landlord can curtail the longevity or hasten the demise of an essential service say like a lift by failing to carry out repairs or failing to undertake proper maintenance or failing to do what a prudent and reasonable person would do or by doing what a prudent and reasonable person would not do, and then be heard to plead with any degree of success "just or sufficient" cause in mitigation or as an extenuating circumstance of his own wanton act or omission, direct or indirect. In a word, no landlord can create a situation and then be heard to plead just or sufficient cause resulting from a situation of his own making. Such a cause is neither "just" nor "sufficient". What is just or sufficient cause must necessarily depend upon the facts and circumstances of each case. Several factors may arise for consideration, to wit, the degree of the essentiality and nature of the supply or service, namely conservancy and sanitation, water, electricity, lift and so forth. In a fit case, the amount which the landlord would have to spend in restoring

such supply or service may also be taken into consideration, provided, of course, the deprivation of such supply or service is not the result of some wanton act or omission on the part of the landlord himself. If it is the result of some direct act on the part of the landlord or the result of an indirect cause which was within the power and control of the landlord to prevent, the landlord is bound and liable to restore such supply or service, irrespective of the cost he may have to undergo, for he cannot be allowed to take advantage of his own wrong and then plead a large expenditure as just or sufficient cause for not incurring it in order to restore a service which it was within his power and control not to deprive the tenants of and is within his power and control to restore. It would indeed be a rare and exceptional case where a landlord can be heard to plead with any degree of success 'just or sufficient cause' in the case of the most essential and basic amenity like conservancy, sanitation or water supply, irrespective of cost and even if for their restoration the landlord may have to go out-of-pocket. The most important consideration is the manner in which the essential supply or service came to an end. We emphasise that if deprivation of the essential supply or service was the result of any wanton act or default on the part of the landlord, or the result of an indirect act which was within his power and control to prevent, he cannot be allowed to plead an exorbitant cost in extenuation of his own wrong, and which would not have resulted in the deprivation of the essential supply or service had he been careful and vigilant to start with. In brief, a cause is "just or sufficient" when it can be said to be reasonable, bona fide and substantial and which does not allow a landlord to take advantage of or perpetuate his own wrong.

18. We have set out these broad principles in an attempt to reconcile the apparently divergent views expressed by the two learned single Judges of this Court, respectively, in the Bombay Bullion case (1960-62 Bom LR 380) and Dhanrajmal's case (1973 Cri LJ 1848). While the reasoning in the earlier decision in the Bombay Bullion case appears to advocate complete immunity to the tenant, the reasoning in the later decision in Dhanrajmal's case appears to propound complete immunity to the landlord in its interpretation of Sec. 24. We have chosen to follow the middle path and to that end have set out the broad principles based on the "Power and control" test.

19. With this test in the forefront, the question that arises is whether the present landlords have made out their case of just or sufficient cause pleaded by them. Indisputably the lift service has not been available to the tenants from Dec., 1975. It has not been suggested to us, and rightly so, that the tenants had failed to discharge the burden upon them. It is not even the landlords' case that the non-availability of the lift service was by reason of any wrongful act or default on the part of the tenants. The question that arises is whether the landlords have discharged the burden of proof, namely that they had just or sufficient cause in withdrawing this essential amenity. It may be recalled that the defence of the landlords in the lower Courts was that the lift having been installed prior to 1940 had outlived its utility and that the cost of repairs would come to a sum of Rs. 20,000/- which the landlords could ill-afford and further that even if the repairs were carried out by them, no useful purpose would be served because the repairs would not last for any length of time. In respect of these defences taken up by the landlords, it may also be recalled that they did not offer to lead their own evidence but satisfied themselves by leading the evidence of their Rent Farmer, Shoeb (Sheikh) Hashim Contractor. It is not in dispute that shortly prior to the withdrawal of the lift service in Dec., 1975, a girl residing in that building had lost one of her fingers as a result of an accident due to the lift suddenly moving when it was not supposed to. Thereafter the Inspector of Lifts ordered the lift to be stopped as it required certain repairs. These repairs the landlords refused to carry out for the reasons stated earlier. The respondents' Rent Farming Contractor admitted in his evidence that the lift was not in a working condition since the middle of Dec., 1975 and that a communication dated 16th Aug., 1975 had been received by the landlords from the Inspector of Lifts requesting them to rectify the defects in the lift by 31st August, 1975 and report written compliance. The defects listed were 16 in number, namely, (1) that the lift was moving when the car gate was open, (2) the final limit was rusted and was mal-functioning, (3) the lift gave jerks while stopping, (4) replacement of broken pickets of landing gates, (5) repair of defective locks of landing gates, (6) discontinuance of using the machine room as a store room or living room, (7) replacement of the missing load place inside the car, (8) repair of the phase failure relay, (9) replacement of the broken

fuse bridge of the main switch, (10) cleaning the machine room and lift parts, (11) replacement of worn out parts in the machine to eliminate noise, (12) providing bell push button and call bell on the landings, (13) the narrowing doors to 25 mm. the gap between the car edge and the landing edge, (14) providing a counter-weight protection screen up to the height of 2 metres, (15) providing a carpet on the car platform so as to make the platform smooth and non-slippery, and (16) replacement of the missing handle of landing gates. Such were the defects noticed by the Inspector of Lifts which the landlords were called upon to rectify. Here it may be mentioned that even before the letter of 16th August, 1975 was addressed by the Lift Inspector to the landlords, an earlier letter dated 18th July, 1975 had also been sent to the landlords by the Lift Inspector stating that on inspection of the lift defects had been noticed. As these defects had not been removed, the Inspector of Lifts again sent his subsequent letter dated 16th Aug., 1975.

20. It is not in dispute that the defects pointed out by the Lift Inspector were the only defects in the lift. This is brought to the forefront by the admission in evidence of the landlords' Rent Farmer who has stated that the lift was defective in the manner described by the Lift Inspector in his letter dated 16th August, 1975. He admitted that in Nov., 1975 a child operating the lift had lost one of her fingers as a result of an accident by reason of the fact that the lift would operate even when the car door was open and that on an inspection of the lift by the Lift Inspector, it was at his insistence that the lift service had been discontinued.

21. Can a landlord be heard to plead just or sufficient cause on the ground that tenants have been deprived of this essential amenity because the Lift Inspector insisted on the discontinuance of the lift in these circumstances? Certainly not. In the facts and circumstances of the present matter, there can be no doubt that the defects pointed out by the Inspector of Lifts arose out of the direct act or default on the part of the landlords themselves in not maintaining the lift in a proper condition which they were bound to do. There is nothing on record to indicate that the landlords had done anything that was within their power and control to keep the lift in a proper condition or in proper repairs, or that they had even entered into any maintenance contract for its due maintenance and repairs. On the contrary, there is the admission of the landlords'

rent farmer that no maintenance contract had been entered into by the landlords for the due upkeep of the lift. In other words, the landlords sat back, did nothing towards keeping the lift in a working condition and wantonly allowed the lift to develop the defects listed by the Lift Inspector which were within their power and control to prevent by taking reasonable care which they totally and absolutely failed to do. It does not behove the landlords not to carry out the barest of repairs, undertake no maintenance, take no proper and reasonable care of the lift and thereafter plead helplessness on their part. The degree of the landlords' culpability is demonstrated by the startling fact that the Lifts Inspector found the machine room being used as a store room or living room which the landlords were directed to discontinue from doing. The respondent-landlords cannot be allowed to take advantage of their own wrongful conduct in not keeping the lift in proper order and maintenance and thereafter plead an alleged expenditure of Rs. 20,000/- as a just or sufficient cause for not setting right the defects, which it is within their power to do and which would not have arisen in the first place but for their utter neglect of this essential service. What also is important is that there is nothing beyond the ipse dixit of the respondents' Rent Farmer in his evidence that an amount of Rs. 20,000/- would have to be incurred for setting right the defects in this lift and that the respondents do not have the necessary funds. The landlords themselves have chosen to give no evidence. Not a single scrap of documentary evidence has been produced by the respondents or by their Rent Farmer in order to establish that they would have to incur an expenditure of Rs. 20,000/- as alleged by them. The cross-examination on this aspect of the respondents' Rent Farming Contractor discloses in no uncertain terms the unreliability of his ipse dixit that a sum of Rs. 20,000/- would have to be expended for curing the defects in the lift. The mere assertion by the landlords' Rent Farming Contractor that the landlords do not have the necessary funds is futile when significantly enough the landlords themselves have not chosen to step into the witness-box. No explanation is forthcoming for this curious lapse on their part. Be that as it may, in a case such as this, where the defects have arisen as a direct result of the wanton acts and omissions on the part of the landlords themselves, it does not now lie in their mouths to plead an alleged expenditure of

Rs. 20,000/- after having been responsible for reducing the lift into the condition in which it was found by the Lift Inspector. The mala fides on the part of the landlords is further demonstrated by the fact that the defects enumerated by the Lift Inspector cannot be said to be any major defects requiring any major repairs or a large expenditure. Most of these defects are of a minor character and some of them are quite trifling. According to the tenants, the cost of rectifying these defects would be in the vicinity of about Rs. 2,000/- though that suggestion has been denied by the respondents' Rent Farming Contractor, according to whom the expenditure would be Rupees 20,000/-, for which there is nothing beyond his bare word. While the landlords have chosen to lead no evidence of income or outgoings in respect of this property, we are informed across the Bar that the annual rents received by the landlords came to Rs. 43,720/- as against the total annual outgoings aggregating to Rs. 20,000/- including taxes. The failure therefore of the landlords to give evidence themselves becomes understandable for their presence in the witness-box would have exposed the hollowness of their pretence of financial inability. In these circumstances, there can possibly be no justification for the landlords to plead financial disability in carrying out the repairs. The landlords' further ground of resistance, namely that the lift had outlived its utility is also of no substance in view of the admission made by their Rent Farming Contractor in evidence that there is nothing in the communication of the Lift Inspector and the defects pointed out by him to suggest that the lift had become so useless that it was irreparable. The evidence of the landlords' Rent Farmer discloses the total hollowness of the defences taken up by the landlords in a vain attempt to establish just or sufficient cause. The record discloses nothing which can be said to be just or sufficient cause for the landlords not carrying out the repairs to the lift as required by the Lift Inspector. It was within the power and control of the landlords not to have reduced the condition of the lift to what it is. It is also within their power and control to make this essential service once again available to the tenants by carrying out the requisite repairs.

22. This is a gross case where nothing can be said in mitigation for the landlords. We were informed across the Bar that the landlords have even taken away the lift

motor and that all that remains at present is the cage. Mr. Abhyankar appearing for the landlords, however, stated that the motor has been removed by the landlords for safe keeping. If so, just as well for in that event they should have no difficulty in restoring it to its proper place instead of having to purchase a new one to put the lift in working condition to the satisfaction of the Lift Inspector. This the landlords shall do on or before 31st July, 1980.

23. Mr. Abhyankar ultimately invited us to remand this case back to the lower Court to enable the landlords to give evidence. Mr. Abhyankar urged that if this opportunity is given, the landlords will be able to establish just or sufficient cause. We have no difficulty in repelling this suggestion of Mr. Abhyankar, which is an application *ad misericordiam*. There is no reason and none was suggested, why the landlords did not choose to step into the witness-box when they had the opportunity to do so or why they contented themselves until now on relying upon the evidence of their Rent Farming Contractor, which instead of being of any assistance to the landlords has let the cat out of the bag. Having done so, it is not now open to the landlords to ask us to remand the case back to the lower Court for their evidence which they could have given earlier. The intention of the landlords is transparent, namely to put off the evil day.

24. We conclude this judgment with the observation that if we have differed from the reasoning of our learned Brother in Dhanrajmal's case (1973 Cri LJ 1848) (Bom) we have done so with the greatest respect and after a great deal of cogitation, alive as we are to his vast knowledge and legal acumen.

25. In the result, the impugned orders are set aside and the Special Civil Application is allowed in terms of prayers (a) and (b). The respondents shall restore the lift service in terms of prayer (b) and obtain the requisite clearance certificate from the Lift Inspector on or before 31st July, 1980. In default, liberty to the petitioners to apply to this Court for further orders in accordance with S. 24 (3) of the Rent Act. As this controversy involved in the main a legal point, namely the interpretation of Sec. 24, there will be no order as to costs throughout.

Petitions allowed.

AIR 1982 BOMBAY 66

MODY, J.

B. J. Patel, Plaintiff v. M/s. Vadilal Dolatram and Sons and others, Defendants.

Notice of Motion No. 1608 of 1980 (In Suit No. 1816 of 1979), D/- 5-2-1981.

Transfer of Property Act (4 of 1882), S. 52 — Application for relief from *lis pendens* — Principles to be applied.

Though there cannot be any exhaustive enumeration of principles to be applied in considering an application for relief from *lis pendens* one thing is clear that this is a discretionary order and *lis pendens* is a rule and relief is an exception and strong grounds must be made out to deprive the plaintiff of the fruits of litigation. (Para 4)

This being a discretionary relief, it will depend on the several circumstances which inter alia, can be, the nature of the plaintiff's case and the defence, the nature of property market and the circumstances of the defendants. If the Court is convinced on the affidavits and the pleadings that even if all the evidence was led by the parties there is a very strong probability that the plaintiff will lose the matter, it will be a very important factor, possibly conclusive for granting relief. The Court will also have to consider the inconvenience and injustice that is likely to be caused to the defendants if the relief is not granted and balance it with the inconvenience and injustice that is likely to be caused to the plaintiff if the relief from *lis pendens* is granted. The Court must necessarily take into consideration the price at which the property is allegedly agreed to be sold originally and the present market value. In case the plaintiff offers to purchase the property at the value of the property on the date of application as alleged by the defendant then no injustice can be caused to the defendants if condition is imposed that the defendants should sell the property to the plaintiff at that price or application is refused. However, if in addition to this the plaintiff is willing to give up rest of his claim, this will confer additional benefit on the defendants and the balance will certainly tilt in favour of the plaintiff. (Para 5)

The defendant is not entitled to make it a matter of prestige, by insisting on selling the property to outsiders though he is getting a fair market value from the plaintiff.

(Para 6)

M. Ghelani with S. J. Rahimtoola, for Plaintiff; J. I. Mehta with H. H. Mody, for Defendants.

ORDER:— This is an application by the defendants under the provisions of S. 52 of the Transfer of Property Act for relief from *lis pendens*. The grounds urged in the affidavit-in-support of this application are, inter alia, that the plaintiff's suit is for specific performance of an alleged agreement which is oral only, that the 1st defendants' firm which has allegedly agreed to sell the property consists of partners who are very old and that they are not helped in the business by their sons who have their own independent business, that none of the defendants reside at the suit property, that the property is a valuable property worth about Rs. 20 lacs and that the defendants desire to wind up the affairs of the partnership and the main thing necessary for the purpose is to sell the property. The affidavit thereafter proceeds to narrate shortly the circumstances surrounding the alleged agreement and concludes that the entire case in the plaint is false and that the suit is filed only with a view to prevent the defendants from selling the property pending the suit. It is contended that in fact the plaintiff has no cause of action at all and that is the reason why the plaintiff did not apply for interim relief. It is stated that in the present uncertain conditions in the present property market, the defendants are anxious to sell the property and that several enquiries were received but the purchaser is not willing to make an agreement in view of the suit. From the said affidavit, one fact that clearly, emerges is that enquiries have been received from purchasers and it can therefore be safely presumed that the value of the property mentioned in the affidavit is obviously based on the said enquiries, and therefore, the value of about Rs. 20 lacs can be said to be a fair market value according to the defendants.

2. Mr. Mehta took me through the facts of the case with a view to convince me that the plaintiff does not have any case or in any event a very weak *prima facie* case. The case made out in the plaint is so weak as is hardly likely that the plaintiff will succeed in the suit. After Mr. Mehta completed his arguments, the case was adjourned for negotiations and it is being heard today.

3. Mr. Ghelani for the plaintiff states that his client is prepared to buy the said property for a price of Rs. 21,33,600/- which is equivalent to the value of the property as alleged by the defendants themselves and give up rest of the claim. This offer is not acceptable to the defendants.

4. The principles applicable to granting of relief from *lis pendens* are not available in any reported case nor are they given in the

section. This being free from any reported case I have to form my own view as to what are the principles which are to be applied. Though, there cannot be an exhaustive enumeration of principles one thing is clear that this is a discretionary order and *lis pendens* is a rule and relief is an exception and strong grounds must be made out to deprive the plaintiff of the fruits of litigation.

5. This being a discretionary relief, it will depend on the several circumstances which *inter alia*, can be, the nature of the plaintiff's case and the defence, the nature of property market and the circumstances of the defendants. If the Court is convinced on the affidavits and the pleadings that even if all the evidence was led by the parties there is a very strong probability that the plaintiff will lose the matter, it will be a very important factor, possibly conclusive for granting relief. The Court will also have to consider the inconvenience and injustice that is likely to be caused to the defendants if the relief is not granted and balance it with the inconvenience and injustice that is likely to be caused to the plaintiff if the relief from *lis pendens* is granted. While comparing this comparative injustice and inconvenience, the Court must necessarily take into consideration the price at which the property is allegedly agreed to be sold originally and the present market value. In case the plaintiff offers to purchase the property at the value of the property on the date of application as alleged by the defendant then no injustice can be caused to the defendants if condition is imposed that the defendants should sell the property to the plaintiff at that price or application is refused. However, if in addition to this the plaintiff is willing to give up rest of his claim, this will confer additional benefit on the defendants and the balance will certainly tilt in favour of the plaintiff.

6. When the plaintiff has filed the suit and there is some evidence to show possibility of an agreement having been arrived at, supported by the facts of exchange of draft agreement and the letter of authority given in favour of the architect and when the plaintiff offers to buy the property at the present market value claimed by the defendants, and which is not accepted, it will be one of the strong grounds for refusing the relief of *lis pendens* as it discloses the bona fide of the plaintiff as against the lack of bona fides of the defendants. If the plaintiff offers a fair market value as on the date of the application for relief and when he has some case though it may be weak, it cannot be said that

his claim is imaginary and if the defendants are not willing to sell at the present value alleged by the defendants themselves, it will be one of the grounds for refusing the relief from *lis pendens*. In an application of present type, the main purpose of the defendants in most cases has to be to get a proper market value and avoid possible future loss caused because of delay in litigation. The defendant is not entitled to make it a matter of prestige, by insisting on selling the property to outsiders though he is getting a fair market value from the plaintiff.

In the circumstances notice of motion is dismissed. Costs, cost in the cause.

Notice of motion dismissed.

AIR 1982 BOMBAY 67

MODY, J.

Central Bank of India, Plaintiff v. Femme Pharma Ltd. and others, Defendants.

Summons for Judgment No. 237 of 1980 (in Sum. Suit No. 597 of 1977), D/- 23-2-1981.

High Court of Bombay Original Side Rules (1980), R. 227 — Suit placed on board for dismissal — Court has wider discretion now than under the Rules of 1957 and is not bound to dismiss the suit. (Para 2)

P. P. Khambata, for Plaintiff; J. M. Patel, for Defendants.

ORDER:— Mr. Patel refers to R. 227 of the High Court Original Side Rules 1980 and to R. 220 (4) of the Rules of 1957 and contends that I must place the suit on board for dismissal and must dismiss the same. He says that under the old rule the Court had discretion to dismiss or not to dismiss the suit depending on whether sufficient cause is shown or not, while under the present rule there is no such discretion vested in Court. In my view the position is actually to the contrary.

2. Under the old rules, the Court's discretion was limited to sufficient cause being shown and if it was not shown the suit had to be dismissed. As against this the present rule only provides that the suit shall be placed on board for dismissal but it does not provide as to what is to happen thereafter. In my view the Court will, therefore, have a wider discretion now than before and the Court is not bound to dismiss the suit.

3. Application is rejected, particularly, in view of the fact that the summons for judgment is now taken out, even before the matter could be notified for being placed on board for dismissal.

JY/JY/E612/81/VRK/RSK

4. In view of the fact that the summons for judgment has been taken out after such delay, unconditional leave to defend. Suit transferred to the list of long causes. Written Statement within 8 weeks. Usual orders for discovery and inspection.

Ordered accordingly.

AIR 1982 BOMBAY 68

DHARMADHIKARI, J.

Minoti, Appellant v. Sushil Mohansingh Malik and another, Respondents.

First Appeal No. 182 of 1981, D/- 29/30-4-1981.

Hindu Succession Act (30 of 1956), S. 25 — 'Murder' — Word 'murder' must be construed in its popular sense and not in technical sense as defined in I. P. C. — Includes culpable homicide or unlawful manslaughter.

Sections 25 and 27 of the Hindu Succession Act were enacted by the legislature to give statutory approval to the principles of equity, justice and goods conscience which disqualifies murderer or a person who abets commission of murder from inheriting the property of the person murdered. Therefore, the words and phrases used in S. 25 will have to be construed in the light of these principles. It is well settled that the word not defined in the Act but a word of every day use must be construed in popular sense as understood in common parlance and not in a technical sense. In popular sense the word "murder" means unlawful homicide or unlawful killing of human being. In popular parlance the word "murder" is not used or understood in the technical sense as defined in S. 300 of the I. P. C. Therefore, to construe the said word in a technical sense as defined in S. 300 of the I. P. C. will result in defeating the very object of the legislation. It will also run counter to the well established principles of equity, justice and good conscience, or the paramount principle of public policy enshrined in S. 25 of Hindu Succession Act. Section 25 does not contemplate punishment for murder to disqualify the murderer from inheriting the property of the murdered. The application of the section should not be approached from the point of view of punishment for murder. It is pertinent to note that the words used in S. 25 are "commits murder or abets commission of murder" and not "is convicted of an offence of murder or abetment of offence of murder". Therefore, it is clear that the legislature has used the term "murderer" in S. 25 of the

Hindu Succession Act not in a technical sense as defined in S. 300 of the I. P. C., but in a wider and popular sense, which must include in its import even culpable homicide or unlawful manslaughter. It is neither possible nor desirable to lay down general rule in this behalf, because to some extent it must depend on the facts and circumstances of each case. AIR 1924 PC 209 and (1972) 2 Mad LJ 49 and AIR 1970 Andh Pra 407, Relied on. (Paras 7, 10, 11, 12)

Cases Referred :	Chronological	Paras
AIR 1979 SC 289		8
(1972) 2 Mad LJ 49		4, 10
AIR 1970 Andh Pra 407		4, 11
AIR 1929 PC 181		8
AIR 1924 PC 209 : 1924 (22) All LJ 962		4, 7, 9
AIR 1921 Bom 270 : ILR (1921) 45 Bom 768		4

M. D. Pathak, for Appellant; M. P. Patel, for Respondents.

JUDGMENT:— The plaintiff who is a minor filed the suit through her next friend, maternal grand-mother for a declaration that the money lying in the special Savings Bank Account No. 14/1168 with the State Bank of Hyderabad, Juhu Branch, Bombay exclusively belongs to her deceased mother as her self-acquired and self-earned separate property and in view of the provisions of S. 25 of the Hindu Succession Act, 1956 daughter alone is entitled to get the said amount.

2. It appears to be an admitted position that defendant No. 1 Sushilkumar was prosecuted for an offence punishable under Section 302 of the Penal Code in Sessions Case No. 196 of 1980 decided on 29th of Oct., 1980. After appreciating all the evidence on record the Sessions Court came to the conclusion that accused Sushilkumar used a sharp-edged weapon for inflicting various injuries on deceased Revati. While inflicting the injuries he chose vital part of the body and used considerable force. The Sessions Court further found that in view of the number of injuries and their location considered together with other factors clearly indicate that accused Sushilkumar did the act with intention of causing the death of Revati. After recording this finding the learned Judge ultimately came to the conclusion that he committed the said act of assault while he was deprived of the power of self-control by grave and sudden provocation given to him by deceased Revati. As a result of this finding he was convicted of the offence punishable under S. 304 Part I of the I. P. C. and was sentenced to suffer rigorous imprisonment for seven years and to pay a fine of

Rs. 1000/- or in default to suffer further rigorous imprisonment for six months. In the suit filed on behalf of the minor it was contended that as the defendant No. 1 was responsible for committing murder of deceased Revati, he is not entitled to succeed to the property of deceased in view of the provisions of S. 25 of the Hindu Succession Act. In this suit an injunction was also sought against defendant No. 1 restraining him from withdrawing the amount from the Bank. The trial Court framed necessary issues and ultimately came to the conclusion on the strength of the affidavit filed by the guardian and next friend of the plaintiff that money lying in the special saving bank account exclusively belonged to the deceased mother of the plaintiff. He also came to the conclusion that in view of the conviction of defendant No. 1 under S. 304, Part I of the I. P. C. he is not disqualified under S. 25 of the Hindu Succession Act. So far as the amount of Rs. 6,800/- is concerned, which according to the plaintiff belonged to her being proceeds of the lottery prizes earned in the lottery tickets purchased in her name and credited in the account in the Bank, the learned Judge held that for that purpose the plaintiff will have to pursue a separate remedy as such a declaration cannot be granted in the present suit as framed. In view of these findings the learned Judge decreed the claim of the plaintiff to the extent of Rs. 5831-31 p. only and also granted leave to the plaintiff to file a fresh suit in respect of the amount of Rs. 6800/-. He also granted necessary reliefs including that of permanent injunction to the extent of Rs. 5831-31 p.

3. Being aggrieved by this judgment and decree the plaintiff has filed the present appeal. Defendant No. 1 has also filed a cross-objection challenging the finding recorded against him and has also explained the circumstances under which he remained absent in the trial Court and has prayed that the *ex parte* decree should be set aside and he should be given an opportunity to defend the suit on merits. According to him he could not remain present in Court because he was detained in jail and the Counsel appearing for him remained absent on the date of hearing.

4. Shri Pathak, learned Counsel appearing for the appellant contended before me that the interpretation put forward by the learned Judge upon the provisions of S. 25 of the Hindu Succession Act is wholly illegal. According to Shri Pathak the phraseology used in S. 25 of the Hindu Succession Act is "a person who commits murder or abets commission of murder". The section does not

contemplate that the person should be convicted or sentenced for the offence of murder. Shri Pathak has also contended that the word "murder" is not defined in the Hindu Succession Act. Therefore, the meaning assigned to the said word in the I. P. C. cannot be incorporated in S. 25 while construing the said provision. In the absence of the definition of the term "murder" it will have to be given the meaning as understood in common parlance; and if so understood it will include all sorts of culpable homicides. In support of his contention Shri Pathak has relied upon the decision of the Andhra Pradesh High Court in *Nannepuneni Seetharamaiah v. Nannepuneni Ramakrishnaiah*, AIR 1970 Andh Pra 407. A decision of this Court in *Girimallappa Channappa v. Kanchava*, ILR (1921) 45 Bom 768 : (AIR 1921 Bom 270), which is confirmed by the Privy Council in *Kanchawa Sonyellappa v. Girimallappa Channappa*, AIR 1924 PC 209. He is also relying upon the decision of the Madras High Court in *Sarvanabhava v. Sallemmal*, (1972) 2 Mad LJ 49.

5. On the other hand it is contended by Shri Patel, learned Counsel appearing for respondent No. 1 that as the word "murder" is not defined in the Hindu Succession Act and is only defined in the I. P. C., the said term will have to be given the meaning as assigned to it in the I. P. C. Therefore, unless a person is convicted of the offence of murder, under S. 302 of I. P. C., he is not disqualified under S. 25 of the Hindu Succession Act. According to Shri Patel, as in the present case respondent No. 1 is convicted for an offence punishable under S. 304, Part I of the I. P. C. viz. culpable homicide not amounting to murder, the learned Judge of the trial Court was right in coming to the conclusion that defendant No. 1 was not disqualified to succeed to the property of the deceased Revati under S. 25 of the Hindu Succession Act.

6. For properly appreciating the controversy raised before me, it is necessary to make a detailed reference to the provisions of Ss. 25 and 27 of the Hindu Succession Act, which read as under:—

"25. A person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder.

27. If any person is disqualified from inheriting any property under this Act, it shall

devolve as if such person had died before the intestate."

7. It is an admitted position that the word "murder" is not defined in the Hindu Succession Act. It appears that S. 25 was introduced in the Hindu Succession Act practically to give statutory sanction to the view expressed by the Privy Council in *Kanchawa v. Girimallappa*, AIR 1924 PC 209. While dealing with such a contention the Privy Council observed that there is much to be said in support of the principles of jurisprudence which can be traced in Hindu Law, which would warrant an inference that a man cannot take advantage of his own wrong. The Privy Council further observed that this principle is the principle of equity, justice and good conscience, which disqualifies and excludes the murderer from inheriting any interest in the property of the person murdered. The Privy Council also held that the murderer in such case should be treated as non-existent and not as one who forms the stock for fresh line of descent. Thus, it appears that Ss. 25 and 27 were enacted by the legislature to give statutory approval to the principles of equity, justice and good conscience which disqualifies murderer or a person who abets commission of murder from inheriting the property of the person murdered. Therefore, the words and phrases used in S. 25 will have to be construed in the light of these principles viz. the principles of equity, justice and good conscience. This is also the well established principle of public policy.

8. As observed by the Privy Council in *Lawrence Arthus Adamson v. Melbourne and Metropolitan Board of Works*, AIR 1929 PC 181:

"It is always unsatisfactory and generally unsafe to seek the meaning of words used in an Act in the definition clauses of another statute dealing with matters more or less cognate even when enacted by the same legislature."

The Supreme Court has also expressed the similar view in the *Board of Muslim Wakfs, Rajasthan v. Radha Kishan*, AIR 1979 SC 289 and has observed that (at p. 295):

"It is not a sound principle of construction to interpret expressions used in one Act with reference to their use in another Act and decisions rendered with reference to construction of one Act cannot apply with reference to the provisions of another Act, unless the two Acts are in *pari materia*."

It is an admitted position that two enactments are neither cognate nor *pari materia* and cover different fields. Therefore, in my opin-

ion words and phrases used in S. 25 of the Hindu Succession Act will have to be construed and interpreted harmoniously keeping in view the object of the legislation, and not in technical sense as defined in I. P. C.

9. In this context a reference could also be made to the following observation in *Halsbury's Laws of England*, Third Edition, Vol. 39, para. 1315, p. 869:—

"Murder or manslaughter. It is contrary to public policy that a man should be allowed to claim a benefit resulting from his own crime. Accordingly a donee who is proved to be guilty of the murder or manslaughter of the testator cannot take any benefit under his will."

It is this principle of public policy that a person cannot be allowed to claim benefit resulting from his own crime which is approved by the Privy Council in *Kanchawa's case* (AIR 1924 PC 209). When the Hindu Succession Act, 1956 was enacted, the legislature had before it the decision of the Privy Council in *Kanchawa's case* and it appears that it is this well established principle of public policy which legislature thought fit to incorporate in S. 25 of the Act, so that the person will not be tempted to commit murder to inherit the property of the person murdered.

10. It is well settled that the word not defined in the Act but a word of every day use must be construed in popular sense as understood in common parlance and not in a technical sense. In popular sense the word "murder" means unlawful homicide or unlawful killing of human being. In popular parlance the word "murder" is not used or understood in the technical sense as defined in S. 300 of the I. P. C. Therefore, to construe the said word in a technical sense as defined in S. 300 of the I. P. C. will result in defeating the very object of the legislation. It will also run counter to the well established principles of equity, justice and good conscience, or the paramount principle of public policy enshrined in S. 25 of Hindu Succession Act. I am fortified in this view by the decision of the Madras High Court in *Sarvanabhava v. Sallammal*, (1972) 2 Mad LJ 49 wherein the Madras High Court has observed as under:

"Almost all systems of law have recognised that a person guilty of homicide cannot succeed to the property of his victim. Section 25 of the Hindu Succession Act gives statutory recognition to the above proposition."

11. In the present case defendant No. 1 is convicted of the offence punishable under

S. 304, Part I of I. P. C. viz. for the offence of culpable homicide. From the findings recorded by the learned Sessions Judge it is clear that as many as eleven incised injuries were inflicted by defendant No. 1 with a sharp edged knife on the person of deceased Revati. He chose vital part of the body for inflicting these injuries and had used considerable force. He assaulted Revati with the intention of causing her death. Therefore it can safely be held that he has committed murder of Revati within the meaning of the said expression as used in S. 25 of the Hindu Succession Act, 1956 and therefore is disqualified from inheriting the property of deceased Revati, the person murdered. Similar view is taken by Andhra Pradesh High Court in *Nannepuneni Seetaramaiah v. Nannepuneni Ramakrishnaiah*, AIR 1970 Andh Pra 407, wherein it is observed by the Andhra Pradesh High Court that to apply the disqualification under S. 25 of Hindu Succession Act it is not necessary that the person who committed murder or abetted commission of murder must also have been convicted of the offence of murder or of abatement of murder under S. 302 of the I. P. C. The said section does not contemplate punishment for murder to disqualify the murderer from inheriting the property of the murdered. The application of the section should not be approached from the point of view of punishment for murder.

12. In my opinion this is the correct approach for interpreting the provisions of Section 25 of the Act, which incorporates a paramount principle of public policy based on principles of justice, equity and good conscience, so that the person will not be able to take the advantage of his own crime. In this context it is pertinent to note that the words used are "commits murder or abets commission of murder" and not "is convicted of an offence of murder or abatement of offence of murder." Therefore, it is clear that the legislature has used the term "murderer" in S. 25 of the Hindu Succession Act not in a technical sense as defined in S. 300 of the I. P. C., but in a wider and popular sense, which must include in its import even culpable homicide or unlawful manslaughter. It is neither possible nor desirable to lay down general rule in this behalf, because to some extent it must depend on the facts and circumstances of each case.

13. However, at this stage I am informed by Shri Pathak, learned counsel for the plaintiff that an appeal is filed against the said order of conviction by the defendant No. 1 and the same is pending. He has fur-

ther stated that the complainant has also filed a revision petition against the order of acquittal passed by the learned Sessions Judge acquitting him of the offence under Section 302 of the I. P. C. and the said revision petition is also pending. Therefore, I am not called upon at this stage to decide the question as to what will be the scope of inquiry before the Civil Court in case of acquittal. I have decided the question of disqualification under S. 25 of the Hindu Succession Act on the basis of the position as it stands today. Parties are at liberty to raise all permissible contentions in case of subsequent development or change in circumstances.

14. So far as the merits of the controversy are concerned, it does appear that because of the pendency of the sessions case and subsequent conviction, defendant No. 1 remained absent in the trial Court. It is no doubt true that he had engaged a counsel at the initial stage but subsequently the counsel also remained absent and the matter proceeded ex parte against him. Shri Patel, learned counsel appearing for defendant No. 1 has contended that money lying in deposit in Bank belonged to defendant No. 1 alone and not to deceased Revati. He further contended that to prove this fact defendant No. 1 should be given an opportunity to file a written statement and lead evidence in support of his case. In all fairness Shri Pathak has conceded before me that in view of the peculiar facts and circumstances of the case he has no objection if defendant No. 1 is given an opportunity to contest the claim of the plaintiff on merits. However, he has further submitted that in that case the plaintiff should also be given an opportunity to amend the plaint and claim a relief of declaration even qua the amount of Rs. 6,800/- which according to the plaintiff exclusively belongs to her as it represents the proceeds of lottery prize earned by the plaintiff herself on the tickets purchased in her name though said amount was credited in the joint account of Revati and defendant No. 1. Shri Patel, learned counsel appearing for respondent No. 1 has no objection for giving such an opportunity to the plaintiff. In this view of the matter by consent of the parties the judgment and decree passed by the learned Judge of the City Civil Court, Bombay dated 23-11-1980 is set aside and the matter is remitted back to the City Civil Court for deciding it on merits in accordance with law after giving a reasonable opportunity to both parties to put forward their respective cases. It is needless to say that after remand the plain-

tiff will be entitled to amend her plaint and claim a relief of declaration qua Rs. 6,800/- and also carry on other consequential amendments, if necessary. The defendant will also be at liberty to file his written statement and thereafter the trial Court will decide the suit on merits in accordance with law. Since the plaintiff is a minor and her mother is dead and the father is also in jail, this is a fit case which requires priority and, therefore, the trial Court is directed to hear and decide the suit as expeditiously as possible preferably before the 31st of Dec., 1981.

15. During the pendency of the suit the ad interim injunction granted by the trial Court restraining the defendant No. 1 from withdrawing the amount from the Bank shall continue. The parties are directed to appear before the trial Court on 29th of June, 1981. Thus the appeal is partly allowed. Since by consent of the parties the matter is being remitted back, no orders on cross-objection are necessary. In the circumstances of the case there will be no order as to costs in this appeal as well as in cross-objection.

Order accordingly.

AIR 1982 BOMBAY 72

LENTIN, J.

M/s. Gangaram Ratanlal, Petitioner v. M/s. Simplex Mills Co. Ltd., Respondent.

Arbitration Petn. No. 106 of 1980 in Award No. 30 of 1980, D/- 21-4-1981.

(A) Arbitration Act (10 of 1940), Ss. 2 (a) and 33 — Arbitrator not having jurisdiction for want of a written arbitration agreement — Mere acquiescence by a party to the jurisdiction and admission of liability before him would not estop such party from questioning arbitrator's jurisdiction. (Evidence Act (1872), S. 115; Civil P. C. (1908), S. 9).

An arbitration agreement must be one as defined in S. 2 (a) of the Arbitration Act and hence must be in writing. If that sine qua non is absent, the result would be that the initial lack of jurisdiction on the part of the arbitrator cannot be cured by oral acquiescence on the part of the party and any admission of liability by such party before the arbitrator can avail the other side nothing as it is made before an authority, who, for want of an arbitration agreement as defined in S. 2 (a) initially has no jurisdiction to act as arbitrator and is therefore incompetent to make an award. Lack of jurisdiction goes to the root of the matter; it is not merely an irregularity which can

be cured by oral acquiescence. AIR 1925 Sind 144 and AIR 1962 SC 1810, Rel. on:

(Para 4)

(B) Arbitration Act (10 of 1940), S. 2 (a) — Arbitration agreement — Incorporation by reference to another instrument — Contract between buyer and sole selling agent of manufacturer subject to terms and conditions contained in manufacturer's printed contract form — Arbitration clause contained in printed contract form must be deemed to have been imported into contract between buyer and sole selling agent. AIR 1977 Cal 482 and AIR 1951 Cal 10 (FB), Applied; AIR 1931 PC 289 and AIR 1930 Cal 774, Ref.

(Paras 8, 10)

Cases Referred: Chronological Paras
AIR 1977 Cal 482: 81 Cal WN 1101: 7, 10
AIR 1962 SC 1810: (1963) 1 SCA 314: 4
AIR 1951 Cal 10: 54 Cal WN 544 (FB)

7, 9, 10

AIR 1931 PC 289: 58 Ind App 381: 1931 All LJ 1116

9

AIR 1930 Cal 774: (1930) 34 Cal WN 447

9

AIR 1925 Sind 144

4

V. V. Tulzapurkar, for Petitioner; D. H. Mehta, for Respondent.

ORDER:— This in an utterly mala fide petition for setting aside an award.

2. New Textiles Ltd. were the sole selling agent of the respondent. By certain contracts entered into between the petitioner and the respondent's selling agent, the petitioner agreed to purchase certain quantities of yarn of the total value of Rs. 2,40,761.77 subject to the terms and conditions contained in the respondent's printed contract form. Clause 21 in the respondent's printed form provided for reference of disputes to arbitration in the following words:—

"All disputes and questions whatsoever which shall arise between the parties hereto out of or in connection with this agreement or as to the construction or application thereof or the respective rights and obligations of the parties hereunder or as to any clause or thing herein contained or any account or valuation to be made hereunder or as to any other matter in any way relating to these presents shall be referred to arbitration in accordance with the rules of the Millowners' Association, Bombay, for the time being in force regulating arbitration with respect to piece-goods."

However, no such arbitration clause was specifically incorporated in the contracts between the petitioner and the respondent's selling agent. Disputes having arisen between the parties by reason of the peti-

tioner's failure to pay the balance amount of Rs. 2,11,022.63, the respondent invoked the arbitration clause contained in its printed contract form and referred the disputes to the Millowners' Association, which in turn called upon the petitioner to appoint its arbitrator. The petitioner failed to do so, with the result that under the rules of the Association the disputes stood referred to the respondent's arbitrator as sole arbitrator. At the hearing before the arbitrator on 21st Nov., 1979 the respondent appeared through its authorised representative; the petitioner also appeared through its authorised representative, namely, its partner one Bhagwandas. The minutes of the arbitrator of that day reveal that Bhagwandas admitted the petitioner's liability to the respondent in the amount of Rs. 2,11,022.63 and also stated before the arbitrator that the petitioner was not in a position to pay this amount and required time to make payment. Thereupon, the meeting was adjourned by the arbitrator to enable the petitioner to approach the respondent for this purpose. The arbitrator's minutes of the next meeting fixed on 21st Feb., 1980 reveal that the petitioner's partner Bhagwandas did not appear, having informed the arbitrator earlier that "he was pre-occupied elsewhere". At the third and final meeting held on 14th Mar., 1980, the petitioner again appeared before the arbitrator thro' its partner Bhagwandas. At this meeting Bhagwandas informed the arbitrator that no useful purpose would be served by the petitioner taking up the matter with the respondent and that the arbitrator should proceed with the reference. The minutes further reveal that after hearing both the parties, the arbitrator concluded the hearing and both parties were informed that the award would be made in due course. For the purpose of this petition, the correctness of the minutes of the meetings before the arbitrator was not disputed by Mr. Tulzapurkar, the learned counsel appearing on behalf of the petitioner. Here it may also be stated that it is not even the petitioner's case that Bhagwandas was not the petitioner's authorised representative or had no authority to represent the petitioner before the arbitrator. Thereafter on 19th Mar., 1980, the arbitrator made his award against the petitioner in the sum of Rs. 2,11,022.63. It is now to set aside this award that the petitioner has filed the present petition.

3. The only ground of challenge to which the petitioner's learned counsel Mr. Tulzapurkar confined himself in inviting me to set aside the award, was that the arbitrator had no jurisdiction to make the award as

there was no arbitration agreement between the parties. To the contrary was urged by Mr. Mehta, the learned counsel appearing on behalf of the respondent. Mr. Mehta further urged that by appearing unconditionally before the arbitrator and admitting its liability before the arbitrator, the petitioner had acquiesced to the jurisdiction of the arbitrator and hence is now estopped from challenging his jurisdiction.

4. I shall first deal with Mr. Mehta's contention and get it out of the way. An arbitration agreement must be one as defined in S. 2 (a) of the Arbitration Act and hence must be in writing. If that sine qua non is absent, the result would be that the initial lack of jurisdiction on the part of the arbitrator cannot be cured by oral acquiescence on the part of the party and any admission of liability by such party before the arbitrator can avail the other side nothing as it is made before an authority, who, for want of an arbitration agreement as defined in S. 2 (a), initially has no jurisdiction to act as arbitrator and is therefore incompetent to make an award. Lack of jurisdiction goes to the root of the matter; it is not merely an irregularity which can be cured by oral acquiescence. In *Kishindas Pursomal v. Menghraj Khailoas*, AIR 1925 Sind 144, it was held that appearing without protest before an arbitrator devoid of jurisdiction, did not amount to waiver of the right to question the arbitrator's jurisdiction. In *Khardah Co. v. Raymon & Co.*, AIR 1962 SC 1810 (1811), it was held by the Supreme Court that a party applying under S. 33 of the Arbitration Act is not estopped by its conduct in appearing before the arbitrators and in taking part in the proceedings before them, from questioning the validity of the award; what confers jurisdiction on the arbitrator to hear and decide a dispute is an arbitration agreement as defined in S. 2 (a) and where there is no such agreement there is an initial want of jurisdiction which cannot be cured by acquiescence. In the light thereof, if in the present matter the arbitrator had no jurisdiction as urged by Mr. Tulzapurkar, oral acquiescence by the petitioner can avail the respondent nothing. If on the other hand I hold against the petitioner on the aspect of jurisdiction, the question of the petitioner's acquiescence does not arise.

5. This therefore brings me to the only ground of challenge urged by Mr. Tulzapurkar, viz. that the arbitrator had no jurisdiction for want of an arbitration agreement between the parties. Mr. Tulzapurkar urged

that the arbitration clause appearing in the respondent's printed form was not directly germane to the transaction of purchase covered by the contracts of the respondent's selling agent and hence could be incorporated in the latter, not by general words, but only by clear and specific words to that effect, and that the same not having been done, the arbitrator had no jurisdiction to enter upon the reference and the award is a nullity. Mr. Tulzapurkar elaborated that the only terms directly germane to the purchase of the goods by the petitioner were those pertaining to price, payment, carriage and so forth and that the arbitration clause had nothing to do with the same and hence could not be incorporated in the contracts of the respondent's selling agent by general words. To the contrary was urged by Mr. Mehra on behalf of the respondent.

6. In support of their rival contentions, both learned counsel relied on the general clause in the contracts between the respondent's selling agent and the petitioner, which reads as under :

"We (viz. the petitioner) hereby agree to purchase from you within mentioned goods subject to the terms and conditions on the Company's (viz. the respondent's) Printed Form."

It is not in dispute that the respondent's printed form contained the arbitration clause. It is not even the petitioner's case that the petitioner was not aware of that arbitration clause. Indisputably the arbitration clause has not been specifically set out in the contracts of the respondent's selling agent. The question therefore that arises is whether by reason of the general clause indented above, the arbitration clause in the respondent's printed form was incorporated in the contracts of the respondent's selling agent.

7. In support of his contentions, Mr. Tulzapurkar relied on the decision of the Calcutta High Court in *Abu Road Electricity Co. v. Industrial Cases*, AIR 1977 Cal 482, not so much for what was decided therein but for the purpose of the principles enumerated therein. It is unnecessary to dilate at any length on that decision of the Calcutta High Court, because apart from the fact, that the facts in that case are different from those in the present matter, the Calcutta High Court ultimately came to the finding that (at p. 488) —

"..... strictly the question of incorporation is not a relevant matter for consideration in respect of the controversy in issue between the parties in this proceeding."

Mr. Tulzapurkar however concentrated on certain observations reproduced in that judg-

ment from certain English decisions. This concentration is misplaced, for those observations, based on the peculiar facts of those cases, can possibly be of no assistance to the present petitioner. Those observations are to the effect that, (a) incorporation by general words of an arbitration clause in the Bill of Lading would be wholly unintelligible and inconsistent with the terms of the earlier contract, viz. the charter party, and that in the facts of those cases, the nature of the arbitration clause in the charter party was such that it could not be imported into a contract relating to a different subject-matter; (b) if the arbitration clause was imported bodily into the Bill of Lading, it would deal with no disputes arising under the Bill of Lading and would be vague, uncertain and insufficient to oust the jurisdiction of the Courts; (c) if the arbitration clause in the original contract (viz. the charter party) was written into the subsequent contract (viz. the Bill of Lading), it had to be intelligible and consistent with the terms of the subsequent contract and had on the face of it to apply to all disputes arising under the subsequent contract; (d) disputes pertaining to the conditions of the charter party did not pertain to disputes arising under the Bill of Lading inasmuch as the arbitration clause governed disputes between the parties to and out of the conditions of the charter party and not to disputes arising out of the Bill of Lading; and (e) if the dispute was exclusively under the Bill of Lading and not under the charter party, the arbitration clause would not apply. It was therefore in the context of the facts and circumstances of those cases that it was held that the arbitration clause in the charter party was not directly germane to the subject-matter of the Bill of Lading and hence such a clause could not be incorporated in the Bill of Lading merely by general words. Thus, the sum and substance of those observations is that on the facts of those cases the arbitration clause in the charter party not being directly germane to the subject-matter of the Bill of Lading, the arbitration clause could not be incorporated by general words in the Bill of Lading but only by words which were appropriate and explicit, leaving no scope for generalisation, speculation or uncertainty. The principles culled out by the Calcutta High Court from the observations in the English decisions and other cases (including *Dwarkanadas v. Daluram*, AIR 1951 Cal 10 (FB), referred to hereafter at length in this judgment) are that (i) a clause in an earlier contract can be imported into a subsequent contract if the language is appropriate, unambiguous

and clear; (ii) such clause in the earlier contract can be written in bodily into the later contract if there is no inconsistency or vagueness or uncertainty; (iii) a clause in the earlier contract which is germane to the subject-matter of the later contract may be incorporated therein by general words though some degree of manipulation may be involved; and (iv) in respect of a clause in the earlier agreement which is not directly germane to the subject-matter of the later agreement, it is not permissible to construe general words as incorporating such clause therein when the clause in terms does not relate to transactions of such later contract; such a clause can only be incorporated in the later contract by clear words either in the earlier or subsequent contract.

8. Applying the very principles enumerated by the Calcutta High Court to the facts of the present matter, it is difficult to appreciate why the arbitration clause appearing in the respondent's printed form, is not directly germane to the subject-matter of the contracts between the petitioner and the respondent's selling agent. The arbitration clause in the terms and conditions in the respondent's printed form, would certainly be one of the terms and conditions on which the petitioner agreed to purchase the goods under the contracts of the respondent's selling agent. There is no inconsistency, vagueness or uncertainty, as is manifest from the general clause in the contracts of the respondent's selling agent, which in terms refers to the terms and conditions contained in the respondent's printed form, the arbitration clause being one of them. On the contrary, far from being of assistance to the petitioner, the principles enumerated by the Calcutta High Court go against the petitioner, as is also borne out by the cases hereafter.

9. What happens where A sells goods to B by a contract containing an arbitration clause and thereafter B enters into a contract with C to sell the same goods to C on the same terms and conditions as in the contract between A and B? Can it be said that the arbitration clause in the earlier contract was incorporated in the later contract or not? In *Louis Dreyfus & Co. v. Arunachala Ayya*, (1931) 58 Ind App 381 : (AIR 1931 PC 289), the Privy Council answered the question in the affirmative. The facts in that case were that on 25th Apr., 1918 a written agreement was entered into between the appellants and certain other persons whereby the latter were to act as Dubashes (Dubash = an interpreter—Ed.) to the appellants. The agreement contained an arbitration clause. Under

that agreement several contracts were made between the appellants and the dubashes including 4 contracts in Aug., 1918, each containing the words—

"Conditions as per agreement with you (i.e. the appellants) dated 25th Apr., 1918." Observing that each of the 4 contracts—

"..... by direct reference to the agreement of Apr. 25, 1918, embodied the arbitration clause".

it was held by the Privy Council that the combined effect of the agreement of 25th Apr., 1918 and the 4 contracts was to import into each of the 4 contracts a provision for arbitration in terms of the arbitration clause contained in the agreement of 25th April, 1918. In *Vali Mahomed Ayoob v. Shamdeo Gopiram*, (1930) 34 Cal WN 447 : (AIR 1930 Cal 774), in respect of a contract of sale, the entry in the sowda book of the vendors signed by the purchasers, recited that the vendors had purchased the goods from a certain importing firm and that all the terms in the present transaction were to be according to the contract between the vendors and the importing firm. It was held by the Division Bench of the Calcutta High Court that the terms of the contract between the vendors and the importing firm, so far as they could and did apply, were made applicable by the above to the present transaction and accordingly an arbitration clause to be found in the first contract must be taken to have been imported into the second contract. The decision in *Haji Vali Mahomed's* case was approved by the Full Bench of the Calcutta High Court in *Dwarkadas v. Daluram*, AIR 1951 Cal 10 (FB). In that case, A entered into a contract with B for sale of certain cloth. It was an express term in the contract that it was subject to all the terms and conditions of contract to A by C (viz. the importers of the cloth). The arbitration clause in the contract between A and C referred to arbitration of disputes which arose "in respect of the goods or in reference to any of the conditions thereof". It was held that the arbitration clause in the earlier contract between A and C was in fact framed in the widest terms and if the clause were to be written in the subsequent contract between A and B, it would be wholly intelligible and consistent with the terms of the subsequent contract and would on the face of it apply to all disputes under the subsequent contracts; that being so, the arbitration clause found in the contract between A and C was imported into the subsequent contract between A and B. It was observed by the Full Bench of the Calcutta High

Court that the terms of a document can be incorporated by reference when they are not inconsistent with the express terms of the incorporating document and are not repugnant to the transaction which that document represents. It was further observed that the general rule of construction is that a document should be construed according to the plain meaning of the words used; but if the literal construction leads to absurdity, repugnancy or inconsistency, then the general rule should be modified to avoid such a result and the incorporation of such a clause is excluded in the case of inapplicable or insensible conditions. It was further observed that an arbitration clause in one contract can be imported into a subsequent contract provided that when so imported, it is not inconsistent with the terms of the subsequent contract.

10. These decisions were brought by me to the pointed attention of Mr. Tulzapurkar. With his habitual discretion, he had no comment to offer and no doubt rightly so. These decisions including the decision of the Full Bench of the Calcutta High Court in Daluram's case (AIR 1951 Cal 10) (FB) (which has also been referred to in Abu Road Electricity case (AIR 1977 Cal 482) (supra)), are a complete answer to the petitioner's challenge to the award and put the same beyond the pale of controversy. To uphold Mr. Tulzapurkar's contentions to the contrary, would be to do violence to the plain reading of the general clause, contrary to all canons of construction.

11. In the result, the petition must stand dismissed with costs. The facts are gross and the challenge to the award without a vestige of tenability. If I do not mulct the petitioner in compensatory costs, it is a temptation I resist with some difficulty.

Petition dismissed.

AIR 1982 BOMBAY 76

MODY, J.

M/s. Govindji Jevat and Co., Petitioner v. Shree Saraswati Mills Ltd., Respondent.

Arb. Petn. No. 126 of 1980 In Award No. 29 of 1980, D/- 23-2-1981.

Evidence Act (1 of 1872), S. 115 — Estoppel — Arbitration award — Party accepting payment under award is estopped from challenging the award. Appeal No. 32 of 1952, D/- 28-8-1952 (Bom), 1940 AC 412 and (1926) 1 KB 348, Rel. on. (Para 10)

LY/LY/F869/81/HR/RSK

Cases Referred : Chronological Paras
(1952) Appeal No. 32 of 1952, D/- 28-8-1952 (Bom) 6

1940 AC 412 : 162 LT 195 : (1940) 1 All ER 425 (HL), Lissenden v. C. A. V. Bosch Ltd. 7

(1926) 1 KB 348 : 95 LJ KB 386 : 134 LT 494 (CA), Dexters Ltd. v. Hill Crest Oil Company (Bradford) 9

H. V. Gala, for Petitioner; S. M. Jhunjhunwala, for Respondent.

ORDER :— This is a petition to challenge the arbitration award of the East India Cotton Association Ltd. made pursuant to the rules of the said Association.

2. The facts leading to the award and the challenge thereto are as follows. Pursuant to several contracts which were all made subject to the bye-laws of the said Association, the petitioner agreed to sell and deliver to the respondent, various quantities of cotton bales aggregating to 5750. Disputes and differences arose between the parties, which resulted in a claim being filed by the petitioner before the arbitrators. In the said arbitration the respondent did not appear and an award came to be passed for Rs. 1,15,164.13 ps. in favour of the petitioner. The rules provided for a right of appeal to the board of directors of the said Association, and an appeal was filed by the respondent. In the appeal the amount was reduced to Rs. 37,500/- and interest. It is the result of the appeal which is under challenge.

3. After the appeal was decided the respondent sent to the petitioner a sum of Rs. 38,944-67 ps. along with its letter dated 24-3-1980, in full implementation of the award. The amount was made up of the principal amount and interest. This amount was sent by demand draft and the demand draft was encashed by the petitioner before 2nd April, 1980. After encashing the same the petitioner addressed a letter to the respondent stating that the petitioner intended to take proceedings to set aside or modify the said award and that the demand draft was accepted without prejudice to the petitioner's rights and contentions in the matter. It is thereafter that this petition was filed challenging the award.

4. The petitioner challenges the award on the ground of misconduct viz., that the Board has taken into consideration material which was not before the arbitrators such material being a letter addressed by a broker allegedly varying the conditions regarding the commencing of interest and that the letter was neither referred to nor produced before the arbitrators nor can the same be said to have

been proved as no evidence was lead for proving the same. Mr. Gala for the petitioner contends that looking to the facts and circumstances of the case, the Board in appeal could not have relied on the said letter or based its decision thereon without oral evidence having been led particularly, when no contention based on the said letter was taken up at the first stage of arbitration nor was the said letter even referred to anywhere or at any time in the course of the first arbitration. Mr. Gala further contended that this being an appeal, principles analogous to these applicable to appeal Court in Civil Procedure Code were applicable and the Board in appeal ought not to have taken fresh evidence except on the same principles and that these principles did not permit fresh evidence at the appellate stage in the present case.

5. Mr. Jhunjhunwala for the respondent contends that having accepted the payment under the decision of the Board of Directors of the said Association, the petitioner is now estopped from challenging the award and that in any event there is nothing to show that the Board has taken into consideration the said letter and passed an award thereon. He has also contended and tried to establish that from the various contentions and the ultimate decision of the Board, it is apparent that this particular claim of the respondent based on the said letter is not accepted by the Board.

6. Coming to the first contention of Mr. Jhunjhunwala, it appears to me clear from the authorities cited by him that in the facts and circumstances of this case, the petitioner is estopped from challenging the award. Though several authorities were cited, I would refer only to three of them. One is a judgment of the Division Bench of this Court consisting of Chagla C. J. and Bhagwati J. dated 28th August 1952 in Appeal No. 32 of 1952, Kantilal Jiwabhai v. Vadila Chunilal. In that case an award was given in favour of the appellant against the respondent for Rs. 22,736-15-10 and one of the respondents sent a cheque for Rs. 21,736-15-10. This cheque was accepted by the appellant and was sent to the bank for encashment. Even before the cheque was sent the appellant had intimated to the respondents his intention to challenge the award. The appellant also replied to the letter sending the cheque saying that he had accepted the cheque under protest and without prejudice to his rights and contentions. It was held by the single Judge that the appellant having received the benefit under the award could not challenge the award relying on the principle that a person cannot approbate and reprobate. This judg-

ment was upheld by the Division Bench. While dismissing the appeal the Division Bench held, inter alia, as follows:—

“But in this case the appellant’s case was that the award was bad and illegal, and that the arbitrator had no right to make it. Therefore, nothing whatever was due to the appellee under the award, and acceptance of any amount awarded to him under the award is clearly a case where he accepted a benefit under the award and thereby acquiesced in the correctness of the award and the validity of the award, and thereby precluded himself from challenging the award.”

The Principle on which the learned Judge acted is to be found in Russel on Arbitration, 14th Edition, page 191; and what the learned author says is that it will be good answer to a motion to set aside an award if the opposing party can show that the party moving has acquiesced in the award by knowingly accepting a benefit under it. The emphasis on ‘knowingly’ is in order to point out that the acceptance of the benefit under the award should not be in ignorance of the fact that the award has been made. If the party accepting the benefit wishes to challenge the award, as in this case there cannot be the slightest doubt that the benefit was accepted knowingly by the party.

“But before he filed this petition he never thought it advisable to return the cheque or the amount of the cheque which he had cashed and which he had utilised. It is difficult to see how it would ever be open to a party solemnly to get up in Court and challenge the award in respect of which he has obtained a substantial benefit and which he never thinks of returning to the other side.”

7. The next authority which is cited by Mr. Jhunjhunwala is 1940 AC 412, Lissenden v. C. A. V. Bosch Limited. In that case an award was made by a County Court under the Workmen’s Compensation Act for payment of certain weekly amount to a worker. There was a right to appeal against the said award given by the rules framed under the Act. The Worker after accepting some weekly payments, filed an appeal challenging the award and it was contended that the appeal was barred on the principle of “approbate and reprobate”. It was held by the House of Lords that this principle may be applicable to the award in normal sense of the petition to challenge the award but was not applicable and was not appropriate in the case of an appeal from an order of Court and complete different principles applied in such a case. It was held in that case that the award was in the nature of an order of the Court and ap-

peal was a normal right of appeal provided by statute as in the case of Court's orders and decrees. This case was therefore, not directly a case of an award as is normally understood. However, while explaining the difference between the position as applicable to an appeal against orders of Court and petition for setting aside an award, the House of Lords has stated at page 434 as follows :

"In arbitration in the ordinary sense the award is the fruit of a consensual agreement under which the parties have agreed to accept the arbitrator's award, which thus governs them by their agreement. There is no appeal in the proper sense of the term. The Court has certain powers over arbitrators, which the parties may invoke. Thus a party may claim that the award was made without jurisdiction or that the arbitrator was guilty of misconduct and that for those or other like reasons should be set aside. A party who has treated the award as valid, for instance, by accepting payment of what it awarded him, would generally be barred from adopting the inconsistent attitude of claiming to set it aside. It might then be said that he could not affirm and disaffirm or perhaps even that he could not approbate and reprobate".

8. The principle that emerges from the two decisions is that it is possible in an appeal against decree or order of Court to confirm the same partly and set aside the same partly even though two parts may not be severable. Another thing to be noted in such a case is that when an appellant challenges a decree against him, the result of the appeal can only be adverse to the appellant to the extent of his challenge in case his challenge fails and if he succeeds only that part is set aside while the part of the decree which is not challenged remains untouched; therefore, the appellant when he receives the money or some other benefit under the decree under challenge always retains the benefit whether he wins or loses the appeal. This is not the position in the case of an award. Whenever an award is challenged on whatever ground it may be, the award has to be set aside in toto or if made in parts, the entire part challenged and thereafter there will not exist any basis for the person challenging the award to retain the benefit received by him under the award or the part of the award which is challenged. In my view this is an important distinction between an award and a decree or order of the Court.

9. Another case cited by Mr. Jhunjhunwala was *Dexters Ltd. v. Hill Crest Oil Company (Bradford) Ltd.* reported in (1926) 1 KB 348. In that case the umpire made three awards on different footings and then stated

a special case leaving the Court to decide which award was right. The amounts in the first and the second awards which were in favour of the appellant were different, the amount in the second award being higher than the one in the first award. The third award was against the appellant in that case. The Court decided that the first award was the correct award. The appellant in whose favour the said first award was decided, demanded the amount and obtained payment and thereafter appealed from the decision of the Judge contending that the second award was the right one. It was held in that case that having demanded and accepted payment under the first award the appellant was precluded from contending that it was wrong. This case was decided on the same basis as the decision in the earlier cases and also on the basis that by accepting payment under the first award the appellant had precluded the respondent from challenging the second award and contending that the third award was the correct award.

10. Accordingly, in my view the principle of estoppel applies and the petition is not maintainable.

11. As regards the second contention of Mr. Jhunjhunwala and the contentions of Mr. Gala, it is for the petitioner to establish from the record that the Board has taken into consideration the new evidence viz., the said letter of the broker. There is absolutely nothing to show that it has been so taken into consideration. The only material available is grounds for appeal, reply thereto and the minutes of the meeting and they do not support the contention of Mr. Gala, in fact, they do not throw any light on the question. The original claim was and the amount awarded was Rs. 1,15,164-13 ps. The amount on the basis of the impugned letter according to the respondent, as stated in the memo of appeal would come to Rs. 81,400-06 ps. But this amount includes not only the interest and the bank charges but also the amount of interest relating to period after 18th April, 1977 when admittedly, there were six contracts containing the period of grace of 25 days covering 1700 bales and so there was no question of relying on the said letter. This admission was made before the Board as is recorded in the minutes. The statement annexed to the memo of appeal shows that the amount of interest as per the said alleged letter would come to Rs. 42,771-22 ps. Mr. Gala contends that the amount awarded would have been Rs. 34,164/- if the contention of the respondent regarding the sum of Rs. 81,400-06 ps. was accepted in toto. This would be the

position if all other claims of the respondent were rejected. But the amount awarded is not that but Rs. 37,500/- which approximates the amount of Rs. 37,124.19 ps. which would be payable if the contention of the respondent based on this letter was rejected and only the other contentions of the respondent which were in respect of the lorry hire, hundies for excess amount, shortage in weight and for rebate in respect of contracts for which the credit was admittedly to be given were accepted. This being the position it is not possible to conclude that the Board took into consideration the impugned letter.

12. It is not permissible for the Court to speculate as to how the minds of the members of the Board worked, but the discussion above clearly shows that it is possible that the Board may not have accepted the contention of the respondent based on the said letter and it was possible for the Board to arrive at the figure it did without relying on the impugned letter. It is for the petitioner to conclusively establish that the arbitrators have acted otherwise which it has failed to do.

13. In the circumstances the petition fails and is dismissed with costs. Looking to the time taken, the cost is quantified at Rs. 1,000/-.

Petition dismissed.

AIR 1982 BOMBAY 79

(NAGPUR BENCH)

WAIKAR, J.

Ratiram Pundlik Khedkar, Petitioner v. Pundlik Arjun Khedkar, Respondent.

Civil Revn. Appln. No. 677 of 1979, D/- 16-1-1980.*

Civil P. C. (5 of 1908), S. 94 and O. 39, Rr. 1 and 2 — Grant of injunction — During pendency of proceedings under S. 145, Criminal P. C., suit for perpetual injunction restraining defendant from disturbing plaintiff's possession over suit lands filed — After institution of suit Kararnama executed in favour of defendant and defendant's possession thus acknowledged by plaintiff himself — Also order of Magistrate passed under S. 145, Criminal P. C. holding defendant to be in possession — Held application for temporary injunction filed thereafter could not be allowed and order of Magistrate under S. 145, Criminal P. C. was binding on plaintiff unless it was set aside under Expl. 8 to S. 11, C. P. C.

*From order of V. L. Ruikar, Extra Asst. J., Akola, D/- 27-11-1979.

An application for temporary injunction in a suit for perpetual injunction proceeds on an assumption that the plaintiff on the date of the suit and on the date of making of such an application is in actual possession of the property and that his peaceful possession is being threatened. If the plaintiff is not in possession then the suit for perpetual injunction simpliciter in fact would be untenable and if in such a situation if he applies for temporary injunction (not being in possession) and if the Courts were to grant such a relief, there is every possibility that such an order obtained by an ingenious and crafty plaintiff on suppression of true facts is likely to be used not as a shield to preserve and protect his possession, but verily as a warrant of possession against which the Courts issuing an order of injunction must guard themselves. The prima facie case for the plaintiff, therefore, lies in pointing out satisfactory evidence that the possession (and not title) is with him. Even assuming that on the date of the suit the possession was with the plaintiff, but on the day on which he moves the Court for temporary injunction his possession is lost, then not only the application for temporary injunction (which is founded on the fact that the plaintiff is in actual possession) is untenable, but even the suit itself simpliciter for perpetual injunction would be bad. The application for temporary injunction could not be allowed in the teeth of the fact that the plaintiff is not in possession when he made such an application. In fact, when the Magistrate under Section 145, Cr. P. C. orders handing over possession that right would come to an end only on passing of a decree or order for eviction in due course of law, but so long as that right exists, no injunction order can be issued, since the order under Section 145, Cr. P. C. protects eviction from the date of the order and the remedy of the aggrieved party is either to get it cancelled by way of revision or by filing a suit, but a suit only for temporary injunction without claiming relief of possession would be misconceived. (1973) 14 Guj LR 812, Rel. on.; 1965 Mah LJ (SOC) 70, Refd. (Paras 10, 11, 13)

Cases Referred: Chronological Paras

1977 Mah LJ (SOC) 82	9
(1973) 14 Guj LR 812	13
AIR 1969 Manipur 29	8
1965 Mah LJ (SOC) 70	13
AIR 1962 SC 527 : 1963 All LJ 169 : 1962	
Supp (1) SCR 450	8
AIR 1953 Pat 399 : 1953 BLJR 442	8
AIR 1939 Mad 733 : (1939) 2 Mad LJ 44	8

R. N. Deshpande, for Petitioner; M. S. Deshpande, for Respondent.

ORDER:— This revision application is filed by the original defendant No. 1 against an order passed by the Extra Assistant Judge, Akola allowing the application of the plaintiff (non-applicant) for temporary injunction. The trial Court had rejected the application of the plaintiff for temporary injunction, but in the appeal the order was set aside and the learned Extra Assistant Judge having allowed the same, the original defendant No. 1 preferred the present revision application.

2. The defendant No. 1 is the adopted son of the plaintiff. Admittedly the plaintiff was the owner of the suit fields and he filed the suit only for perpetual injunction praying that the defendant No. 1 should not disturb his possession over the suit fields, which he tried to do a few days prior to the filing of the suit with the help of some persons.

3. The plaintiff filed an application for temporary injunction and an ex parte temporary injunction was granted by the trial Court. When the defendant No. 1 put in appearance in response to the show cause notice, he stated that he was the adopted son of the plaintiff by virtue of the registered adoption dated 1-5-1971. The plaintiff was old and infirm and suffered from gangrene and as he was unable to manage the property, the management and cultivation was entrusted to him and he was in actual possession of the same. His name was also entered in the Record of rights after notice to the plaintiff and that his possession for the year 1978-79 is also shown in the crop-statement. He further stated that the plaintiff was disputing the adoption deed at the instance of his nephews and was trying to disturb his possession. He, therefore, prayed for vacation of the order of temporary injunction passed ex parte against him, since he was himself in possession of the property to the exclusion of the plaintiff on the date of the suit.

4. As stated earlier, the trial Court after hearing both the parties vacated the temporary injunction order which was issued earlier, but in appeal the learned Extra Assistant Judge allowed the same and hence this revision application by original defendant No. 1.

5. Shri R. N. Deshpande, the learned counsel for the applicant, submitted that prior to the filing of the present suit on 25-6-1979 proceedings under S. 145 of the Code of Criminal Procedure were commenced on 20-5-1979 and the learned Sub Divisional Magistrate had passed orders on 3-9-1979 upholding the possession of the defendant No. 1 and directing the plaintiff not to disturb his possession. He further submitted

that even after the institution of the suit on 25-6-1979 the plaintiff himself had executed a Kararnama, or an agreement, on 3-7-1979 whereby he requested the defendant No. 1 to execute sale deed in respect of 5 acres in favour of each of his two nephews. He submitted that this Kararnama was wrongly read by the learned appellate Judge when the recitals contained an admission of the plaintiff that the defendant no. 1 was the full owner in the management of the property.

6. It was further submitted by Shri R. N. Deshpande, that the defendant No. 1 had filed an affidavit at Ex. 56 of the wife of the plaintiff himself in which she had admitted the fact of possession of the defendant No. 1. The other evidence that was relied upon in the Courts below and also relied upon in this revision are the affidavits of Jiwanising, Balwant and Dharmarao (Exts. 43 to 45) stating that they had received amounts from the defendant No. 1 for performing the summer operations of this land. Mr. R. N. Deshpande further submitted that even assuming that the defendant No. 1 was only in joint possession of the suit fields, as observed by the learned Appellate Court, then a writ of temporary injunction could not be issued against him restraining him from entering upon the suit fields.

7. Mr. M. S. Deshpande, the learned counsel for the non-applicant (plaintiff), on the other hand, submitted that the crop-statements for the years 1976-77 and 1977-78 showed that it was the plaintiff who was in possession of the suit property, though in the year 1978-79 the possession of the defendant No. 1 came to be shown. He referred me to one notice dt. 20-5-1979 (Ex. 20/1) which was issued by the defendant No. 1 to the plaintiff just a month or so before the suit wherein the defendant No. 1 had stated that the plaintiff and his wife were not on talking terms and were residing separately, about which he was extremely sorry and he requested both the plaintiff and his wife to come and reside together. He, therefore, submitted that no weight could be attached to the affidavit at Ex. 56 of the wife of the plaintiff relied upon by the defendant No. 1. He further submitted that the grant or refusal of injunction was a discretionary relief and it should not be lightly interfered with by this Court in its revisional jurisdiction.

8. Mr. M. S. Deshpande relied upon *Manickvachakam Chettiar v. Official Receiver, East Tanjore, Nagapatam* (AIR 1939 Mad 733) which lays down that if the lower Court wrongly decided the question as to burden of proof it was no ground for interference in

revision. In *Mt. Bibi Rafiquan v. Gopi Mohton* (AIR 1953 Pat 399) what was observed was that when justice has been done between the parties and no prejudice to their respective claims has occurred, the High Court would not interfere. Further in *Naik Brindhavanrai v. Churamani Thapa*, (AIR 1969 Manipur 29) it was observed that interference under S. 115 of the C. P. C. is not to be made in an order based on appreciation of evidence and lastly in *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal*, (AIR 1962 SC 527) which was relied upon, it was observed that temporary injunction could be granted under inherent jurisdiction by a Court.

9. On the other hand, Mr. R. N. Deshpande referred me to *Namdeo v. Digambar*, (1977 Mah LJ (SOC) 82) in support of his proposition that the evidence tendered by the parties cannot be ignored and if it is ignored on unsustainable grounds, it would be an error of jurisdiction entitling the High Court to interfere.

10. Now, in the first place, I find that an application for temporary injunction in a suit for perpetual injunction proceeds on an assumption that the plaintiff on the date of the suit and on the date of making of such an application is in actual possession of the property and that his peaceful possession is being threatened. If the plaintiff is not in possession then the suit for perpetual injunction simpliciter in fact would be untenable and if in such a situation if he applies for temporary injunction (not being in possession) and if the Courts were to grant such a relief, there is every possibility that such an order obtained by an ingenious and crafty plaintiff on suppression of true facts is likely to be used not as a shield to preserve and protect his possession, but verily as a warrant of possession against which the Courts issuing an order of injunction must guard themselves.

11. The prima facie case for the plaintiff, therefore, lies in pointing out satisfactory evidence that the possession (and not title) is with him. Even assuming that on the date of the suit the possession was with the plaintiff, but on the day on which he moves the Court for temporary injunction his possession is lost, then not only the application for temporary injunction (which is founded on the fact that the plaintiff is in actual possession) is untenable, but even the suit itself simpliciter for perpetual injunction would be bad.

12. The learned appellate Judge in the instant case tried in vain to address himself to the question of title and to the provisions

of S. 12 (c) of the Hindu Adoptions and Maintenance Act. Even assuming that the defendant No. 1 is the adopted son of the plaintiff and did not and could not divest the adoptive father of his title, if it is established that the plaintiff had put him in possession of the management of the property on his behalf, the remedy of the plaintiff lay in filing a proper suit for possession of title and not a bare suit for perpetual injunction. In this view of the matter, the following observations of the lower appellate Court seem wholly irrelevant:

"Thus defendant No. 1 being the adopted son, the plaintiff expressed his desire that this defendant should thereafter look after the management of the property of the plaintiff. Does it thereby mean that the plaintiff has surrendered all his interest in his property and exclusively given the entire property in such kind of possession of the defendant No. 1 and that no interest of the plaintiff was retained with the plaintiff in the suit property? I do not think that it was such an intention of the parties. It simply means that the plaintiff became old and was not in a position to physically supervise the cultivation of the suit property. Seeing that the defendant No. 1 is living with him probably it appeared to him that it would be better if the management is entrusted to defendant No. 1. It does not mean that the possession of the plaintiff is lost. Such a possession of the defendant No. 1 would not amount to his possession exclusively and separate from the plaintiff only if it is supported with some title."

13. So far as the finding of the Criminal Court in the proceedings under S. 145 of the Cr. P. C. is concerned, the learned Extra Assistant Judge again tried in vain to distinguish the case, namely, *Visan Narayan Gedam v. Madhukar*, (1965 Mah LJ (SOC) 70). In that case the order of the Magistrate holding the defendant to be in possession was passed prior to the filing of the suit. In the instant case the suit was filed on 25-6-1979 and the order in the proceedings under S. 145 of the Cr. P. C. came to be passed about 3 months thereafter, that is, on 3-9-1979, which in fact ought to relate to the date when the proceedings under S. 145 were commenced, that is, on 20-5-1979. When the order in those proceedings was passed, was in fact not very material. That was at any rate a relevant and material piece of evidence which negated the prima facie case of the plaintiff that he was in possession of the suit

property. As stated earlier, even if it is shown that after the filing of the suit for perpetual injunction, the plaintiff lost possession during the pendency of the suit, an application for temporary injunction could not be allowed in the teeth of the fact that the plaintiff is not in possession when he made such an application. In fact, as observed in *Aher Mesa Hamir v. Charan Shamla Sura* (1973) 14 Guj LR 812, when the Magistrate under S. 145, Cr. P. C. orders handing over possession that right would come to an end only on passing of a decree or order for eviction in due course of law, but so long as that right exists, no injunction order could be issued, since the order under Section 145, Cr. P. C. protects eviction from the date of the order and that the remedy of the aggrieved party is either to get it cancelled by way of revision or by filing a suit, but a suit only for temporary injunction without claiming relief of possession would be misconceived. The said order passed by the Magistrate under S. 145, Cr. P. C. would also be binding on the plaintiff unless it is set aside under Explanation VIII to Section 11 of the C. P. C., as amended.

14. The Kararnama dt. 3-7-1979 executed by the plaintiff in favour of the defendant No. 1 after filing of the suit was in fact misread by the learned Extra Assistant Judge. The plaintiff in fact by executing the said Kararnama virtually recognised the defendant No. 1 as a full owner in actual possession and management of the suit property. This document containing the admission of the plaintiff as regards the fact of possession was duly proved by the defendant No. 1 by filing the affidavits of its scribe Sonaji (Ex. 40) and of the two attesting witnesses Bhimrao (Exhibit 42) and Ajabrao (Ex. 41).

15. The order passed by the Extra Assistant Judge setting aside the order of the trial Court has, therefore, to be set aside since the Assistant Judge without considering the question as to whether the plaintiff was in fact in actual possession of the property or not was influenced more by the fact that he was the holder of the title and that he must be deemed to be in joint possession along with his adopted son as the member of the joint Hindu family, which in fact was never the case made out by the plaintiff in applying for temporary injunction. The order being based upon wrong appreciation of the evidence and the circumstances of the case and on wrong approach to issue in question has to be set aside under S. 115 of the C. P. C. on the ground of error of jurisdiction.

16. In the result, the revision application is allowed and the impugned order passed by

the learned Extra Assistant Judge is set aside and the order passed by the trial Judge has to be restored. The application of the plaintiff (non-applicant) for temporary injunction stands dismissed. In the circumstances of the case there will be no order as to costs.

Revision allowed.

AIR 1982 BOMBAY 82

CHANDURKAR AND BHONSALE, JJ.

Bhagwan Motiram Mali (Mahajan), Petitioner v. Jayant Shridhar Khare and another, Respondents.

Civil Revn. Appln. No. 369 of 1978, D/- 5-12-1980.

Maharashtra Debt Relief Act (3 of 1976), Ss. 11 and 12 — Bar of jurisdiction of Civil Courts — Civil Court is barred from deciding questions referred to in S. 7 (1) or (6). AIR 1977 Bom 42, Overruled. (Civil P. C. (1908), S. 9).

On a careful scrutiny of Ss. 7, 11 and 12, it is clear that the scope of S. 11 cannot be restricted only to a dispute contemplated by S. 4 (e). For ascertaining whether the jurisdiction of the Civil Court is excluded under Section 11, all that is material is to ascertain whether any questions which under Chap. III or under the D. R. Act are required to be decided by the Authorised Officer have arisen for decision before the Civil Court and once such questions arise before the Civil Court, the Civil Court is obliged statutorily to stay the suit and make a reference to the Authorised Officer. The fact that those questions are raised or could be raised in a proceeding arising out of a claim by a debtor under Section 4 (e) to be instituted by the creditor is of no consequence for the purposes of ascertaining the nature of the questions which the Civil Court is barred from deciding. By S. 11, the Civil Court is barred from deciding any question which is required to be settled, decided or dealt with by the Authorised Officer. For the purposes of identifying the question which is required to be settled, decided or dealt with by the Authorised Officer under the Act and to which reference is made in S. 11, one has to go to S. 7. It is no doubt true that proceeding contemplated by S. 7 arises out of a claim under S. 4 (e). What is, however, important is that S. 7 also enumerates the questions which the creditor can raise before the Authorised Officer. Those questions are that:— (1) the person who claims to be a debtor is not a marginal farmer, a rural artisan, a rural labourer or

a worker; (2) the dispute regarding the eligibility of the debtor for relief under the Act on any other ground including the valuation of the immovable property of a worker. These are, therefore, the questions which are referred to in S. 11 as the questions which are required to be settled, decided or dealt with by the Authorised Officer by or under Chapter III of the D. R. Act. A further jurisdiction of the Authorised Officer to determine all questions which are raised by the creditor is to be found in S. 7 (6) which provides that the Authorised Officer shall have power to determine all questions in relation to, or connected with, the question or dispute raised by the creditor in his application. This provision is merely ancillary to the provision in S. 7 (1) and where the determination of any question which is related to or connected with the questions referred to in S. 7 (1) becomes necessary, the jurisdiction to decide those additional questions is also with the Authorised Officer. Therefore, wherever questions of the nature referred to in S. 7 (1) and (6) are raised before the Civil Court, the provisions of Ss. 11 and 12 of the D. R. Act will be attracted and the jurisdiction of the Civil Court to decide those questions is ousted by S. 11 and unless a reference is made to the Authorised Officer by the Civil Court for adjudication of those questions and the decision of the Authorised Officer is communicated to the Civil Court, the Civil Court is incompetent to proceed to decide the suit if the decision of those questions is necessary for the decision of the suit. Therefore, the view taken in AIR 1977 Bom 42 that the only question which is required to be settled, decided or dealt with by the Authorised Officer is one in respect of the return of the security contemplated by S. 4 of the Act and that the mischief of Ss. 11 and 12 does not extend to the cases of unsecured debts or debt-aspects of secured debts is not correct. Before each of Cls. (a), (b), (c), (d) and (e) is invoked by the debtor, it will necessarily require the decision of the questions referred to in S. 7 (1) and one these questions are raised in a suit, having regard to the provisions of Ss. 11 and 12, the jurisdiction of the Civil Court to decide those questions will be ousted. Civil Revn. Appln. No. 539 of 1976, decided on 12-12-1977 by Kantawala, C. J. (Bom), Approved; AIR 1977 Bom 42, Overruled.

(Paras 17, 18, 23-A)

In the instant case, the plaintiff-creditor had filed a suit against the applicant debtor for recovery of an amount of Rs. 4,329.90 on the strength of a promissory note for Rupees 3,000/- executed by the debtor in favour of the plaintiff. In the suit the debtor raised

the contention that he had 1 hectare of land and therefore he was entitled to the benefits under the Act. On this reference made by the debtor, the trial Court ordered that the reference be made to the proper authority. But the trial Court recalled the reference on the view that it had jurisdiction to try the matter under the reference.

Held, the order recalling the reference made by the trial Court was liable to be set aside. In the application on which the reference was made the defendant had merely stated that the defendant had 1 hectare of land and, therefore, he was entitled to the benefits of the D. R. Act. The trial Court had to determine, in the light of S. 7 read with Sections 11 and 12 whether it had jurisdiction to decide the reference. (Para 26)

Cases Referred : Chronological Paras
AIR 1977 Bom 42 3, 4, 5, 7, 9, 15, 20, 23-A
(1977) Civil Revn. Appln. No. 539 of 1976,
D/- 12-12-1977 (Bom), M/s. Vithaldas
Raghunathdas Soni v. Ramgopal Hiralal
Tapdiya 4, 24

P. M. Karlekar, for Petitioner; Y. S. Jahagirdar, for Respondent No. 1.

CHANDURKAR, J.:— This revision application filed by original defendant No. 1-debtor has been referred to a Division Bench in view of the conflict arising out of two decisions of this Court, one given by Mridul J. and the other by Kantawala C. J. on the construction of the provisions of Ss. 11 and 12 of the Maharashtra Debt Relief Act, 1975 (hereinafter referred to as "the Debt Relief Act").

2. The plaintiff creditor had filed Suit No. 101 of 1973 against the applicant debtor for recovery of an amount of Rs. 4,329.90 on the strength of a promissory note for Rupees 3,000/- executed by the debtor in favour of the plaintiff on 24th Dec., 1970. In the suit the debtor raised a contention that in view of the Maharashtra Debt Relief Ordinance which was promulgated on 22nd Aug., 1975 which is now replaced by the Debt Relief Act, the debtor was a marginal farmer holding less than 1 hectare of unirrigated land and, therefore, under the provisions of the Ordinance, the debt in question stood discharged and the suit was, therefore, liable to be dismissed. On this application the trial Court made an order on 3rd Aug. 1976 as follows :

"Reference be made to the proper authority."

Accordingly a reference came to be made to the authorised officer.

3. It appears that in view of the decision of this Court in *Promod M. Jhaveri v. Sukh-*

deo Ramratan, AIR 1977 Bom 42 (43), the learned Civil Judge suo motu decided to recall the reference and made the following order on 14th Mar., 1978 without hearing the petitioner :

"In view of AIR 1977 Bom 42 (43) this Court has jurisdiction to try the matter under reference. Hence I call back the reference."

This order has been challenged by the debtor-defendant in this revision application.

4. When this revision application came up for hearing before D. B. Deshpande, J., apart from the decision in Promod Jhaveri's case, another unreported decision of Kantawala, C. J. in *M/s. Vithaldas Raghunathdas Soni v. Ramgopal Hiralal Tapdiya* in Civil Revision Application No. 539 of 1976 decided on 12th Dec. 1977 was brought to the notice of the learned Judge. The learned Judge referred to the view taken by Mridul J. that "the mischief of Ss. 11 and 12 does not extend to the cases of unsecured debts or debt-aspects of secured debts, which matters being within the purview of Cls. (a), (b), (c) and (d) thereof, have to be dealt with by the Civil Courts concerned". Mridul J. had rejected the objection to the jurisdiction of the Civil Courts to try the issues raised in the Civil Court in its insolvency jurisdiction. Kantawala C. J. had taken the view that "the question whether a person who claimed to be a debtor was a worker or not was to be decided by the Authorised Officer" and two additional issues were, therefore, framed dealing with the question whether the defendants or any one or more of them were workers within the meaning of S. 2 (o) of the D. R. Act and whether the debt or the liability, if any, under the transaction in suit was wholly discharged by reason of the provisions of S. 4 of the D. R. Act. Deshpande J. took the view that the suit out of which the revision application decided by Kantawala C. J. arose was for a simple money transaction and did not fall within the purview of S. 4 (e) of the D. R. Act and yet Kantawala C. J. held that the jurisdiction was with the Authorised Officer alone and the Civil Court had no jurisdiction to decide this question. It is because of this conflict of view in the two decisions referred to above that this revision application has been referred to a Division Bench.

5. Mr Karlekar appearing on behalf of the debtor-defendant has contended that there is express provision in Ss. 11 and 12 as well as in S. 4 (b) of the D. R. Act which ousts the jurisdiction of the Civil Court in respect of the issue which is required to be settled, decided or dealt with by the Authorised Offi-

cer under the Act and, therefore, according to the learned Counsel, when the debtor had applied to the trial Court that he was a marginal farmer because he owned less than 1 hectare of land, he was, therefore, freed of the debt liability by the provisions of the Ordinance, the question as to whether he was a marginal farmer or not could be decided only by the Authorised Officer and the Civil Court did not have jurisdiction to decide that question in view of the express provision in Ss. 11 and 12 of the D. R. Act. The learned Counsel questioned the correctness of the view taken by Mridul J. in Promod Jhaveri's case (AIR 1977 Bom 42).

6. Mr. Jahagirdar appearing on behalf of the plaintiff has wholly relied upon the decision of Mridul J. in support of his contention that the reference as contemplated by S. 12 of the D. R. Act could be made only in respect of matters which are covered by Cl. (e) of S. 4 of the D. R. Act and consequently, according to the learned Counsel, since, as held by Mridul J., an occasion to make an application under S. 7 by the creditor would arise only for the purpose of implementing the provisions of S. 4 (e) of the Act, the reference contemplated by S. 12 could be made only in a case where the question arises out of a claim for return of the pledged articles as contemplated by S. 4 (e) of the D. R. Act.

7. Before we deal with the decision of Mridul J. in Promod Jhaveri's case (AIR 1977 Bom 42) it is necessary to set out a few provisions of D. R. Act. We are not concerned with the provisions of the Ordinance which stands repealed by the D. R. Act and the relevant provisions admittedly are now the provisions of the D. R. Act. The substantive provision providing for liquidation of certain debts is contained in S. 4 of the D. R. Act. S. 4 provides :

"Notwithstanding anything contained in any other law for the time being in force or in any contract or other instrument having force by virtue of any such law, and save as otherwise expressly provided in this Act, every debt of a worker whose immovable property, if any, does not exceed twenty thousand rupees in market value and every debt of any other debtor, outstanding on the appointed day, including the amount of interest, if any, payable by a debtor shall be deemed to be wholly discharged."

The substantive provision in S. 4 thus firstly deals with every debt of a worker, whose immovable property does not exceed twenty thousand rupees in market value and it further deals with every debt of any other deb-

tor. The debts of these persons which are outstanding on the appointed day are now statutorily deemed to be discharged and the debtors are freed from any liability which they may have originally owed to the creditors.

8. Section 4 further enumerates the consequences which will follow as a result of the statutory discharge of the debt liability of the workers and the debtors. The first consequence is that no such debt due from the debtor on the appointed day would be recoverable from him on, from or against any movable or immovable property belonging to him and further no such property is liable to be attached and sold or proceeded against in any manner in the execution of any decree or order relating to such debt against him. The other consequence stated in Cl. (b) is that no Civil Court shall entertain any suit or proceeding against such debtor for the recovery of any amount of such debt, including interest, if any. However, where a suit or proceeding is instituted jointly against such debtor or any other person, the suit or proceeding in so far as it relates to such other person is not affected. Further, all suits and proceedings (including appeals, revisions, attachment or execution proceedings) pending on the appointed day for the recovery of any such debt against such debtor abate. This, however, does not apply to the sale of any movable property held and concluded before the appointed day or sale of any immovable property confirmed before such day. If a debtor is undergoing detention in a civil prison in execution of any decree for money passed against him a Civil Court in respect of any such debt, the law directs that he shall be released.

9. An important consequence which follows the extinction of the debtor's liability is with regard to the right to receive back the pledged property by the debtor. This consequence is stated in Cl. (e) and since the decision in *Promod Jhaveri's case* (AIR 1977 Bom 42) is based mainly on S. 4 (e) read with S. 7, we reproduce Cl. (e) which reads as follows:

"(e) every property pledged or mortgaged by such debtor shall stand released in favour of such debtor, and the creditor shall be bound to return the same to the debtor forthwith on the debtor making an application in writing in that behalf; and the creditor shall pass a receipt to the debtor of having received the application. If the creditor refuses to pass a receipt, then the debtor may get the application endorsed to that effect under the signature and date of any of the

officers referred to in S. 6 or by any person authorised by them in this behalf.

Explanation 1.— Nothing in this section shall be construed to entitle any such debtor to the refund of any part of a debt already repaid by him or recovered from him before the appointed day.

Explanation 2.— For the purposes of this section, the expression 'debt of a worker' includes a debt arising out of loans taken from more than one creditor."

The effect of Cl. (e) is that there is a statutory obligation created against a creditor to return the property pledged or mortgaged to a debtor forthwith when the debtor makes an application in writing in that behalf. When the debtor gives an application to the creditor, he has to pass a receipt acknowledging that the application has been received. If the creditor refuses to pass a receipt, then the latter may get that application endorsed to the effect that the creditor declines to pass a receipt under the signature and date of any of the officers referred to in S. 6 or by any person authorised by them in this behalf. The officers referred to in S. 6 are the Commissioner of Police, where there is one, and elsewhere the District Magistrate or the Superintendent of Police.

10. Section 5 of the D. R. Act prohibits the creditor from damaging, destroying or tampering with any property pledged or mortgaged with him or any document connected therewith or part with it or otherwise deal with the same except as provided in this Act. This provision operates from the appointed day. We need not refer to the provisions of S. 6 which entitles a debtor to seek assistance of a Police Officer or the District Magistrate to take such steps as may be reasonably necessary for securing the delivery of possession of the property to the debtor.

11. Then comes S. 7 (1) which reads as follows:

"If, in the course of implementing the provisions of S. 4, a creditor raises a question that the person who claims to be his debtor is not a marginal farmer, a rural artisan, a rural labourer or, as the case may be, a worker, or disputes the eligibility of the debtor for relief under this Act on any other ground including the valuation of the immovable property, if any, of a worker, then the creditor shall make an application in writing to an officer not below the rank of an Additional Tahsildar (or any officer in any department who in the opinion of the District Magistrate is of equivalent rank) duly appointed by an order in writing by the District Magistrate in this behalf hereinafter referred to as "the Authorised Officer").

Under sub-sec. (2) of S. 7, an application has to be made within seven days from the date of receipt of the application by the creditor under Cl. (e) of S. 4 or from the date of endorsement made on the application under that clause. Sub-section (6) which deals with the power and jurisdiction of the Authorised Officer reads as follows:

"(6) The Authorised Officer shall have power to determine all questions in relation to, or connected with, the question or dispute raised by the creditor in his application and accordingly, he may determine the extent, or as the case may be, the value of the property, give directions for the safe custody of the pledged property and may pass such orders as may be necessary in the circumstances of each case for enforcing and implementing the provisions of this Act. It shall be lawful for the Authorised Officer to take the assistance of the services of an expert for determining the value of any immovable property; and the provisions of sub-section (3) of S. 9 for payment of honorarium shall apply to such payment."

Sub-sec. (8) of S. 7 deals with finality to the question which the Authorised Officer is required to decide under S. 7 (1) and S. 7 (6) of the D. R. Act. Sub-sec. (8) of S. 7 reads as follows:

"(8) The Authorised Officer shall decide the question as provided in this section and his decision shall be final and conclusive and shall not be called in question in any civil Court. If the property or its value is in the possession of the Authorised Officer and the decision is in favour of the debtor, it shall be delivered to the debtor forthwith; and he shall make an endorsement on the order that the property or value has been delivered to the debtor."

12. It may be pointed out that a "worker", "debtor", "marginal farmer" and "rural artisan" have been defined in S. 2 of the D. R. Act. It is not necessary to reproduce those definitions in full. It is enough to point out that "debtor" means a marginal farmer, a rural artisan or a rural labourer whose total income from all sources did not exceed two thousand and four hundred rupees during the year immediately before the 1st day of Aug., 1975 and a worker whose total income from all sources did not exceed, if living in an urban area six thousand rupees during the year immediately before the said date, and if living elsewhere four thousand and eight hundred rupees during that year is a debtor for the purposes of the Act.

13. It is now necessary to reproduce the provisions of Ss. 11 and 12 of the D. R. Act

on the construction of which the decision of this revision application will turn. Section 11 reads as follows:

"11. (1) No Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Chapter required to be settled, decided or dealt with by the Authorised Officer.

(2) No order of the State Government or any officer or authority made under this Chapter shall be questioned in any Court."

Section 12 reads as follows:

"12. (1) If a suit instituted in any Civil Court involves any issues which are required to be settled, decided or dealt with, by the Authorised Officer under this Act, the Civil Court shall stay the suit, and refer such issues to the Authorised Officer for determination.

(2) On receipt of such reference from the Civil Court, the Authorised Officer shall deal with and decide such issues in accordance with the provisions of this Chapter, and shall communicate his decision to the Civil Court; and such Court shall thereupon dispose of the suit in accordance with the procedure applicable thereto."

Sections 11 and 12 both occur in Chap. III of the D. R. Act. The D. R. Act has been extensively amended by introducing Chapter V-A. It is also common ground that apart from the provisions of Chap. III there is no reference to the Authorised Officer anywhere else in the Act and the only reference to the Authorised Officer is in Ss. 7 and 10.

14. Section 11 bars the jurisdiction of the Civil Court to settle, decide or deal with any question which is by or under Chap. III required to be settled, decided or dealt with by the Authorised Officer. Section 12 lays down the course which the Civil Court has to adopt where a suit before it involves an issue which is required to be settled, decided or dealt with by the Authorised Officer. In case such an issue arises, the Civil Court has to stay the suit and refer the issue to the Authorised Officer for determination. Once the Authorised Officer deals with the issues and decides them and the reference is sent back to the Civil Court, the Civil Court has to dispose of the suit in accordance with the decision of the Authorised Officer in respect of those issues.

15. The crucial question which arises is which are the issues under Chap. III which are required to be settled, decided or dealt with by the Authorised Officer. The only relevant provision is in S. 7 of the D. R. Act. Now, what is contended on behalf of the decree-holder is that S. 7 specifically refers to the jurisdiction which the Authorised Officer has to exercise while implementing the provi-

sions of S. 4 of the D. R. Act and, according to the learned Counsel, the only material clause of S. 4 for the purposes of S. 7 is Cl. (e). Therefore, according to the learned Counsel, unless the dispute between the debtor and the creditor is one which arises out of a claim under Cl. (e) of S. 4 with regard to the return of the pledged property, there is no occasion for the creditor to make an application under S. 7 and consequently it is only in such a case that the provisions of S. 7 will be attracted. The learned Counsel, therefore, contends on the authority of Promod Jhaveri's case (AIR 1977 Bom 42) that since the Civil Court is not implementing S. 4 in a case where there is no question of return of pledged property to the debtor, no question of the Authorised Officer being required to determine any issue which is required to be decided under the D. R. Act arises in such a case. The argument, therefore, is that this scope of Ss. 11 and 12 of the Act is restricted only to a case in which the creditor would have had to apply under S. 7 of the D. R. Act. As already pointed out, this contention is based mainly on the decision in Promod Jhaveri's case, which we shall consider later.

16. Now there can be no doubt that the proceeding under S. 7 before the Authorised Officer can arise only where a creditor wants to raise a question that his debtor is not entitled to the benefits of the D. R. Act and, therefore, his debt does not stand extinguished and, therefore, further he is not bound to return the pledged property to the debtor on an application being made by him as contemplated by Cl. (e) of S. 4.

17. However, if a careful scrutiny of Sections 7, 11 and 12 is made, it appears to us to be clear that the scope of S. 11 cannot be restricted only to a dispute contemplated by S. 4 (e). Section 4 (e) of D. R. Act no doubt deals with a secured debt because it refers to "every property pledged or mortgaged by such debtor". The consequence of S. 4 (e) is that the pledged or mortgaged property shall stand released in favour of such debtor and the creditor is bound to return the same to the debtor forthwith on the debtor making an application in writing. Now if we read S. 11 of the D. R. Act, it is clear that S. 11 does not refer to any particular proceeding in which the Authorised Officer is to decide the question referred to in that section. Sec. 11 refers to "any question which is required to be settled, decided or dealt with by the Authorised Officer". For the purposes of identifying the question which is required to be settled, decided or dealt with by the Auth-

orised Officer under the Act and to which reference is made in S. 11, we have to go to S. 7.

18. If we now go to S. 7, it is no doubt true that proceeding contemplated by it arises out of a claim under S. 4 (e). What is, however, important is that S. 7 also enumerates the questions which the creditor can raise before the Authorised Officer. Those questions are that:—

(1) The person who claims to be a debtor is not a marginal farmer, a rural artisan, a rural labourer or a worker;

(2) the dispute regarding the eligibility of the debtor for relief under the Act on any other ground including the valuation of the immovable property of a worker.

These are, therefore, the questions which are referred to in S. 11 as the questions which are required to be settled, decided or dealt with by the Authorised Officer by or under Chap. III of the D. R. Act. A further jurisdiction of the Authorised Officer to determine all questions which are raised by the creditor is to be found in S. 7 (6) which provides that the Authorised Officer shall have power to determine all questions in relation to, or connected with, the question or dispute raised by the creditor in his application. This provision is merely ancillary to the provision in S. 7 (1) and where the determination of any question which is related to or connected with the questions referred to in S. 7 (1) becomes necessary, the jurisdiction to decide those additional questions is also with the Authorised Officer. Section 7, therefore, is in two parts. It deals with the nature of the proceeding and it further deals with the questions which can be decided in such proceeding. When S. 11 refers to questions which are required to be settled, decided or dealt with by the Authorised Officer, those questions are to be identified with reference to their mention in S. 7 (1) or 7 (6) of the D. R. Act for the purposes of S. 11 or S. 12. For ascertaining whether the jurisdiction of the Civil Court is excluded under S. 11, all that is material is to ascertain whether any questions which under Chap. III or under the D. R. Act are required to be decided by the Authorised Officer have arisen for decision before the Civil Court and once such questions arise before the Civil Court, the Civil Court is obliged statutorily to stay the suit and make a reference to the Authorised Officer. In our view, the fact that those questions are raised or could be raised in a proceeding arising out of a claim by a debtor under S. 4 (e) to be instituted by the Creditor is of no consequence for the purposes of as-

pertaining the nature of the questions which the Civil Court is barred from deciding. Therefore, wherever questions of the nature referred to in S. 7 (1) and (6) are raised before the Civil Court, the provisions of Ss. 11 and 12 of the D. R. Act will be attracted and the jurisdiction of the Civil Court to decide those questions is ousted by S. 11 and unless a reference is made to the Authorised Officer by the Civil Court for adjudication of those questions and the decision of the Authorised Officer is communicated to the Civil Court, the Civil Court is incompetent to proceed to decide the suit if the decision of those questions is necessary for the decision of the suit.

19. A reference to Cl. (b) of S. 4 does not appear to be relevant for the purposes of construing the provisions of Ss. 11 and 12. One of the consequences specified in S. 4 of the Act is that in cl. (b) it is provided that no Civil Court shall entertain any suit or proceeding against the debtor for the recovery of any amount of such debt, including interest, if any. Now this, as already pointed out is merely a consequential provision consequent upon the statutory extinguishment of the liability of the debtor as a result of the operation of the D. R. Act in respect of the debts of the debtor to whom the Act becomes applicable. Before, however, the bar of Section 4 (b) can be availed of, the question whether the debt of the debtor is extinguished will have to be decided and this issue will have to be decided by the Authorised Officer. Cl. (b) of S. 4 is, therefore, not of any assistance for the purposes of the construction of Ss. 11 and 12.

20. Coming now to the decision in *Promod Jhaveri's case* (AIR 1977 Bom 42), though we agree with the view taken by the learned Judge that the governing concept in S. 7 is the implementation of the provision of S. 4 and that Civil Courts are not instrumentalities charged with the task of implementing the provisions of S. 4, we find ourselves unable to agree with the narrow construction which the learned Judge has placed on Ss. 11 and 12 of the D. R. Act. It was contended before the learned Judge, who decided *Promod Jhaveri's case*, on behalf of the creditor that only claims which relate to release and delivery of possession of security fall within the scope of the Authorised Officer's authority. The learned Judge in that case has taken the view that "reading S. 7 as a whole, the reference to S. 4 in opening part of sub-sec. (1) of S. 7 must be said to be a reference only to Cl. (e) of the said S. 4" and "the governing concept in sub-sec. (1) of

S. 7 is, implementation of the provisions of S. 4". It is not possible to dispute the validity of this view. It is also not possible for us to dispute the view taken by the learned Judge that when the Courts give effect to the consequences enumerated in Cls. (a), (b), (c) and (d) of S. 4, the Courts cannot be said to be the instrumentalities charged with the task of implementing the provisions of S. 4 and that the Courts do not implement the provisions of law, but they merely enforce the rights and liabilities recognised by law. The learned Judge has also, in our view, correctly taken the view that the jurisdiction of the Authorised Officer is confined to such questions as are raised by the creditor in his application and that the said sub-sec. (6) of S. 7 enumerates powers of the Authorised Officer. The learned Judge has further taken the view that the Authorised Officer has no jurisdiction to decide questions or disputes which are not capable of being raised by the creditor in his application to the Authorised Officer and in the proceeding under S. 7, the Authorised Officer is not required by the Act to go into the questions or claims pertaining to debts simpliciter.

21. There can be no doubt that having regard to the provisions of S. 4 (e) and S. 7 (1), the jurisdiction to be exercised by the Authorised Officer under S. 7 (1) can be invoked only on an application made by a creditor disputing the debtor's claim. It is, however, difficult for us to concur with the view taken by the learned Judge when he further holds that the applicability of the provisions of Ss. 11 and 12 of the Act is restricted only to a case which must fall under S. 4 (e). The relevant observations of the learned Judge in para 44 of the Judgment are as follows:

"In my opinion, an authorised officer is entitled to settle, decide or deal with, questions which can be raised by a creditor in his application under S. 7, that is to say, claims arising in connection with release and delivery of possession of 'property pledged or mortgaged by' a debtor. That being so, Civil Courts have jurisdiction to adjudicate upon and adjudge all claims, questions and disputes other than those which are raised by the creditor in his application under S. 7. As held above, the applications contemplated by S. 7 of the Act do not take within their sweep claims, questions and disputes pertaining to Cls. (a), (b), (c) and (d) of S. 4 in so far as the said disputes relate to unsecured debts or merely to debt aspect of secured debts as contradistinguished from security aspect thereof. In my opinion, the mischief of Ss. 11 and 12 does not extend to the cases

of unsecured debts or debt aspects of secured debts, which matters being within the purview of Cls. (a), (b), (c) and (d) thereof, have to be dealt by the Civil Courts concerned."

22. The learned Judge seems to have taken the view that S. 7 does not contemplate decisions of questions pertaining to Cls. (a), (b), (c) and (d) of S. 4. These observations, in our view, are not justified by the terms of S. 4 read with S. 7. It will be clear from a careful reading of S. 4 that the consequences specified in Cls. (b), (c), (d) and (e) thereof cannot survive independently of the consequences in Cl. (a). The effect of the Act is mainly to be found in the substantive part of S. 4 and in order to decide whether any of the consequences specified in Cls. (a) to (e) follow in a given case, one must first decide whether the debt stands statutorily extinguished as provided in the main part of S. 4. Unless the debt is of the kind defined in the Act and the 'debtor' satisfies the requirements of being a debtor as defined in S. 2 (f) of the D. R. Act, the question of ascertaining whether the consequences specified in S. 4 can follow really could not arise. In order to decide whether even under S. 4 (e) a debtor is entitled to the return of the security, the Authorised Officer, even while making his enquiry under S. 7 (1), has to go back to the main provisions in S. 4 because the claim of the creditor that the debtor is not entitled to the return of the debt security can be substantiated only if the creditor is able to satisfy the Authorised Officer that the debt of the debtor does not stand extinguished under the D. R. Act.

23. These are the basic questions which are required to be decided before the provisions of S. 4 (e) are implemented, as will be clear from the provisions of S. 7 (1). There is no question which independently arises under S. 4 (e) and unless the Authorised Officer first decides the question as to whether the debtor satisfies the description of a marginal farmer, a rural artisan, a rural labourer or a worker, or whether the debtor is entitled to the benefits or the reliefs under the D. R. Act, even a claim under S. 4 (e) cannot be successfully made by the debtor. It is no doubt true that the basic questions referred to above do not fall expressly within the terms of Cl. (e), but for giving effect to the provisions of S. 4 (e), it is clear that these basic questions were required to be decided first and that is why the legislature has specifically made a reference to those questions in S. 7 (1). It would, therefore, be incorrect to say that S. 7 (1) does not contemplate the decision of the questions in Cls. (a)

to (d), because unless the requirement of the main provisions of S. 4 is satisfied, the consequences enumerated in the latter part of that section could not be given effect to. The main question which is required to be decided under Chap. III is the eligibility of the debtor or the applicability of the Act or whether the debt is a 'debt' within the meaning of the Act and any other questions would be merely incidental to those main questions. As already pointed out, before giving effect to the provisions of Cls. (a) to (e), a determination of the questions referred to in S. 7 (1) is necessary for the purposes of the main part of S. 4.

23-A. With respect, to the learned Judge, it appears that the fact that Ss. 11 and 12 refer only to the questions which are required to be decided by the Authorised Officer and not to the proceedings in which those questions are to be decided under S. 7 has been overlooked by him. Section 11 refers to the questions which are to be settled, decided or dealt with by the Authorised Officer under Chap. III. Section 12 deals with the same questions, but the terminology used is, "any issues which are required to be settled, decided or dealt with by the Authorised Officer under this Act". Though Section 11 uses the words "under this chapter" and S. 12 uses the words "under this Act", that does not make any difference because admittedly the questions referred to in Sections 11 and 12 are required to be decided by the Authorised Officer only under Chapter III. Thus, as already pointed out, all that has to be done for the purposes of Sections 11 and 12 is to ascertain the questions which are to be decided by the Authorised Officer under Chap. III of the Act. For this one has to look to S. 7. The fact that those questions are required to be decided in an application under S. 7 (1) does not cease to make those questions answer the description necessary for the attraction of Sections 11 and 12 of the D. R. Act. We are, therefore, of the view that the learned Judge was not right when he held that the only question which is required to be settled, decided or dealt with by the Authorised Officer is one in respect of the return of the security contemplated by S. 4 of the Act and that the mischief of Ss. 11 and 12 does not extend to the cases of unsecured debts or debt-aspects of secured debts. Not much argument is necessary to point out that whether a debt secured or unsecured is not relevant for the purposes of the D. R. Act and both kinds of debts stand extinguished provided the necessary conditions required to be satisfied under the Act are fulfilled. Before

each of Cls. (a), (b), (c), (d) and (e) is invoked by the debtor, it will necessarily require the decision on the questions referred to in S. 7 (1) and once these questions are raised in a suit, having regard to the provisions of Ss. 11 and 12, the jurisdiction of the Civil Court to decide those questions will be ousted. We are, therefore, of the considered view that the jurisdiction of the Civil Court to decide any of the questions referred to in S. 7 (1), i.e., whether the person who claims to be a debtor is not a marginal farmer, a rural artisan, a rural labourer or, as the case may be, a worker, or where the eligibility of the debtor for relief under the Act on any other ground including the valuation of the immovable property, if any, of the worker, is taken away by S. 11. Similarly, all questions in relation to or connected with the above questions also will be outside the jurisdiction of the Civil Court. The decision in *Promod Jhaveri's case* (AIR 1977 Bom 42) must, therefore, stand overruled.

24. We respectfully agree with the view taken by Kantawala C. J. in unreported decision in *M/s. Vithaldas Raghunathdas Soni's case*. That was a case in which the plaintiff had filed a suit to recover a sum of Rs. 10,198.32, being the amount due from the defendants on account of a loan advanced to them. A claim was made by the defendants that their income was less than Rs. 400/- per month and their liability in respect of the transaction was wholly discharged by reason of the provisions of the Act and the application to refer the relevant issues under S. 12 of the D. R. Act by the Authorised Officer was rejected by the trial Court and the defendants had filed a revision application. While allowing the revision application, Kantawala C. J. after making a reference to S. 12 of the D. R. Act observed as follows:

"Having regard to the provisions of S. 7, the question whether a person who claims to be a debtor is a worker or not is to be decided by the Authorised Officer specified therein. It is unnecessary in the present case for me to consider in detail the various questions which are likely to arise in determination of the plea that has been taken by the defendants before the plea can be granted. Ordinarily, these matters are to be decided by the Authorised Officer in view of the provisions of S. 11 read with S. 12 of the Act because for any question which is required to be decided or determined by the authority under the Act the jurisdiction of the Civil Court is expressly taken away to decide the same."

Two issues, one dealing with the question as to whether the defendants or any one or more of them were workers within the meaning of S. 2 (o) of the D. R. Act and the other dealing with the question as to whether the debt or the liability, if any, under the transaction in suit was wholly discharged by reason of the provisions of S. 4 of the D. R. Act were directed to be referred by the trial Court to the Authorised Officer.

25. We may, however, sound a word of caution to the Civil Courts that while it is obligatory upon them to give effect to the provisions of Ss. 11 and 12, before making a reference to the Authorised Officer, it would be the duty of the Civil Courts to first come to the conclusion that the issues which are asked for being referred to the Authorised Officer arise in the case and that they are required to be decided for the purposes of the suit. The Civil Court is not mechanically required to stay its hands the moment a plea is taken. It is common experience that vague pleas are taken by the defendants merely with a view to delay the proceedings in the Civil Courts. Before framing issues, it must be ascertained that the plea is not a frivolous one in the sense that the defendant raising these issues must make a full and complete pleading in respect of those pleas in the written statement itself. Unless such full particulars of the plea are given, the Civil Court will be justified in not framing an issue on vague and inadequate pleading. It is well-known that once such reference is made, the reference takes a long time to be disposed of and maximum care must, therefore, be exercised by the Civil Court before exercising its jurisdiction to make a reference as contemplated by Ss. 11 and 12. The minimum that is demanded in such a case is that the Court must satisfy itself that a *prima facie* case of being entitled to the benefits under the D. R. Act must be made out in the pleadings by the party who desires to seek a reference to the Authorised Officer under S. 11 of the D. R. Act.

26. In the view which we have taken, the order recalling the reference made by the trial Court in this case is liable to be set aside. It appears from the application on which the reference was made that the defendant had merely stated that the defendant had 1 hectare of land and, therefore, he was entitled to the benefits of the D. R. Act. The written statement of the defendant is not available at this stage. It will, however, be open to the trial Court to deal with the question of reference afresh in the light of the observations made in this judgment.

27. The revision application is, therefore, allowed. Rule made absolute. However, there will be no order as to the costs of this revision application.

Revision allowed.

AIR 1982 BOMBAY 91

REGE AND KANADE, JJ.

Kausar Husein Mohamed Hushin, Appellant v. Mohamed Umer Bhola and others, Respondents.

Letters Patent Appeal No. 104 of 1976, D/- 25-3-1981.

Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 14 (1) — Nature of statutory tenancy under S. 14 (1) — Is different from that under S. 12 (1) inasmuch as S. 14 (1) does not merely protect possession of statutory tenant but also entitles him to benefits under the original contract of sub-tenancy.

It is apparent that the wording as well as the subject of S. 14 of the Rent Act are quite different from that of S. 12 (1) of the Act. Unlike S. 12 (1) object of S. 14 appears to be to protect lawful subtenancy in toto by making the lawful sub-tenant, a tenant directly of the landlord but on the same terms and conditions as existing between the tenant and the sub-tenant. Unlike S. 12 (1), the said S. 14 does not seek to protect merely the possession of the statutory tenant i.e. the tenant who has continued in possession after the contractual tenancy was terminated only on his paying standard rent and performing and observing the other conditions of tenancy. Section 14 gives to the lawful sub-tenant as the deemed tenant of the landlord also the benefit under the contract between him and the tenant along with his liability to perform and observe the conditions and the obligations thereunder. The nature of the statutory tenancy under S. 14 would therefore depend on the terms and conditions which the lawful sub-tenant had with the tenant. If one of such terms and conditions were to permit the sub-tenant to part with the possession by granting leave and licence or did not prohibit the same if otherwise permissible under law, then transferability could be considered to be an incidence of such a statutory tenancy and the same under S. 14 of the Act, therefore, would not come to an end merely because the statutory tenant had transferred possession of the premises. AIR 1976 SC 2229

KY/KY/F546/81/HR/RSK

and AIR 1980 Bom 341, Rel on; AIR 1965 SC 414, Ref.; AIR 1960 Bom 18, Disting.

(Para 33)

Cases Referred: Chronological Paras

AIR 1980 Bom 341: 1980 Mah LJ 229: (1980) 1 Ren CR 392 19, 20, 31, 35

AIR 1976 SC 2229: (1976) 2 SCWR 125

19, 20, 31, 33, 35, 38

AIR 1965 SC 414: (1965) 1 SAC 172

12, 13, 17, 20, 24, 31, 32, 37

AIR 1960 Bom 18: 60 Bom Lk 1282 34

D. L. Jha with M. V. Paranjpe, for Appellant; V. O. Menghani (for No. 1) and Firdosh & Co. (for Nos. 3 and 4), for Respondents.

REGE, J.:— This is a Letters Patent Appeal by the original first defendant against the order of Joshi, J. summarily dismissing his appeal against the order and judgment of the learned Judge of the City Civil Court dated 14th Oct., 1976 decreeing the plaintiff's suit and declaring the plaintiffs to be the tenants in respect of the suit premises and to be entitled to continue in possession thereof and granting perpetual injunction against the first defendant restraining him from interfering with the possession of the plaintiffs and, in a particular, from executing the order/decreed of possession passed by the Court of Small Causes at Bombay in an ejectment application by the first defendant against the plaintiff and one other person, being No. E. A. 201/E/62.

2. The main question that arises is, whether on the facts of this case the landlords-respondents Nos. 2 to 7 could lawfully create a tenancy in favour of the plaintiff when the first defendant was under S. 14 of the Bombay Rent Act, a deemed tenant of the landlords by reason of being a lawful sub-tenant on the tenancy of the original contractual tenant being determined and had thereafter transferred possession thereof to the plaintiff and one Mohamed Umer Abdul Majid under a leave and licence agreement executed with them.

3. It may be pointed out at the outset that at the initial stage the contention was raised by the first defendant that the Court had no jurisdiction to entertain and try the suit as the same being solely within the jurisdiction of the Court of Small Causes u/S. 28 of the Bombay Rent Act. The trial Court had initially held that it had no jurisdiction to entertain and try the suit the same being within the exclusive jurisdiction of the Court of Small Causes and had ordered the return of the plaint for presentation to proper Court. However, in appeal to this Court against the said order being appeal No.

360/64, this Court held that the City Civil Court had jurisdiction to entertain and try the suit. It, therefore, set aside the said order of the City Civil Court and referred the matter back for being heard on merits.

4. To appreciate the contentions raised before us, it would be proper to set out certain facts involving prior to litigation between the parties in respect of the suit premises.

5. The building in which suit premises being shop No. 1 is situate belongs to a trust of which defendant Nos. 2 to 7 are the present trustees (hereinafter referred to as the landlords). In respect of the suit shop one Hussein Shamsuddin was initially a contractual tenant. Admittedly, the said tenant had sublet the suit premises to defendant No. 1. Thereafter the landlords filed a suit against the said tenant and defendant No. 1 as the sub-tenant, in the Court of Small Causes being R. A. E. Suit No. 3810 of 1959 for eviction and possession. At the hearing of the suit the tenant did not appear. The suit was, however, defended by defendant No. 1. On 25th Jan., 1960 the Court passed an ex parte decree of eviction against the original tenant only, directing him to vacate the premises on or before 31st Jan., 1960. However, the suit against defendant No. 1 was dismissed with no orders as to costs, the landlords at the hearing recognising the first defendant as a lawful sub-tenant. It is not disputed that on 29th Dec., 1961 defendant No. 1 entered into an agreement of leave and licence with the plaintiff herein i.e. Mohamed Umer Bhola and one Mohamed Umer Abdul Majid and handed over to them possession of the premises under the said agreement. It is the plaintiff's case that though the said agreement was termed as a leave and licence agreement, it was a camouflage for an agreement of sub-tenancy.

6. Thereafter the landlords under an application dated 25th Jan., 1962 for execution of decree of eviction against the original tenant, obtained a warrant of possession. When the landlords themselves had, while obtaining a decree for eviction against the original tenant, recognised the first defendant as a lawful sub-tenant on the footing that he was in possession of the premises, it was difficult to envisage the purpose of taking out a warrant of possession against the original tenant who was admittedly not in possession and as to how it could have been executed. However, it is not disputed that when the landlords sought to execute the said warrant of possession, the execution was obstructed. It is difficult to say from

the record as to which of the two persons viz. the plaintiff or the said Mohamed Umar Abdul Majid had obstructed execution. However, it appears from the record that the landlords had taken out an obstructionist notice being Obstructionist Notice No. 124 of 1962 against only one obstructionist named Mohamed Umar. The said proceedings were compromised between the landlords and the said obstructionist Mohamed Umer under the consent terms dated 29th Mar., 1962. The consent terms provided :

(i) that the obstructionist notice was discharged;

(ii) the landlords accepted the obstructionist Mohamed Umer as his tenant in respect of the premises in notice; and

(iii) the said obstructionist had paid to the landlords the arrears of rent till 31st Mar., 1962.

Although the plaintiff herein claims to be the person against whom the said obstructionist notice was taken out and who had signed the consent terms, the consent terms filed in the Court (the original of which is in the record and was produced before us and a copy of the certified copy of which is a part of the paper book) show that the only person who had signed the said consent terms as an obstructionist was the other person Mohamed Umar Abdul Majid and not the plaintiff who is Mohamed Umar Bhola. Although the learned counsel for the plaintiff has by relying on the plaint filed by the first defendant in the subsequent ejectment proceedings that he took viz. E. A. 292 of 1962, contended that it was the plaintiff against whom the landlords had taken out obstructionist notice and had signed the said consent terms, the record of the proceedings and the plaintiff's subsequent conduct would show that the said obstructionist proceedings were taken out only against and the consent terms were signed only by, the said Mohamed Umar Abdul Majid and not against or by the plaintiff and the plaintiff had nothing to do with it.

7. Continuing the narration, thereafter the first defendant took out a Miscellaneous Notice No. 387 of 1962 in the landlords' original ejectment suit No. R. A. E. 2801 of 1959 making the said Mohamed Umar, the obstructionist, a party thereto, to set aside the said consent order between the landlords and the obstructionist, the said Mohamed Umar Abdul Majid on 29th Mar., 1962 in the landlords' obstructionist proceedings. It is the plaintiff's case that the said notice was served on him, but since at the hearing

of the notice defendant No. 1 told him that the said notice was not against him, he had withdrawn from the proceedings. In reply to the said notice by the first defendant, the said Mohamed Umar Abdul Majid had as the obstructionist filed an affidavit denying that he was ever a sub-tenant of the premises, that an affidavit made by the plaintiff was not his affidavit and stating that he was the only obstructionist who had signed the consent terms and had no objection to the cancellation thereof and restoring the possession to the first defendant. The learned Judge of the Court of Small Causes by his order dated 23rd Mar., 1963 allowed the first defendant's said application and set aside the said consent terms and awarded to the first defendant compensatory costs of Rs. 300/-. The learned counsel for the plaintiff has objected to the said affidavit of Mohamed Umar Abdul Majid being referred to and looked at as it was not part of the proceedings in the City Civil Court. That objection has no substance, as the learned Judge of the Court of Small Causes in his said order dated 28th Mar., 1963 while setting aside the consent terms has in terms referred to the said affidavit. An appeal by the landlords against the said order of the learned Judge setting aside the consent terms and awarding costs, to the appellate Bench of that Court was refused. Against that order, revision application No. 330 of 1964 filed by the landlords to this Court was also rejected by this Court by an order dated 24th June, 1967. The result, therefore, was that the consent terms obtained in the obstructionist proceedings whereunder the landlords had accepted the obstructionist Mohamed Umar Abdul Majid as a tenant, no longer subsisted, nor was there any further execution of the decree of eviction obtained by the landlords against the original tenant.

8. At the same time, it is not disputed that the present plaintiff though being aware of the proceedings by the first defendant to set aside the consent terms between the landlords and the obstructionist, who according to the plaintiff was he himself and not the said Mohamed Umar Abdul Majid, the notice admittedly being served on him, did not take any steps against the said order setting aside the consent terms and has stood by.

9. After the first defendant filed the said miscellaneous application to set aside the consent terms dated 29th Mar., 1962 between the landlords and obstructionist Mohamed Umar Abdul Majid, he also filed in the Court of Small Causes an ejectment appli-

cation being E. A. No. 292 of 1962 against both, the present plaintiff Mohamed Umar Bhola and the other, obstructionist Mohamed Umar Abdul Majid u/S. 41 of the Presidency Small Cause Courts Act, as it then stood for an order of ejectment. At the hearing, the plaintiff herein had sought to substantiate his tenancy by producing a solitary rent receipt for the month of Mar., 1962 in his favour issued by the landlords for payment of rent. The Court held that the said act of the landlords done behind the back of the first defendant was not binding on him. The Court further held that the first defendant's tenancy not having been terminated, the landlords had no right to create a tenancy of the suit premises in favour of Mohamed Umar Abdul Majid and the same was not legal and valid. The Court, therefore, by its order dated 19th Nov., 1963 ordered the plaintiff and the said Mohamed Umar Abdul Majid to quit and vacate the premises on or before 20th Dec., 1963.

10. The said Mohamed Umar Bhola has, therefore, filed this suit on title, as permissible under the said Act, claiming direct tenancy with the landlords. In the plaint his case was that in pursuance of the settlement in obstructionist proceedings by the landlords, the landlords got the obstructionist notice dismissed and got the fact of the acceptance of the plaintiff as their tenant recorded in Court, for which the plaintiff relied on the rent receipt issued by the landlords in his name. As pointed out above from the record, the plaintiff's case that under the settlement the landlords accepted the plaintiff as their tenant appears to be false. In fact it appears from the record in the said settlement that it was only the said Mohamed Umar Abdul Majid who was a party to the said obstructionist proceedings and who had signed the consent terms, was recognised as a tenant. The main contention of the plaintiff in para 6 of the plaint was that he was in possession of the suit premises as a lawful tenant of the landlords, defendant Nos. 2 to 7, by reason of tenancy created by them, in his favour on 29th Mar., 1962, that the decree for possession was passed in favour of the landlords against the original tenant Huseinbhai Shamsuddin, that the agreement of leave and licence executed between the plaintiff and defendant No. 1 even on the basis that it was intended to be acted upon, came to an end on the re-entry by title paramount when defendants Nos. 2 to 7 attempt to execute the decree for possession passed in their favour in R. A. E. Suit No. 3801 of 1959 and that the tenancy

created by the landlords in favour of the plaintiff was valid and subsisting one and, therefore, the plaintiff was entitled to continue possession of the suit premises. On that basis the plaintiff sought a declaration that he was a tenant of the suit premises and that he was entitled to continue in possession of the suit premises. (underlining supplied)

11. The first defendant in his written statement contended that the agreement of leave and licence executed by him in favour of the plaintiff and the said Mohamed Umer Abdul Majid had not come to an end on the alleged re-entry by title paramount, as the decree was executed against the tenant only, and no decree was passed against him in the said proceedings. He also contended that no valid tenancy could be created by the landlords, defendants Nos. 2 to 7 in favour of the plaintiff, in view of what had happened in the past and in fact no such tenancy was created.

12. It appears that when the plaintiff filed the suit, the Supreme Court had not given its decision in the case of Anand Nivas Pvt. Ltd. v. Anandji Kalyanji's Pedhi, (AIR 1965 SC 414) on which both the trial Court in its judgment as well as the learned counsel for the plaintiff before us to support his case, have strongly relied. The said decision dealt with the nature of statutory tenancy under S. 12 (1) of the Bombay Rent Act. However, at the hearing of the suit the said decision was available. Therefore without amending the pleadings the Court raised an additional issue being issue No. 8 viz. whether the statutory tenancy of the first defendant if any, came to an end on 29th Dec., 1961 on account of defendant No. 1 ceasing to be in possession of the premises in suit.

13. At the hearing, the landlords defendants Nos. 2 to 7 remained absent and did not take part in proceedings. The contest was, therefore, only between the plaintiff and the first defendant who alone gave evidence in support of their respective cases. The learned Judge, only on the basis of the solitary undated rent receipt for the month of March issued by the landlords in the name of the plaintiff, held that the landlords had created tenancy in favour of the plaintiff. The Court solely relying on the aforementioned decision of the Supreme Court in Anand Nivas case, held that since in this case the first defendant who was a statutory tenant had admittedly parted with the possession of the premises, his statutory tenancy had come to an end and therefore, the tenancy created by the landlords in favour of the plaintiff was valid. The learned trial Judge, therefore, de-

creed the plaintiff's suit. Appeal by the first defendant against the said judgment and order was summarily rejected by Joshi J. Hence this Letters Patent Appeal by the first defendant.

14. Before dealing with the contentions advanced by the learned counsel for the plaintiff and the first defendant, it may be mentioned at the outset that the plaintiff's claim of being a direct tenant of the landlords appears to be unsustainable. The plaintiff's claim in the plaint to the tenancy is on the basis of the consent terms dt. 29th Mar., 1962 obtained in the obstructionist proceedings. As pointed out above, the plaintiff was not a party to the said proceedings, nor had he signed the said consent terms. However, even if the plaintiff's plea that the obstructionist proceedings were taken out against him and that he had signed the consent terms were to be accepted still, the said consent terms having been set aside by a competent Court, they ceased to exist and as a result thereof the tenancy supposed to have been granted by the landlords to the plaintiff under the said consent terms also came to an end and ceased to exist. The plaintiff had made out no case in the plaint that independently of the said consent terms the landlords had granted a tenancy to him. If the tenancy was on the basis of the consent terms which no longer existed, then it was difficult to see how on a mere production by the plaintiff of a stray undated rent receipt issued by the landlords in his name, without a fresh tenancy being properly proved by the plaintiff, particularly when the above stated facts created a suspicion of collusion between the landlords and the plaintiff, could be said to create a new tenancy in favour of the plaintiff. That by itself was sufficient to negative the plaintiff's claim.

15. However, in spite of the said position and on the basis that the landlords had granted a fresh tenancy to the plaintiff as contended by him other contentions of the parties be considered.

16. The first main contention of the plaintiff was that since under S. 14 of the Bombay Rent Act, the first defendant was a statutory tenant of the suit premises, on his parting with the possession thereof to the plaintiff and the said Mohamed Umar Abdul Majid, under a leave and licence agreement, his statutory tenancy which entitled him under the said Act to the protection of his possession only automatically came to an end and, therefore, the tenancy created by the landlords in favour of the plaintiff thereafter was valid.

17. In support of his said contention the learned counsel for the plaintiff very strongly relied on the aforementioned decision of the Supreme Court in Anand Nivas case (AIR 1965 SC 414). The learned Judge had also relying on the said decision only, decreed the plaintiff's suit.

18. Before dealing with the said contention it would be proper to consider generally the incidence of a statutory tenancy and also to consider the ambit of S. 14 of the Bombay Rent Act under which admittedly the present case is covered.

19. A general nature or incidence of statutory tenancy, a term borrowed by us from the English law, was considered by the Supreme Court in its decision in the case of Damadilal v. Parshram, (AIR 1976 SC 2229), which was a case arising under the provisions of M. P. Accommodation Control Act permitting sub-letting by a statutory tenant, which was not a case under Ss. 12 (1) and 15 the B. R. Act. However, the observations of the Court in that decision, which were of a general nature as regards the nature of a statutory tenancy were considered to be applicable by a Division Bench of this Court in its decision in Vasant Tatoba Hargunde v. Dikkayya Pujari, 1980 Mah LJ 229 : (AIR 1980 Bom 341). The said observations of the Supreme Court at p. 2234 of the report were :

"We find it difficult to appreciate how in this country we can proceed on the basis that a tenant whose contractual tenancy has been determined but who is protected against eviction by the statute, has no right of property but only a personal right to remain in occupation without ascertaining what his rights are under the statute. The concept of a statutory tenant having no estate or property in the premises which he occupies is derived from the provisions of the English Rent Acts. But it is not clear how it can be assumed that the position is the same in this country without any reference to the provisions of the relevant statute. Tenancy has its origin in contract. There is no dispute that a contractual tenant has an estate or property in the subject matter of the tenancy and heritability is an incident of the tenancy. It cannot be assumed, however, that with the determination of the tenancy the estate must necessarily disappear and the statute can only preserve his status he had in the premises in his occupation. It is not possible to claim that the "sanctity" of contract cannot be touched by legislation." (Underlining supplied)

20. While dealing with the nature of statutory tenancy as laid down in the said decision as against the observation of the Supreme Court in Anand Nivas case (AIR 1965 SC 414) with which we will deal presently, the Division Bench of this Court in its decision in the case of Tatoba Krishna v. Dikkayya Mattayya, (1980) Mah LJ 229 : (AIR 1980 Bom 341), at page 234 of the report (Mah LJ) : (at p. 344 of AIR Bom) observed :—

"It is difficult to escape the conclusion that the view expressed in Anand Nivas case (AIR 1965 SC 414) as to the statutory tenant basically not having any interest, estate or property in the demised premises is irreconcilable with the view of Damadilal's case (AIR 1976 SC 2229), that heritability is the incidence of the tenancy and that a statutory tenant does not cease to hold such an estate, interest and property therein as such ordinary incidence of tenancy unless the statute protecting his such possession provides to the contrary. Transferability is as such the incidence of any tenancy as heritability. Origin of tenancy being in the contract, the same is enforceable by or against the heirs and transferees, unless any personal element is involved in the contract itself."

(underlining supplied)

21. The above quoted observations, therefore would show that as a general rule, it cannot be said that, each and every statutory tenancy would come to an end ipso facto on transfer of possession by him. Transferability was as much an incidence of statutory tenancy as of a contractual tenancy and, therefore, the nature and incidence of a statutory tenancy in each case has to be determined on the provisions of the statute creating statutory tenancy.

22. In the light of the said observations, we may consider the contentions of the learned counsel for the plaintiff that in this case, where the first defendant's statutory tenancy had arisen under S. 14 (1) of the Rent Act, the same came to an end on his transferring and/or parting with the possession of the premises to the plaintiff under a leave and licence agreement and the landlords could take possession of the premises in the manner they have sought to do in this case.

23. S. 14 (1) of the B. R. Act provides :—

"When the interest of a tenant of any premises is determined for any reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let before the commencement of the Bombay Rents Hotel and Lodging House Rates Control (Amend-

ment) Ordinance, 1950, shall subject to the provisions this Act, be deemed to become the tenant of the landlord on the same terms and conditions as he would have held from the tenant if the tenancy had continued.” (Underlining supplied)

In this particular case it is not disputed that the original tenant Huseinbhai who was the contractual tenant had during the subsistence of the contractual tenancy created a sub-tenancy in favour of the first defendant and that when he created that said sub-tenancy, it was lawful. It cannot be disputed that when the Court of Small Causes in the suit filed by the landlords against the original tenant as well as the first defendant had on 25th Jan., 1960 passed a decree of eviction only against the said tenant as required under the said section, the interest of the said tenant in the suit premises was determined, with the result that the first defendant who was a lawful sub-tenant, was under the said section considered to be a deemed tenant of the landlords defendants Nos. 2 to 7 on the same terms and conditions as were between him and the original tenant. It may be that ordinarily on the termination of the contractual tenancy of a tenant, the sub-tenancy would come to an end. However, since, by reason of the said S. 14, the lawful sub-tenancy of defendant No. 1 was protected, loosely speaking the first defendant who was a lawful sub-tenant, on being deemed to be a tenant of the landlords, could be termed as a statutory tenant.

24. In that connection, the decision of the Supreme Court in Anand Nivas case (AIR 1965 SC 414) on which strong reliance has been placed both by the trial Court as well as by the learned counsel for the plaintiff, be first considered.

25. In that case the Court was mainly concerned with the nature of statutory tenancy under S. 12 (1) of the B. R. Act.

26. The said S. 12 (1) of the Act provides :—

“12 (1):— A landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays or is ready and willing to pay the amount of standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy in so far as they are consistent with the provisions of the Act.”

27. The facts of the case, shortly, were :

A, the landlord had given the suit premises Anand Nivas to B, as a tenant. B's tenancy had come to an end by efflux of time. Thereafter B had created a sub-lease in respect of

the part of the premises in favour of C. The landlord instituted a suit against B, the tenant, for eviction in the Court of Small Causes under S. 28 of the B. R. Act, and obtained a decree. In execution of the decree the landlord took possession of the first floor which was in possession of the tenant B, but C resisted the execution in respect of the ground floor in his possession claiming to be a sub-lessee from the tenant and, therefore, having acquired a right of tenancy, C filed a suit in the Court of Small Causes for a declaration that he was not bound to deliver possession of the premises in their occupation in execution of a decree by the landlord against the tenant. Interim stay of execution was refused by the trial Court as well as by the High Court against which an appeal to the Supreme Court came to be filed.

28. As the judgment shows that the Court in that case was only concerned with the right of B as a statutory tenant after the period of lease had expired as arising under Ss. 12 (1), 13 and 15 of the Act. The extent to which the Court was concerned with S. 14 was only to consider whether sub-tenant C was a lawful sub-tenant to be protected under S. 14 of the Act and the Court held that C was not a lawful sub-tenant as B, the tenant, had created a sub-tenancy in favour of C only after B's contractual tenancy had come to an end by efflux of time and B had become a statutory tenant. While dealing with S. 12 (1) of the Act the Court at p. 422 observed :—

“S. 12 (1) of the Act merely recognised his right to remain in possession so long as he pays or is ready and willing to pay the standard rent and permitted increases and performs the other conditions of the tenancy, but not the right to enforce the terms and conditions of the original tenancy after it is determined.”

The Court further observed at page 423 :

“As a statutory tenant he had no estate or interest capable of being assigned or transferred and his statutory right to occupy could not in law be sub-let, because a lawful sub-letting postulates a right to enjoy the property and a right to transfer the same to another. There can be no sub-letting when there is no right in the premises especially when the statutory tenancy ceases when the tenant parts with the possession.”

29. In that case to show that a statutory tenant was entitled to the benefit of the terms and conditions of the contract of tenancy, the Court was referred to the provisions of the English Act viz. S. 15 (1) of Increase of Rent and Mortgage Interest (Restrictions) Act 1920 which provided that the tenant who by virtue

of the provisions of the said Act retained possession of any dwelling to which the Act applied shall so long as he retained possession be entitled to benefit of the terms and conditions of the general contract so far as consistent with the provisions of the Act. The Court on the difference in the wording of English Act as against the wording of S. 12 (1) of the B. R. Act, pointed out that unlike English Act, the B. R. Act merely granted conditional protection to a statutory tenant and did not invest him with the right to enforce the benefit of any of the terms and conditions of the agreement of tenancy and that the said difference in phraseology of the two enactments was vital to the matter under discussions.

30. Both, the learned Judge, as well as the learned counsel for the plaintiff laid great emphasis on the above quoted observations of the Supreme Court in support of their case that in this case as well though arising under S. 14, the statutory tenancy of the first defendant on his parting with possession of the premises in favour of the plaintiff under leave and licence agreement came to an end.

31. It is clear from the said decision of the Supreme Court in Anand Nivas case (AIR 1965 SC 414) that the Court there was concerned only with the nature of statutory tenancy as arising under S. 12 (1) of the said Act, which expressly protected only the possession of the statutory tenant and gave him no other right, with the result that on his parting with the possession of the premises the statutory tenancy ipse facto came to an end. The said observations, however, do not have application to every case of a statutory tenancy without reference to the provisions of statute under which the same was created. As pointed out by the Supreme Court in the aforesaid Damadilal's case (AIR 1976 SC 2229) and by this Court in Tatoba's case (AIR 1980 Bom 341) transferability of possession could be an incidence of statutory tenancy.

32. The question is whether the said incidence of statutory tenancy under S. 12 (1) of the Act, as held by the Supreme Court in the said decision in Anand Nivas case (AIR 1965 SC 414) would be said to apply also to a statutory tenancy under S. 14 of the Act where a person being a lawful sub-tenant on the termination of the tenancy, was deemed to be the tenant of the landlord on the same terms and conditions as he would have held from the tenant if the tenancy had continued?

33. As pointed out by the Supreme Court in the aforesaid decision in Damadilal's case (AIR 1976 SC 2229) the nature of the statu-

tory tenancy was to be determined from the wording of the provisions of each statute. It is apparent that the wording as well as the object of S. 14 of the Rent Act are quite different from that of S. 12 (1) of the Act. Unlike S. 12 (1) object of S. 14 appears to be to protect lawful sub-tenancy in toto by making the lawful sub-tenant, a tenant directly of the landlord but on the same terms and conditions as existing between the tenant and the sub-tenant. Unlike S. 12 (1), the said S. 14 does not seek to protect merely the possession of the statutory tenant, i.e. the tenant who has continued in possession after the contractual tenancy was terminated only on his paying standard rent and performing and observing the other conditions of tenancy. Section 14 gives to the lawful sub-tenant as the deemed tenant of the landlord also the benefit under the contract between him and the tenant along with his liability to perform and observe the conditions and the obligations thereunder. The nature of the statutory tenancy under S. 14 would therefore depend on the terms and conditions which the lawful sub-tenant had with the tenant. If one of such terms and conditions were to permit the sub-tenant to part with the possession by granting leave and licence or did not prohibit the same if otherwise permissible under law, then transferability could be considered to be an incidence of such a statutory tenancy and the same under S. 14 of the Act, therefore, would not come to an end merely because the statutory tenant had transferred possession of the premises.

34. In support of his said contention, the learned counsel for the plaintiff relied on certain observations in the decision of this Court in the case of Motwani v. Albert Sequeira, (AIR 1960 Bom 18) at p. 20 of the report to the effect:—

"Protection given to a sub-tenant under Section 14 does not confer title in land. It is not an estate in land which S. 14 creates. It is now well settled that the protection which the Rent Act gives to a tenant or a sub-tenant is a personal right and not a right to property."

35. The Court had made the said observations only in connection with the contention that the tenant's title had never been determined and his contractual title had merged with the statutory title and therefore even according to explanation to S. 43 of the Presidency Small Causes Court Act, there was no difficulty on the part of sub-tenant in obtaining possession under Chap. VII of the said Act. The Court there was only concerned

with the nature of jurisdiction of the Court of Small Causes under S. 43 with the explanation and S. 46 under Chap. VII of the Act. The Court was not concerned with finding out the nature of statutory tenancy as such on the wording of S. 14. The said observations were therefore, of a general nature and cannot be considered to be laying down the nature of a statutory tenancy under S. 14. On the other hand, the observations of the Supreme Court in the aforesaid decision in Damadilal's case (AIR 1976 SC 2229) as accepted by the Division Bench of this Court in its decision in Tatoba's case 1980 Mah LJ 229 : (AIR 1980 Bom 341) would go to show that depending on the wording of the statute, transferability could be an incidence of statutory tenancy.

36. In our view, in this case since the Court had to consider the nature of the statutory tenancy under S. 14 of the Act, it would not have without ascertaining the terms and conditions of tenancy between the tenant and defendant No. 1 come to the conclusion that on the defendant No. 1 transferring possession of the suit premises to the plaintiff under a leave and licence agreement, the statutory tenancy of the first defendant ipso facto came to an end.

37. The learned counsel for the plaintiff urged before us that although the wordings of S. 14 the Act were quite different from those of S. 12 (1) of the Act, the aforesaid observations of the Supreme Court in the case of Anand Nivas (AIR 1965 SC 414) should be taken as having universal application to every type of a statutory tenancy under the B. R. Act and, therefore, in spite of the different wording of that section, particularly the provision for creation of deemed tenancy on the same terms and conditions as existed between the tenant and the sub-tenant, the Court must hold that the only protection that a statutory tenant would get under S. 14 of the Rent Act was as regards his possession as under S. 12 (1). While interpreting the said S. 14, there would be no justification for omitting the said part of the section and holding that in spite of the said provision, the nature of the statutory tenancy would be the same as under S. 12 (1). As we have pointed out above, the object of S. 14 is quite distinct from that of S. 12 (1). It is to keep lawful sub-tenancy alive and intact along with its terms and conditions which would have otherwise come to an end along with the tenancy. The only thing that is sought to be done is to establish a direct contact between the landlord and the lawful sub-tenant, which was not there before but on the same terms and conditions as those of sub-

tenancy existing between the original tenant and the landlord.

38. In our view, therefore on proper interpretation of S. 14 of the Act and in view of the aforesaid observations of the Supreme Court in Damadilal's case, (AIR 1976 SC 2229) the contention of the learned counsel for the plaintiff that on the proper interpretation of S. 14 of the Rent Act the protection granted to the lawful sub-tenant thereunder was dependent only on his being in possession of the premises and that the said protection was not available to him and came to an end on his parting with the possession, cannot be accepted.

39. Apart from this, the next question was, firstly, whether in this case the learned Judge was right in assuming that factually the landlord had obtained possession of the premises and then created a tenancy in favour of the plaintiff who was in the position of an obstructionist, only on the basis that the statutory tenancy of the first defendant had come to an end as a result of his parting with possession of the suit premises to the plaintiff under leave and licence agreement.

40. In this case, it is not disputed that the plaintiff had got into possession of the suit premises under a leave and licence agreement with the first defendant and the landlords had during the obstructionist proceedings sought to create tenancy in favour of the plaintiff without actually obtaining possession of the premises from either the first defendant or the plaintiff. The whole transaction appears to have been brought about behind the back of the first defendant by collusion between the landlords and the plaintiff who was in possession as the first defendant's licensees, from whom otherwise without the order of the Court the landlord could not have been able to obtain the possession of the premises.

41. In this case the fact that the first defendant had under an agreement of leave and licence given possession of the premises to the plaintiff and one Mohamed Umee Abdul Majid is not disputed. However, landlords defendants Nos. 2 to 7 who were the only persons to say in what manner of right they had purported to take possession of the premises and/or create tenancy of the premises in favour of the plaintiff, have not taken part in the proceeding nor had the plaintiff examined any of them to support his case. There is, therefore, no evidence on record to show that the landlords had purported to take possession of the suit premises on the basis that the first defendant's tenancy had come to an end on his parting with possession. On the other hand, the plea of the plaintiff in para 6 of the plaint in that connection was that the

landlords had caused re-entry in the suit premises when they attempted to execute the decree for eviction against the original tenant. Therefore, even according to the plaintiff the landlords had entered into possession not on the footing that the first defendant's statutory tenancy had come to an end on his parting with possession to the plaintiff, but it was in attempting to execute the decree against the original tenant. It is difficult to see how the landlord could be said to have got possession of the premises from the first defendant and the plaintiff on only attempting to execute a decree against the tenant. The said plea, therefore, by the plaintiff was difficult to be sustained. However, the said plea on the part of the plaintiff clearly shows that the landlord had not sought to create tenancy in favour of the plaintiff on the ground that the first defendant's statutory tenancy had come to an end on his parting possession of the suit premises to the plaintiff under a leave and licence agreement, but only on the footing of the possession being taken by the landlords on the attempted execution of the decree of eviction against the tenant.

42. Apart from this, and assuming that the contention of the learned counsel for the plaintiff were to be accepted, still, the further question was whether the landlords could and/or were entitled to take possession of the premises in a manner they have purported to do in this case i.e. in collusion with the plaintiff, so as to become entitled to create a tenancy in favour of the plaintiff. There is a difference between a right to possession and a right to enforce possession. In the existing case while the obstructionist proceedings were pending if the landlords wanted to create tenancy in favour of the third party, they could not have been able to do so without first obtaining from the Court an order determining the first defendant's tenancy and as a consequence an order to recover possession, although on the plaintiff's contention, at all times he could be said to have a right to the possession of the premises by reason of the termination of the first defendant's statutory tenancy on his parting with the possession of the premises and the possession of the plaintiff being unlawful as coming from the statutory tenant. In the ordinary course, therefore the landlord could not have got possession of the premises excepting either by surrender of premises by the first defendant, which is not the case here, or by an order of the Court for recovery of possession. In this case the landlords having failed to obtain possession of the premises in execution of the decree against the tenant they have purported, without any order of the Court, to obtain

constructive possession of the premises, in collusion with the plaintiff who was in possession under leave and licence agreement with the first defendant and behind the back of the first defendant, who was recognised by the landlords as their lawful sub-tenant. Such a possession of the premises taken by the landlords cannot be considered to be lawful to entitle them to create tenancy in favour of the plaintiff.

43. Under the circumstances, in our view, the landlords were not entitled to create a tenancy in favour of the plaintiff as they have sought to do and the tenancy purported to have been created by the landlords in favour of the plaintiff cannot be considered to be lawful.

44. In the result the appeal is allowed with costs throughout. The plaintiff's suit is dismissed.

45. The learned counsel for the plaintiff/respondent makes an oral application for leave to appeal to the Supreme Court. The same is rejected. However, the execution of the order of the Court of Small Causes dated 19th Nov., 1963 in the first defendant's application by E. A. 292/E of 1962 stayed for four weeks from today on the same terms and conditions as in this Court's order dated 29th Sept., 1978 in Civil Application No. 3459 of 1976.

Appeal allowed.

AIR 1982 BOMBAY 99

MASODKAR AND KANADE, JJ.

Dinkar Ananda Deore, Petitioner v. Shantaram Punjaji Ahed and others, Respondents.

Writ Petn. No. 263 of 1981, D/- 27-2-1981.

(A) Maharashtra Zilla Parishads and Panchayat Samitis Act (5 of 1962), S. 27 — Election Petition — Disqualification of returned candidate can be raised as ground of challenge and can be considered by Election Court. 1966 Mah LJ 321 and 1963 Mah LJ 834, Held not good law in view of AIR 1976 SC 2283 and AIR 1975 Bom 205 (FB).

(Para 6)

(B) Maharashtra Zilla Parishads and Panchayat Samitis Act (5 of 1962), Ss. 16 (1) (a) (i) and 58 (1-A) — Words "Zilla Parishad" — Cannot be read as "Panchayat Samiti" — Person having direct or indirect interest in contract with Zilla Parishad is disqualified under S. 16 (1) (a) (i) to be member of Panchayat Samiti.

For all practical purposes, Panchayat Samiti is a statutory delegate available to the Zilla Parishad in the matters of execution of its own

KY/KY/F202/81/JHS

schemes and contracts. As far as the primary education is concerned, even by virtue of Second Schedule, a duty is cast on the Panchayat Samiti to manage the primary schools. In the light of this, the purpose of Cl. (i) of sub-s. (1) of S. 16 is clear, in that the member of the Panchayat Samiti should not have the direct or indirect share or interest in the contract with, by or on behalf of the Zilla Parishad. Such a contract may eventually be within the functional management of the Panchayat Samiti itself and that is the reason why the words "Zilla Parishad" need not be substituted by the words "Panchayat Samiti". (Para 13)

The provisions of S. 58 (1-A) introduce clearly a scheme by reference to the earlier provisions and the sub-section itself is self-contained with regard to the matters of modifications and changes, that are required to be made in the earlier provisions, like Sections 14, 15, 15-A, 16, 17 and 18. These modifications and changes are limited in character and enacted as such. Firstly, these sections have been made applicable in relation to the members of the Panchayat Samiti, as they apply in relation to the councillors of the Zilla Parishad. Having applied in this manner, the specific modifications have been enacted with regard to the changes in the text of Ss. 15, 16 and 17. It is obvious, therefore, that while applying these provisions no other modifications could be introduced having recourse, so as to substitute in Cl. (i) of sub-s. (1) of S. 16 the words "Panchayat Samiti" in place of the words "Zilla Parishad". That would be reading a modification by implication, a course quite hazardous and also not necessary to further the clear object and intent of the provisions of Section 16 (1) (i). Besides, wherever the Legislature intended to lay down independent disqualification qua the matters of Panchayat Samiti, it has chosen to say so, by using the language Zilla Parishad or the Panchayat Samiti, as is available in Sec. 16 (1) (a) (i). Further, the whole of the text of S. 16, because of the enacting provision of sub-section (1-A) of S. 58, is presently under the part of S. 58 itself and a member of the Panchayat Samiti is subjected to the process of disqualification because of the enacting part of S. 58, sub-sec. (1-A) and not merely because of enactment of S. 16 of the Act. For all purposes, this would be a disqualification under S. 58 itself and that is how the Legislature understands the scheme of S. 58. This is evident from the provisions of S. 62 where reference is in Cl. (1) (a) to the disqualification "under S. 58", S. 58 by itself

does not lay down the disqualification, but incorporates, by reference to the provisions with regard to the disqualifications, by enacting S. 16 as a part of sub-s. (1-A) thereof. Once this enacted arrangement is available, it follows that the whole of S. 16 will have to be read as it is in the body of sub-s. (1-A) of S. 58 and so read the enacted Cl. (i) of sub-s. (1) would take in the disqualification as against the Panchayat Samiti Members when he/she has direct or indirect by himself or by his partner, any share or interest in any work done by order of the Zilla Parishad or in any contract with, by or on behalf of the Zilla Parishad. (Paras 14, 16)

Therefore, once it is shown that there exists a disqualification by virtue of direct or indirect interest with regard to the contract with the Zilla Parishad, the disqualification operates and is available, as far as the member of the Panchayat Samiti is concerned. The disqualification under S. 16 (1) (a) (i) would also operate in cases where the contract is exclusively with the Panchayat Samiti, for, the Panchayat Samiti is a statutory instrumentality at the Block level, available for the purpose of the Zilla Parishad, and interest of its works would be the interest in the works of Zilla Parishad. (Para 17)

Held, in view of S. 58 (1-A), the employment of the wife of the petitioner by the Zilla Parishad as a teacher in a primary school disqualified the petitioner under Section 16 (1) (a) (i). (Para 21)

Cases Referred : Chronological Paras

AIR 1976 SC 2283 : (1977) 1 SCC 70 6
 AIR 1975 Bom 205 : 1975 Mah LJ 701 (FB) 4, 6, 7
 1966 Mah LJ 321 : 68 Bom LR 392 2, 4, 6
 1964 Mah LJ (Notes) 65 4
 1963 Mah LJ 834 : 65 Bom LR 545 2, 4, 6

V. Z. Kankaria, for Petitioner; P. S. Patankar (for No. 1), W. S. Devnani, Asstt. Govt. Pleader (for No. 4), for Respondents.

MASODKAR, J.:— The debated issue in the present petition relates to the jurisdiction of the Assistant Judge, Nasik, to entertain Election Petition No. 7 of 1979 and further to the disqualification that has been found against the present petitioner in view of the provisions of S. 16 (1) (a) (i) of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, for, admittedly, the petitioner's wife is a primary teacher since Sept. 3, 1965 and she was posted at Deola at the time of election of the petitioner as a member to the Panchayat Samiti, Kalvan from Deola Electoral College and she has been thereafter serving as a primary teacher at village Adgaon which falls in the Panchayat Samiti area of

Nasik. Holding that the petitioner was disqualified under S. 16 (1) (a) (i) of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 to be the member of the Panchayat Samiti, his election has been set aside.

2. Mr. Kankaria, the learned Counsel, in support of the present petition, mainly urged three points. Firstly, the learned Counsel contended that in view of the Rules framed under S. 14 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 which are made applicable because of S. 58 (1-A) thereof to the election of the Panchayat Samiti, the election petitioner could, at the most, at the time of scrutiny of nomination papers, raise such an objection. Under the rules framed, against the decision of the Returning Officer, an appeal is provided and the decision in appeal is made final. The learned Counsel submits that at no other stage the question of disqualification can be re-agitated. Secondly, it is contended that the remedy provided for by S. 27 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, does not confer the jurisdiction on the Election Court to enquire into the matters of disqualification of the returned candidate. Reliance is placed on a Division Bench decision of this Court in the case of *Gopikisan Agarwal v. District Judge, Bhandara*, 1966 Mah LJ 321, which followed the earlier judgment of this Court rendered by another Division Bench in the case of *Venkatrao Vithalrao v. Vithal Sambhaji*, 1963 Mah LJ 834. On the authority of this decision, the learned Counsel submitted that under S. 27, the question of disqualification of the petitioner could not have been gone into and the eventual order impugned in the present petition is thus without jurisdiction. Lastly, it is contended that upon proper reading of S. 58 (1-A), which, by reference incorporates S. 16, matters of disqualification with regard to members of Panchayat Samiti, as far as the provisions of sub-s. (1) (i) are concerned, will have to be read as indicating that before a person is held disqualified, he should have direct or indirect share or interest in any work done by order of the Panchayat Samiti in place of Zilla Parishad or in any contract with, by or on behalf of the Panchayat Samiti, in place of Zilla Parishad. The submission is that, the contract with the Zilla Parishad is not the contract with the Panchayat Samiti, and therefore, the employment of the wife of the petitioner by the Zilla Parishad in a primary school of Adgaon in the area of another Panchayat Samiti, would not be a disqualification. As a second limb of this submission, the learned Counsel submitted that, the provisions

of the Act show that the Panchayat Samiti is an independent entity and as such, is capable of employing servants and having contracts. Unless, therefore, there exists such type of contract, S. 16 (1) (i) is not attracted. Even otherwise, the submission is that the matters of primary education and the employment with regard to the education, are not exclusive matters of contract, but are governed by the provisions of the Bombay Primary Education Act, 1947. It is contended that, at the most, the contract of employment of a teacher in a primary school would be a statutory contract within the meaning of that Act, and if it is the State which finances the matters of primary education, in substance, the contract will be at the most with the State Government or with regard to the matters of State activities. Reliance is placed particularly on Chap. V of the Bombay Primary Education Act, 1947, to submit that such a contract is liable to be terminated by the modality indicated by that Act. In view of the provisions, the learned Counsel submits that the requirement of S. 16 (1) (i) is not fully satisfied. The provision of disqualification, according to the learned Counsel, being of the penal nature, should be strictly construed and should be strictly answered. There is, in his submission, an apparent error committed by the learned Election Judge in assuming that all these requirements have been satisfied.

3. We have given our anxious consideration to all these points raised by the learned Counsel.

4. As far as the jurisdiction under S. 27 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, is concerned, in our view, the matter is no more *res integra*. No doubt, as far as the passage of finding the jurisdiction with regard to the adjudication of the disputed qualification is concerned, the two judgments relied upon by the learned Counsel, being Venkatrao's case reported in 1963 Mah LJ 834 and Gopikisan's case reported in 1966 Mah LJ 321, did hold that the remedy under S. 27 of the Act, was a restricted remedy and because of the rules, the question of disqualification could not be subject-matter of issue in an Election Petition under S. 27. However, all this controversy, though no doubt under the different statute, i.e. the Maharashtra Municipalities Act, 1965 containing *pari materia* provisions, for providing of adjudicatory forum for deciding election disputes and the scope thereof under similar rules, has been examined by the Full Bench of this Court in the case of *Dattatraya v. Prabhakar*, AIR 1975 Bom 205. There, the

basic decision in Venkatrao's case above, which was followed in Gopikisan's case was in terms cited along with the Rules which are almost identical and the Court stated that in the view of the Full Bench, the view taken by another Division Bench of this Court in Spl. Civil Appln. No. 345 of 1962, (Radhabai Bajranglal Jaiswal v. State of Maharashtra decided on Feb. 11, 1964 : (1964 Mah LJ (Notes) 65) which was dealing with similar provisions under the Bombay Village Panchayats Act, 1958 was preferable to the view taken in Venkatrao's case, which was dealing with the provisions of the present Act, i.e. the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961. The authority of the Division Bench judgment, therefore, which normally we are bound to follow and apply, is shaken and in fact, has not been approved by the Full Bench of this Court though dealing with the question that arose under the Maharashtra Municipalities Act, 1965. The Full Bench observed, after referring to the Rules and the provisions of Section 27 as well as the observations in Venkatrao's case to the following effect:

"The well recognised distinction that exists between the provisions of the statute and those of rules made in exercise of the power of subordinate legislation, was overlooked in this case. If rules cannot be reconciled with the provisions of the statute under which they are framed, then, provisions of the statute must always prevail, though every possible attempt should be made to reconcile if it could be done, but if they cannot be reconciled, then, to the extent to which the provisions of the rules are inconsistent with the provisions of statute or derogatory from the provisions, the rules to that extent will be bad and they cannot be given overriding effect over the provisions of the statute. This aspect of the matter which was considered by the earlier Division Bench in Radhabai's case (1964 Mah LJ (Notes) 65) was overlooked. Apart from this, even the language of S. 14 (2) of Maharashtra Zilla Parishads and Panchayat Samitis Act is materially different from that of S. 17 of the Act. In our view, the view taken in Radhabai's case is preferable to the view that has been taken in Venkatrao's case by the Division Bench."

5. It is obvious that the Division Bench judgment, on which reliance is placed by the learned counsel, proceeded on a different principle and, as is pointed out by the Full Bench, did not apply the principle that the rules cannot travel beyond the terms of the statute. The jurisdiction of Election Court is created by the statute, while the jurisdic-

tion in the matter of hearing of the appeal at the stage of scrutiny, is conferred and created by the rules. It should be impermissible for the rules to cut down the statutory jurisdiction created by the parent enactment.

6. Though, no doubt as a matter of precedent the Full Bench of this Court was dealing with the similar provisions of Section 21 of the Maharashtra Municipalities Act, 1965, and the rules framed under that Act in similar terms and made these observations, we think that such observations which have the foundation in identical findings do shake the authority of the earlier judgment of the Division Bench duly considered by the Full Bench dealing with the identical or similar issues. The matter of distinction has been pointed out by the Full Bench decision and it will not be proper for us to apply the ratio of the two earlier Division Bench judgments, so as to render a judgment, which will directly conflict with the holding of the Full Bench. Not only this, but the judgment of Full Bench of this Court has been approved by the Supreme Court in the case of Madhukar v. Jaswant, AIR 1976 SC 2283. There, the Court was dealing with the provisions of the Maharashtra Municipalities Act, 1965 and the matters of disqualification and the powers of the Election Court under Section 21 of that Act. While considering the language of S. 21 and the jurisdiction conferred upon the Election Court, the Supreme Court observed that an Election Petition under S. 21 was all-inclusive and not under-inclusive and went on to further observe (at p. 2298):

"What we mean is that even if the invalidation of the election is on the score of the disqualification under S. 16 it is appropriate to raise that point under S. 21 which is comprehensive. All grounds on the strength of which an election can be demolished can be raised, in a proceeding under Section 21. The language of the provision is wide enough."

The language of S. 27 of the present Act and that of S. 21 of the Municipalities Act, 1965 is *pari materia* and is similar. On the authority of the above judgment of the Supreme Court and also of the Full Bench of this Court in Dattatraya's case (AIR 1975 Bom 205) (supra), it must be concluded that the authority of the earlier two judgments rendered in Venkatrao's case and in Gopikisan's case, holding that the matters of disqualification cannot be raised under Sec. 27 of the present Act, is shaken and is not available as a good law. On the other hand, the decision of the Supreme Court in Madhu-

kar's case clearly shows that such a challenge is permissible under S. 27 of the Act and the Election Court is competent to consider matters of disqualification.

7. Once we rule in this manner, what really remains is a question of fact and finding within the provisions of S. 16 (1) (a) (i). As far as disqualification by contract of service by the wife with the corporate body is concerned, Dattatraya's case reported in AIR 1975 Bom 205 (FB) under a similar statute is a good authority that such a service does disable the person, as well as the husband of the servant.

8. We have indicated how Mr. Kankaria wants to get out of the provisions of Section 16 (1) (a) (i) by referring to the provisions of S. 58 (1A) and the provisions of the Bombay Primary Education Act, 1947.

9. As far as S. 58 (1A) is concerned, its enacting, purpose is clear, in that, for the purpose of electing two members by direct election under S. 57 (1) (f), the provisions of Ss. 14, 15, 15-A, 16, 17 and 18 with regard to the date of election, qualifications for being elected and disqualifications and the rights to vote are being incorporated in Section 58 itself. Section 57 deals with the constitution of Panchayat Samitis and provides that two members of such Panchayat Samitis are to be elected by direct election from electoral colleges. For these direct elections, the provisions of Ss. 14 to 18 have been made applicable and sub-section (1A) of S. 58 states that the same "shall apply in relation to the members of a Panchayat Samiti as they apply in relation to the Councillors of a Zilla Parishad with the modifications that". What is being contended is that in S. 16, which is enacted for the purpose of laying down disqualifications of Councillors of the Zilla Parishad, the Court should read, for the words "Zilla Parishad", the words "Panchayat Samiti" as wherever the word "Councillor" occurs, it is required to be read as the word "member". If so read, Cl. (i) of sub-section (1) of S. 16 will indicate that what is intended is to lay down a disqualification because of direct or indirect share or interest in the contract with the Panchayat Samiti. In other words, if the contract be with the Zilla Parishad, another statutory authority, then that cannot be imported as a disqualification, for the purpose of being a member of the Panchayat Samiti. It was suggested that the words in sub-section (1A) of S. 58 "as they apply in relation to" will only mean that the words occurring, having reference to Zilla Parishad, are being substituted by similar words having reference

to Panchayat Samiti. A reference was also made to S. 62, wherein the provision is made with regard to the office of the member becoming vacant, if the member of the Panchayat Samiti becomes disqualified under Section 58. From this it is contended, that in S. 16 we will have to perforce of law, read, in place of words "Zilla Parishad" the words "Panchayat Samiti" and if so read, the present contract with the Zilla Parishad cannot be the contract that would render the petitioner disqualified. Now, the matters of disqualification rests on certain basic accepted principles; the first and foremost being that which is enacted for the purpose of maintaining the purity of administration and for the purpose of avoiding possible conflict of interest and duty of the holder of the public office, an interpretation that will subserve this statutory purpose will have to be preferred to the one which tends to be grammatical or literal. Equally correct is the proposition that, unless enacted, the disqualification cannot be assumed and an applicative effort has to be made to find out the exact terms of disqualification.

10. In the scheme of the present Act, Zilla Parishad is a constituted, corporate body. Chapter II deals with its constitution and Sec. 8 with its incorporation. Section 7 of the Act, enumerates the authorities which are charged with the duty to carry out the provisions of the Act, the first being the Zilla Parishad and the second being the Panchayat Samiti, followed by other committees, authorities and officers. All the incident, of statutory corporation have been expressly enacted in favour of the Zilla Parishad required to be so constituted. The constitution of the Panchayat Samiti is independently dealt with in Chap. III and that shows that it is a legal body created for the specific purpose and not by itself an independent corporation. Section 57 deals with the constitution of Panchayat Samiti which is a body established at the Block level of the District. Councillors from the Block of the Zilla Parishad become ex-officio members of the Panchayat Samiti under S. 57 (1) (a), followed by the co-opted Councillors, if any residing in the Block. (S. 57 (1) (b)). Clauses (c) and (d) of sub-section (1) of Section 57 deal with the representative of the co-operative society, while Cl. (e) with a woman representative. Clause (f) permits two members to be elected by direct election from electoral colleges. This constitution shows that a direct election has to be held only under S. 57 (1) (f) with regard to the two representatives to be elected in the manner provided for by S. 58. The Block De-

velopment Officer is the ex-officio secretary of the Panchayat Samiti. No doubt, the other provisions indicate that the office of the member has a statutory tenure as well as the Panchayat Samiti has to have the Chairman and Deputy Chairman. Followed by the scheme of S. 7, a provision is also made to constitute other committees. After this statutory constitution of the different authorities is so laid down, Chap. VI deals with the powers and duties of the Zilla Parishad, Panchayat Samiti and Committees. Section 100 deals with the administrative powers and duties of the Zilla Parishad while Section 101 with that of Panchayat Samiti, the former having reference to the First Schedule, while the latter having reference to the Second Schedule. The First Schedule shows several subjects of activities, including the development activities, which are made the part of the duty of the Zilla Parishad to carry on, so far as its district funds may allow. Entries under the heading Education from 24 to 29 include, at Entry 24, the establishment, management, maintenance, inspection, etc. of primary schools and that Entry 24 includes the matters of powers vested in the State Government, under the provisions of the Bombay Primary Education Act, 1947. A similar scheme is available in Section 101 with regard to the Second Schedule, laying down that it would be the primary responsibility of the Panchayat Samiti so far as funds at its disposal will allow, to make reasonable provision for the matters enumerated by the Second Schedule, and that includes item (23-a) with regard to the management of primary schools.

11. These provisions unmistakably show that, as far as the primary education is concerned, it is the duty of the Zilla Parishad and its management of primary schools also falls under item (23-a) of the Second Schedule. The scheme of the Act shows that the district funds are at the disposal of the Zilla Parishad, out of which the funds are made available to Panchayat Samiti for the purpose of carrying out its various functions. The matter is not different, even if the reference is made to Bombay Primary Education Act, 1947. Chapter III of the Bombay Primary Education Act, 1947 deals with powers, duties and functions of Zilla Parishads and other bodies like the Authorised Municipalities and Municipal School Boards. Sub-section (1) of S. 13 of that Act provides that the Zilla Parishad shall have control over all approved schools and sub-section (2) of S. 13 further provides that the Zilla Parishad shall perform the duties and functions

one of which is to maintain an adequate number of primary schools. It is obvious therefore that both under the Maharashtra Zilla Parishads and Panchayat Samities Act, 1961 as well as under the Bombay Primary Education Act, 1947, the Zilla Parishad is obliged, not only to supervise the primary schools but also to maintain adequate number of schools by itself. When such Zilla Parishad Schools are within the area of the Block, it can be consistently read, in view of the Second Schedule, item (23-a), that the management of such schools is also the responsibility of the Panchayat Samiti.

12. The character of the Panchayat Samiti in relation to the Zilla Parishad is clearly one of legal authority charged with the duty by the statute, with regard to the matters primarily available in the Second Schedule. The administration of the district under the Act vests in the corporate body called Zilla Parishad. It is only at the Block level that a legal authority is created as a statutory functionary and is made available for carrying out the statutory purposes as may be laid down even by Zilla Parishad Act. Section 106 deals with the powers and functions of Zilla Parishad, while Section 108 deals with the powers and functions of Panchayat Samiti. Clause (e) of S. 108 (i) enjoins upon the Panchayat Samiti to perform such functions of the Zilla Parishad as are delegated to it by or on behalf of the Zilla Parishad. Similarly Cl. (d) of S. 108 (i) enjoins upon the Panchayat Samiti to execute, maintain, supervise and administer the works and development schemes of the Zilla Parishad. Section 108-A lays down that the Panchayat Samiti shall conform to any instructions that may be given to it by the Zilla Parishad in the execution by the Panchayat Samiti of its duties and functions under the Act. Therefore, it follows that the Panchayat Samiti is a legal body which is subjected to the jurisdiction and powers of the Zilla Parishad to the extent expressly stated by these various provisions.

13. We have referred to these provisions so as to indicate the purpose as to why it is not necessary to follow the approach of interpretation suggested by the learned counsel so as to read S. 16 (1) (i) by substituting wherever the words "Zilla Parishad" occur, the words "Panchayat Samiti". For all practical purposes, Panchayat Samiti is a statutory delegate available to the Zilla Parishad in the matters of execution of its own schemes and contracts. We have indicated that as far as the primary education is con-

cerned, even by virtue of Second Schedule, a duty is cast on the Panchayat Samiti to manage the primary schools. In the light of this, the purpose of Cl. (i) of sub-section (1) of S. 16 is clear, in that the member of the Panchayat Samiti should not have the direct or indirect share or interest in the contract with, by or on behalf of the Zilla Parishad. Such a contract may eventually be within the functional management of the Panchayat Samiti itself and that is the reason why the words "Zilla Parishad" need not be substituted by the words "Panchayat Samiti", as is being canvassed for by the learned counsel.

14. The provisions of S. 58 (1A) introduced clearly a scheme by reference to the earlier provisions and the sub-section itself is self-contained with regard to the matters of modifications and changes, that are required to be made in the earlier provisions, like, Ss. 14, 15, 15-A, 16, 17 and 18. These modifications and changes are limited in character and enacted as such. Firstly, these sections have been made applicable in relation to the members of the Panchayat Samiti, as they apply in relation to the Councillors of the Zilla Parishad. Having applied in this manner, the specific modifications have been enacted with regard to the changes in the text of Ss. 15, 16 and 17. It is obvious, therefore, that while applying these provisions no other modifications could be introduced having recourse, as is suggested and submitted by the learned counsel for the petitioner, so as to substitute in Cl. (i), of sub-section (1) of S. 16 the words "Panchayat Samiti" in place of the words "Zilla Parishad". That would be reading a modification by implication, a course quite hazardous and also not necessary to further the clear object and intent of the provisions of S. 16 (1) (i).

15. Therefore, once it is shown that there exists a disqualification by virtue of direct or indirect interest with regard to the contract with the Zilla Parishad, the disqualification operates and is available, as far as the member of the Panchayat Samiti is concerned. It is not necessary in all cases that such a contract must be with the Panchayat Samiti so as to attract the said disqualification.

16. Wherever the Legislature intended to lay down independent disqualification qua the matters of Panchayat Samiti, it has chosen to say so, by using the language Zilla Parishad or the Panchayat Samiti, as is available in S. 16 (1) (a) (i). So also, when any other body was to be indicated like the Village Panchayat, specific mention of such

a body, is available in S. 16 (1) (h) "a Panchayat Samiti or Zilla Parishad or under or in the gift of the Government". So is the position with regard to Cl. (k). No doubt each of the clauses from (a) to (m) of sub-section (1) of S. 16 is an independent subject by itself, but its text can offer a guideline in the matters of interpreting the other clauses. Particularly when an interpretative debate is raised suggesting the modifications in the text of a clause like the present one, because of its application to the members of the Panchayat Samiti. The whole of the text of S. 16, because of the enacting provision of sub-section (1A) of S. 58, is presently under the part of S. 58 itself and a member of the Panchayat Samiti is subjected to the process of disqualification because of the enacting part of S. 58, sub-section (1A) and not merely because of enactment of S. 16 of the Act. For all purposes, this would be a disqualification under S. 58 itself and that is how the Legislature understands the scheme of S. 58. This is evident from the provisions of S. 62 where reference is in Cl. (1) (a) to the disqualification "under S. 58". Section 58 by itself does not lay down the disqualification, but incorporates, by reference to the provisions with regard to the disqualifications, by enacting Section 16 as a part of sub-section (1A) thereof. Once this enacted arrangement is available, it follows that we will have to read the whole S. 16 as it is in the body of sub-section (1A) of S. 58 and so read the enacted Cl. (i) of sub-section (1) would take in the disqualification as against the Panchayat Samiti Members when he/she has direct or indirect by himself or by his partner, any share or interest in any work done by order of the Zilla Parishad or in any contract with, by or on behalf of the Zilla Parishad.

17. An argument was advanced that this interpretation will not cover cases where the contract is exclusively with the Panchayat Samiti. We do not think so. The position of the Panchayat Samiti, as is indicated, is that of a statutory authority and it is really an instrumentality of the Zilla Parishad itself. A person having contract of the nature contemplated by Cl. (i) of Sec. 16 (1) given by the Panchayat Samiti would nonetheless be having an interest in the contract which is either by or on behalf of the Zilla Parishad. The scheme of the various functions of the Panchayat Samiti, its statutory funds and its subordination to the Zilla Parishad, clearly goes to show that it is not an independent corporation as such. It is a statutory instrumentality at the Block level, available for the purpose of the Zilla

Parishad, and interest of its works would be the interest in the works of Zilla Parishad. It will be futile to contend that when the work is being done, if it be the case of a work, or the contract is being executed if it be the case of a contract, the Zilla Parishad will not have any interest, either in the execution, implementation or possession of the work or of the contract. The integrated scheme of the present Act shows that the defined district is placed under the administration of Zilla Parishad and for the purpose of development works and schemes, in the jurisdiction of the Zilla Parishad several instrumentalities have been created so as to achieve the objects of the Act. Though the Panchayat Samiti is constituted as an authority, that by itself is not enough to confer a separate identity on its functioning so as to take away the contracts out of the interest that Zilla Parishad has. This approach furthers the object to avoid possibility of conflict of interest with public duty attached to the office of the member of the Panchayat Samiti. We have, therefore, no manner of doubt that the words in S. 16 (1) (i) are wide enough to include the contracts given, assuming it can be so given, by the Panchayat Samiti but that would normally be in the interest of the Zilla Parishad so as to attract the disqualification.

18. This conclusion is reinforced, if we see the scheme of the district fund, which is placed at the disposal of the Zilla Parishad. It is the Zilla Parishad who can levy taxes or collect the fees and it is one of the obligations of the Zilla Parishad to set apart and allocate moneys out of that fund even to the Panchayat Samiti. Section 104 makes district fund ordinarily liable for all costs and expenses including the liability that arises under any contract or agreement in relation to any Panchayat Samiti. Therefore, we are satisfied that without the substitution of the words "Zilla Parishad" by the words "Panchayat Samiti" as is argued, the efficacy of Cl. (i) of S. 16 (1) is not whittled down, nor there is any scope to avoid the disqualification by reason of the contract with the Panchayat Samiti, which would obviously be a part of the activity in relation to the Zilla Parishad and thus within the terms of Cl. (i).

19. There is yet another principle which must be applied to the matters of disqualification. We have indicated above that Section 16 by process of statutory incorporation is the part of S. 58. As far as the constitution of Panchayat Samiti is concerned, it does not merely consist of the elected members, as is provided by the process of hold-

ing elections under S. 58, but there are other members, like all councillors, who are elected to the Panchayat Samiti from the electoral divisions included in the Block. Similarly, there are co-opted councillors residing in block and further are the members who come under Cls. (c), (d) and (e) of S. 57 (1). By virtue of the constitution provided for in Section 57 all those who come under these different categories from Cls. (a) to (f) of sub-section (1), become the members of the Panchayat Samiti. While interpreting the matters of disqualifications which are the matters of disabling the holders of the public office qua the public office, we think the interpretative approach should be to achieve and apply the uniform norms in the matters of qualifications and disqualifications. This principle of uniformity underlies the scheme of incorporation by reference in the terms of sub-section (1A) of S. 58. It subjects the members, to be elected under S. 57 (1) (f), to the same process of qualifications for being elected, and disqualifications as applies to councillors. That shows that to all categories of members the Legislature intends that the matters of disqualification shall apply uniformly and in the same manner. This scheme is further clarified by the provisions of S. 62 dealing with the disqualification of a member of Panchayat Samiti. That has a reference to the member of the Panchayat Samiti other than a councillor. By that a member other than a councillor, is subjected to the disqualifications enacted by S. 58, while the councillor remains subject to the same disqualification by virtue of Section 16 of the Act. If we were to read the changes in S. 16 (1) (i) by substituting the words "Panchayat Samiti" in place of the words "Zilla Parishad", then obviously there would be two different types of disqualifications with regard to the members under S. 57 (1) (f) and the councillors who become the members under other clauses of sub-section (1) of S. 57. Though the councillors, by virtue of their office, become the member of the Panchayat Samiti with regard to them a different rule of the disqualification will apply while with regard to the members who are elected because of the election under S. 58, different rule with regard to the same matter will be operative.

20. By suggesting interpretation, it is not necessary to work out any such antithetical results. The said interpretation, as we indicated above, assumes a total independence and identity in favour of Panchayat Samiti, the position, however, being just the otherwise. An instrumentality for specific purpose need not be equated with the corpora-

tion. When such an instrumentality enters in any contract, it should necessarily follow that a corporate body like Zilla Parishad under the present statute would be interested in execution as well as the fruits of such contracts. Therefore, uniformly the councillors and members are subjected to the same disqualification. Furthermore this principle of uniformity requires that all those who become the members of the Panchayat Samiti either because of their being the councillors residing in the Block or because of their election, should be subjected to the similar process of disqualification. Such a disqualification is very much enacted in terms by S. 16 (1) (i) and, because of sub-section (1A) of S. 58, is made applicable to those who are elected under S. 58 and become the members of the Panchayat Samiti.

21. We, therefore, hold that the contract of service as teacher in the Zilla Parishad Primary School of the wife of the present petitioner is within the disqualification enacted by S. 16 (1) (i) applicable, because of sub-section (1A) of S. 58, to the petitioner.

22. In view of all this, we find no merits in any of the submissions of the learned counsel. Rule discharged with no order as to costs.

Petition dismissed.

AIR 1982 BOMBAY 107

SHARAD MANOHAR, J.

Krishnabai, Appellant v. Dnyandeo Laxman Yeyale and others, Respondents.

Second Appeal No. 703 of 1974, D/- 21-10-1980.

Transfer of Property Act (4 of 1882), S. 8 — Deed — Construction — Grant in favour of Hindu female — Same rules of construction as in case of grant in favour of male apply — Family dispute — Decree for possession of immovable property in favour of plaintiff Hindu widow — Neither decree nor subsequent compromise in execution providing that limited estate was granted — Held, what was granted was absolute estate. (1874) 2 Ind App 7 (PC), Held not good law in view of AIR 1954 SC 355 and AIR 1951 SC 139 — (Deed — Construction).

(Paras 12, 13, 15, 17)

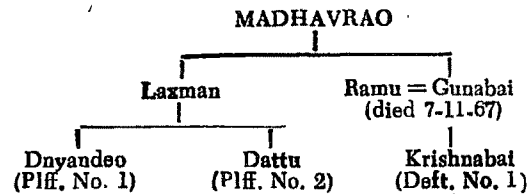
Cases Referred: Chronological Paras
AIR 1954 SC 355 : 1954 SCJ 557 14, 15
AIR 1951 SC 139 : 1951 All LJ 24 : 1950 SCJ 575 15, 16
(1874) 2 Ind App 7 (PC) 14, 15

V. M. Limaye, for Appellant; K. J. Abhyankar, D. R. Bamalikar and G. R. Rege, for Respondents.

JY/JY/E862/81/JHS

JUDGMENT :— This second appeal is filed by original defendant No. 1 against the decree for possession passed against her by the learned Assistant Judge, Satara. The original plaintiffs and defendant No. 2 are the respondents before me.

2. It will be useful to set out the genealogical table showing the relationship of the parties.



From the genealogy it will be seen that Madhavrao had two sons Laxman and Ramu. Admittedly Ramu died before the year 1937. He had no male issue. His widow's name was Gunabai and his daughter was Krishnabai, who was defendant No. 1 in the suit. Gunabai died on 7th Nov., 1967. Rama's brother Laxman left behind him two sons viz. Dnyandeo Laxman (plaintiff No. 1) and Dattu Laxman (plaintiff No. 2).

3. The plaintiff's contention in the plaint was that at the time of his death Rama was joint with Laxman. According to the plaintiff on 4th Oct., 1907, a maintenance deed was executed by Laxman in favour of Gunabai and by virtue of that maintenance deed a portion of land admeasuring 3 acres out of Survey No. 573 and one house were given to Gunabai for her maintenance during her lifetime. In the maintenance deed it was mentioned that she would be entitled to get the income of the property only. As a matter of fact initially the income of the property was given to her by Laxman himself by cultivating the property. But the provision was that if he failed to give such income she was to get possession of the land and was to get it cultivated herself. But there is no room for doubt left by the said document that during her lifetime Gunabai was to enjoy the property as owner. This is what is stated in the maintenance deed in this behalf.

"After your lifetime we will be owners of both these properties".

Thus, there is no room for doubt that during her lifetime she was the owner of the property but was to have only a widow's estate. In other words what was given to Gunabai was only a widow's estate in the said property by virtue of the said maintenance deed. It appears that in spite of the maintenance deed Gunabai was smarting under some grievance. Her exact grievance is to be found only from

the documents she filed in Civil Suit No. 66/1915 on 9th Oct., 1916 against Laxman and his two sons i.e. the present plaintiffs. In that suit she maintained that the statements made in the impugned maintenance deed were not correct and that she came to know about those statements only subsequently. In the said suit i.e. Suit No. 66/1915 she claimed possession not only of Survey No. 573 but also of Survey No. 643 contending that there was already a partition between Laxman and Rama, that the suit property belonged to Rama exclusively and that after his death she had inherited the suit property. So far as the claim of Gunabai for the land Survey No. 573 was concerned, the Court passed a decree in favour of the plaintiffs as regards that land but the Court, for some reasons or the other, did not consider the plaintiff's claim to land Survey No. 643 in that suit. A decree was passed in the suit in favour of Gunabai directing Laxman and the present plaintiffs to handover possession of the said portion of the land to her, leaving her right to claim the other land bearing S. No. 643 open. Gunabai filed an application for execution of the said decree which was regular Darkhast No. 364/1917 and in that Darkhast there was a compromise arrived at between the parties. According to the compromise, though Gunabai was entitled as per the decree, to get a portion of land Survey No. 573, she was given, instead, a portion of land admeasuring 2 acres and 20 gunthas from land Survey No. 643. But what is to be noted is that neither in the decree nor in the subsequent compromise there was any restriction placed upon Gunabai, so far as the enjoyment of the property was concerned. It may be mentioned here that so far as the Maintenance Deed (Exh. 51-A) was concerned, it is specifically mentioned in it that what was given by that Maintenance Deed to Gunabai was widow's estate. It is also mentioned that Gunabai was prohibited from making any alienation of the property by way of sale or mortgage etc. But neither the subsequent decree nor the subsequent compromise mentioned above put a restriction upon Gunabai to alienate the property during her lifetime nor did those two instruments in any way provide that what was being granted to Gunabai under the decree or under the compromise was only a limited widow's estate.

4. There is no dispute that the compromise was acted upon and Gunabai got the possession of land Survey No. 643/2-A admeasuring 2 acres and 20 gunthas and continued to be in possession of the same actually or constructively, till 15th Sep., 1943,

when she executed a gift deed in favour of her daughter Krishnabai, defendant No. 1 in these proceedings. The plaintiffs, no doubt, contended that in spite of the gift deed Gunabai continued to be in possession of the suit land and that the defendant No. 1 had no right, title and interest in the same. Gunabai died on 17th Nov., 1967. The plaintiffs therefore contended that they got the right of possession of this suit land on the said date of the death of Gunabai. They contended that Krishnabai had no right, title and interest on the property either by virtue of the gift deed or independent of the gift deed. So far as the gift deed was concerned their contention was that the gift deed was void ab initio because there was a restriction upon Gunabai from making any alienation of the property by virtue of the deed of maintenance. So far as the right of the defendant No. 1, independent of the gift deed, was concerned, the plaintiffs' contention was that in the peculiar circumstances of the case Krishnabai could not be said to have become full-fledged owner of the suit land and hence defendant No. 1 could not be said to have inherited the suit land from Gunabai. In the suit defendant No. 2 was impleaded because according to the plaintiffs his name was shown in the record of rights as a tenant. The plaintiffs contended that even if any rights were created in favour of defendant No. 2 by Gunabai, they were extinguished with the death of Gunabai. They therefore contended that they were entitled to actual possession of the land in question from both the defendants.

5. Defendant No. 1 filed her written statement Ex. 18 and contended that the suit land belonged to Rama as his exclusive property. They challenged the validity of the maintenance deed Exhibit 51-A contending that it was a false and fabricated document, brought about only to avoid the share of Gunabai in the property of her husband Rama. Defendant No. 1 contended that the Maintenance Deed was never acted upon. The defendant No. 1 also contended that the gift deed dated 15th Sep., 1943 was fully acted upon and she was in possession of the suit land on the basis of the said gift deed. They contended that Gunabai was an absolute owner of the property and that there was nothing in the decree Exhibit 34 and the compromise Exhibit 47, by virtue of which the land became a limited estate in the hands of Gunabai. They contended that she being a full owner of the property was perfectly competent to execute the gift deed in favour of defendant No. 1 and that hence the gift deed was a valid document.

6. Defendant No. 2 filed his written statement contending that he was a tenant of the land and was in possession of the same for the last 42 to 45 years. He contended that firstly his father was the tenant on the land even before Gunabai had obtained possession of this land. He contended that after his father's death he himself became the tenant of the land. He therefore contended that no decree for possession could be passed against him.

7. On these pleadings the issues were framed by the learned trial Judge. Issue No. 2 was to the effect as to whether the plaintiffs proved that Gunabai was a limited owner in respect of the suit lands. The finding recorded by the learned trial Judge was that they had failed to prove the same. The learned Judge arrived at the conclusion that there was nothing in the decree Exhibit 34, or the compromise Ex. 47, which showed that what was given to Gunabai under the said decree was only a limited estate of a widow. The learned Judge therefore held that Gunabai was an absolute owner of the suit land. Hence the learned Judge held that the gift deed executed by Gunabai in favour of defendant No. 1 was a valid document and that her possession of the suit land as per the said gift deed was a lawful possession.

8. Issue No. 4 framed by the learned trial Judge is of some significance in this appeal. The issue framed by the learned trial Judge is as follows:—

Does defendant No. 2 prove that he is a tenant in the suit land since the time of his father?

After framing this issue the learned trial Judge referred the said issue to the Tenancy Court under S. 85-A of the Bombay Tenancy Act. Initially the Tahsildar made a report that according to the Tenancy Court defendant No. 2 was a tenant in respect of the suit land since the time of his father. But it appears that the present plaintiffs filed an appeal to the Collector and the Appeal Court set aside the order of Tahsildar and remanded the case back to him. After the remand the Sub-Divisional Officer observed that the issue involved the question of title. He held that before deciding the question as to whether defendant No. 2 was a tenant of the land or not, the question of title of the person who let out the land to defendant No. 2 would have to be adjudicated upon. He therefore returned the issue to the Civil Court for decision of the question regarding the title of the person who let out the land to defendant No. 2. Therefore the trial Court was required to decide this issue but since the trial Court came

to the conclusion that the plaintiffs themselves failed to prove their title to the suit land, and that defendant No. 1 proved her title to the same, the plaintiffs' suit for possession had to be dismissed and hence according to the trial Court no separate answer to issue No. 4 was necessary. The trial Court therefore dismissed the plaintiffs' suit with no order as to costs.

9. In appeal the learned Assistant Judge took a different view. According to the learned Judge, what was given to Gunabai as per the decree Ext. 34, as well as, as per Compromise Ex. 47, was nothing but a limited estate. This view was arrived at by him by holding that the decree Ext. 34 was passed with a view to enforce the Deed of Maintenance itself. After taking this view the learned Judge referred to and relied upon the provisions of S. 14 (2) of the Hindu Succession Act and held that Gunabai's right could have been perfected into an absolute ownership under S. 14 (1) of the Hindu Succession Act but he found that Gunabai was not "possessed" of the property at the time of the advent of the Hindu Succession Act within the contemplation of S. 14 (1) of the said Act. He found that the property at that time was in possession of the defendant No. 2. He also referred to provisions of S. 14 (2) of the Act and held that by virtue of the decree Gunabai had got only a limited right in the suit property. He therefore held that even under S. 14 (2) of the Hindu Succession Act Gunabai could not be said to have acquired absolute ownership of the suit property on the date when the Hindu Succession Act came into force. He therefore held that the defendant No. 1 had no title to the suit property after the death of Gunabai. He also held that even assuming that the property was separate property of Rama, the plaintiff being reversionary heirs are entitled to the suit land.

10. So far as defendant No. 2 was concerned the learned Judge noticed the fact that the reference was returned by the Tenancy Court but he did not think it necessary to make the reference afresh. He held that defendant No. 2 was a trespasser because Gunabai could not create a valid legal tenancy in his favour nor could defendant No. 1 create any legal tenancy in his favour. He therefore allowed the appeal and passed a decree for possession in favour of the plaintiffs against both the defendants.

11. The present appeal has been filed by the original defendant No. 1 against the said decree for possession. It may be mentioned here that no appeal as such was filed by the defendant No. 2 against the order for de-

livery of possession of the suit property. Having regard to the view that I am taking in the matter, the fact that the defendant No. 2 has filed no appeal, may be of no legal consequence. However, I might make a few observations in that behalf in the concluding portion of this judgment.

12. Coming to the main question as to whether the plaintiffs have proved their title to the suit lands Mr. Limaye the learned Advocate for the appellant contended before me, with some force, that assuming any right or title enured in favour of Gunabai by virtue of the Maintenance Deed Ex. 51-A, Gunabai had not certainly claimed the right to suit property in Civil Suit No. 66/1915 on the basis of the said Maintenance Deed. In fact Ext. 34 passed in the said suit clearly shows that according to her the document that came to be executed was without her knowledge and she did not agree with the contents of the same at all. In fact she claimed that her husband Rama was not living jointly with his brother Laxman and that both the lands Survey Nos. 573 and 643 were separate property of Rama. She, therefore, filed a suit for possession not only of the said Survey No. 573 but also of Survey No. 643. It is the decree in this suit which is on record. The written statement filed by the defendant in that suit is not on record at all. No doubt the decree goes to provide that Gunabai would be entitled to possession of land Survey No. 573 and the decree does not give anything to Gunabai so far as the land Survey 643 was concerned. But from this fact it cannot be inferred that the decree was one which enforced the maintenance deed. For ought we know, the defendants might have themselves set up the maintenance deed by way of defence and the Court might have passed a decree on admission so far as the Survey No. 573 was concerned. It is significant that the plaintiffs' claim regarding Survey No. 643 was not at all rejected by the Court. It seems that the Court was willing to grant whatever was admitted by the defendant and the disputed claim was left to be adjudicated upon by them in an independent litigation. The point is that the decree nowhere mentions that the land Survey No. 573, the possession of which was to be received by Gunabai from Laxman and his sons, was to be had by her as widow's estate. I will presently discuss the effect of this decree which is an unqualified decree. What I want to point out here is that the learned Judge's plea that the decree created a limited estate in favour of the widow is not justified by the phraseology employed in the decree.

13. We then come to the compromise which was arrived at between the parties in the Darkhast proceedings. I have mentioned above that in the Darkhast the parties arrived at a compromise by virtue of which Survey No. 573 which was to be taken possession of by the widow Gunabai was to be given to Laxman and his sons, whereas a portion admeasuring two acres and twenty gunthas out of Survey No. 643 was given to Gunabai. In a sense it can be legitimately said that this was a grant in favour of Gunabai. As a matter of fact it can be said that the decree created a grant in respect of Survey No. 573, whereas the compromise created a grant in respect of land Survey No. 643, to the extent of 2 acres and 20 gunthas in favour of Gunabai in place of the other land. But the noteworthy feature is that even this compromise makes a grant of this Survey No. 643 in favour of Gunabai in an unqualified manner. The compromise by itself nowhere shows that what was contemplated by the compromise was to grant only widow's estate to Gunabai and not the absolute estate as contemplated by S. 8 of the Transfer of Property Act. Relying upon these facts Mr. Limaye contends that there is nothing in the grant resulting from the decree Ext. 34 and Compromise Ex. 47 to show that Gunabai ever received a grant of widow's estate in respect of the suit land. He therefore contended that there is no basis for the learned Judge's reasoning that because Gunabai was not possessed of the land at the time of the advent of the Hindu Succession Act, she did not become the full owner of the same by virtue of S. 14 (1) of the Act. He contends that under S. 14 (1) of the Act a limited estate can itself ripen into a full absolute estate but neither the effect of S. 14 (1) nor of S. 14 (2) was in any way to affect an estate which was already an absolute estate. He therefore contended that Gunabai's executing a gift deed in favour of her daughter Krishnabai was legal and she was perfectly competent to do the same. He contended that the defendant No. 1 acquired a full title to the suit property by virtue of her right. He contends that neither sub-sec. (1) nor sub-sec. (2) of S. 14 of the Hindu Succession Act had any relevance in the context of the facts of this case.

14. Mr. Abhyankar, the learned Advocate appearing for the plaintiffs on the other hand contended that the decree as well as the compromise must be deemed to have contemplated a grant of widow's estate only in favour of Gunabai. In this connection he relied upon the following observations of their Lordships

of Privy Council in *Mahomed Shumsool v. Shewukram*, (1874-2 Ind App 7) :

"In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus, with respect to the devolution of property. It may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate." Relying upon these observations Mr. Abhyankar also referred to para 401 of the Commentaries of Mulla on Principles of Hindu Law. In fact the above observations have been culled out from Cl. 2 of the said para 401 only. Relying upon these observations Mr. Abhyankar contended that when the decree Ext. 34 provided that Gunabai was to get possession of S. No. 573, what must be deemed to have been intended is that she was to get a widow's estate in respect of the suit lands. He however contended that so far as the compromise Ext. 47 was concerned all that was done by the latter document was to exchange one land for the other. I am afraid it will not be possible for me to agree with Mr. Abhyankar so far as this legal aspect of the matter is concerned. No doubt the above mentioned observations of the Privy Council do give rise to an inference of presumption in favour of holding that if a decree results in a grant in favour of a widow, the grant is presumed to be of a limited estate. But ought we know much water has been flown through the Ganges since the said P. C. decision was given as early as in the last century in the year 1874, if not even earlier. But as against that decision, I have before me two Authorities of the Supreme Court wherein different view is expressed. The first one is *Nathoo Lal v. Durga Prasad*, (AIR 1954 SC 355) wherein the Supreme Court observed as follows (at p. 358) :—

"It may be taken to be quite settled that there is no warrant for the proposition of law that when a grant of an immoveable property is made to a Hindu female, she does not get an absolute or alienable interest in such property, unless such power is expressly conferred upon her. If an estate were given to a man without express words of inheritance, it would, in the absence of a conflicting context, carry, by Hindu law, an estate of inheritance. This is the general principle of law which is recognised and embodied in S. 8 of the Transfer of Property Act and unless it is shown that under Hindu law a gift to a female means a limited gift or carries with it the restrictions or disabilities similar to those that exist in a 'widow's

estate' there is no justification for departing from this principle. There is certainly no such provision in Hindu law and no text could be supplied in support of the same. The position, therefore, is that to convey an absolute estate to a Hindu female, no express power of alienation need be given; it is enough if words are used of such amplitude as would convey full rights of ownership."

15. It will be thus seen that according to the Supreme Court the tests laid down for construing the words of grant in favour of a male and female under the Hindu law are not different. The words employed for a grant in favour of a male Hindu would connote the same meaning as those employed for the grant in favour of a female Hindu and vice versa. If this is the position, then what is necessary to be seen is as to whether the words of the decree that was passed by the Court in Civil Suit No. 66/1915 would spell a limited estate if the decree was passed in favour of a male plaintiff. Mr. Abhyankar contended that we have to take into account the circumstances in which the decree was passed. But in the first place I am not sure that there is much scope for such construction. There is nothing unequivocal or vague in the decree. The decree has to be read in the context of the law of the land which, as observed by the Supreme Court, is to be found in S. 8 of the T. P. Act. The said S. 8 provides that unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property thereof. Section 8 of the T. P. Act no doubt contemplates the case of transfer inter vivos by the act of parties; but the principle is the same in respect of transfer mortis causa or one which materialises by virtue of any order or decree of a Court. There is no reason to assume that when the decree was passed giving Gunabai title to the suit property she was intended to be given limited estate and not full-fledged estate. I have before me another Authority of the Supreme Court reported in AIR 1951 SC 139, (*Ram Gopal v. Nandlal*), which lays down the same proposition. In *Nathoolal's case* (AIR 1954 SC 355) the Supreme Court no doubt observed that there is no warrant for the proposition of law that when a grant of immoveable property is made to a Hindu female, she does not get an absolute or alienable interest in such property unless such power is expressly conferred upon her. The Supreme Court held that the position is that to convey an absolute estate to a Hindu female no express power of alienation

need be given; it is enough if words are used of such an amplitude as would convey the full right of ownership. We have only to see here in the decree Ext. 34 as well as the decree compromise Ex. 47 that there is no restriction whatsoever placed upon the rights of Gunabai when she was given initially the grant of land Survey No. 573 and later on the grant of land Survey No. 643/2. The words are of sufficient amplitude to convey an absolute estate, and there is nothing in the decree which in any way restricts Gunabai's property in the suit land to a widow's estate. I may mention here that while making the above observations the Supreme Court in fact considered and examined the effect of the Privy Council's decision in Mahomed Shumsool's case (1874-2 Ind App 7) referred to above and the judgment was given in spite of that case. It can, therefore, be safely said that the judgment in Shumsool's case is no longer good law in view of the above mentioned two Authorities of the Supreme Court.

16. Incidentally, I may also point out that in Ramgopal's case, AIR 1951 SC 139, the property received by a Hindu female was under a gift deed for her maintenance only. But in spite of this position the Supreme Court in that case came to the conclusion that merely because the properties of the gift was to provide for maintenance of the widow it would not mean that the extent of the property was widow's estate only. In the instant case, no doubt it is the case of the plaintiff that what was given to Gunabai was property for the sake of her maintenance. But when the land Survey No. 643 was given in lieu of the property mentioned in the Maintenance Deed it could not be said that what was intended to be given was only a limited estate. It would no doubt be perfectly open for the parties to lead evidence for proving the intention of the transfer while making the grant. But the fact that it was given with a view to facilitate the widow to maintain herself would not by itself given rise to a presumption that only limited estate was purported to be created.

17. In this view of the things, I am unable to agree with the view taken by the learned Assistant Judge that Gunabai was in possession of the suit land as a limited owner. The inference must be that if she was the owner of the land she had the right of absolute ownership in respect of the same. I may hasten to add that I am expressing this view only strictly in the context of the facts of this case where nothing is brought on record to show that a contrary intention was entertained by both the parties.

18. Having regard to this view that I have taken it is unnecessary to examine the correctness of the learned Judge's final decree against defendant No. 2, directing him to hand over the actual possession of the suit land to the plaintiffs. However I may make a few observations in this behalf. The contention of defendant No. 2 was that he was a tenant on the suit land for nearly 42 to 45 years before the date of the suit and that too even before Gunabai got possession of the land from Laxman and the two present plaintiffs. He contended that it was his father who was tenant of the land and thereafter he became the tenant and that the tenancy subsisted for a period of nearly 42 to 45 years. To my mind the Tenancy Court was not at all right in returning the reference on the ground that a question of title was involved. So far as the question of title was concerned, Gunabai's title from the date of the compromise Ext. 47, till the gift deed of the year 1943 was never in question. The position, therefore, would be that if Gunabai had created the tenancy in her lifetime before the date of gift deed, the tenancy would be perfectly lawful one. It is only if Gunabai did not have an absolute estate, but had only a limited estate and if Gunabai had created a tenancy in favour of defendant No. 2, after the year 1943, that the question as to whether the tenant would be lawful tenant or not would be of some relevance. In the instant case the Tenancy Court actually recorded a finding in the first instance that the defendant No. 2 was a tenant since the time of his father. The impression that is gathered is that the contention of the defendant No. 2 that he was a tenant for nearly 45 years before the date of the suit is accepted by the Tenancy Court. The correctness of this view could no doubt be verified and examined by the Appellate Court but the Tenancy Court had no jurisdiction or justification to send back the matter to the Civil Court. In any event the Civil Court could be said to be having no jurisdiction to pass a decree against the tenant if the tenant was inducted on the land by Gunabai before the year 1943. The view of the learned Assistant Judge that Gunabai had no power to create tenancy appears to be without any basis. No doubt the learned Judge appears to have been influenced by the prohibition contained in the Maintenance Deed Ext. 51-A forbidding Gunabai from alienating the land. But what the learned Judge lost sight of was that Gunabai did not claim her right to the suit lands through the maintenance deed at all. Assuming she got any right flowing from the maintenance deed, the right merged in the decree in the first in-

stance and in the compromise later on. Both those documents did not contain any restriction against any alienation by Gunabai. The learned Judge's view that defendant No. 2 was therefore a trespasser is a finding without jurisdiction. However, having regard to the facts that I have taken viz. that the plaintiffs' suit itself is liable to be dismissed for want of title, it is not necessary for me to pass any separate order in this behalf.

19. I may state that during the pendency of this appeal a stay has been obtained by the appellant defendant No. 1 and by virtue of the stay defendant No. 2 continues to be in possession of the suit property. No doubt by allowing this appeal, in substance I am setting aside the decree passed against the defendant No. 1 only because she alone has filed the appeal. But merely because defendant No. 2 did not file an appeal, I cannot allow the plaintiffs to take possession of the property from defendant No. 2, which property in fact belonged to defendant No. 1.

20. In the result this appeal is allowed. The decree passed by the lower appellate Court is set aside and the one passed by the trial Court is restored. The heirs of respondent No. 1 shall pay the costs of this second appeal and that of the appeal in the lower appellate Court to the present appellant.

Appeal allowed.

AIR 1982 BOMBAY 113

KANIA AND KURDUKAR, JJ.

Dhanaji Fakira Mokashi and others, Appellants v. Lahu Kamalakar Koli and others, Respondents.

Letters Patent Appeal No. 26 of 1976, D/- 5-3-1981.

Bombay Public Trusts Act (29 of 1950), S. 18 — Application for registration of Trust — Assistant Charity Commissioner disposing of the application in a casual manner — Held, case should be remanded to avoid difficulties that would arise in respect of intervening transactions if applicant was compelled to file fresh application, F. A. No. 666 of 1973, D/- 7/8-1-1976 (Bom), Reversed.

(Para 4)

A. P. Inamdar, for Appellants; V. P. Tipnis, for Respondents Nos. 1 to 9 and M. R. Kotwal, Govt. Pleader, as per notice, for Charity Commr.

KANIA, J.:— This is an appeal from the judgment delivered by Mukhi, J.,

LY/LY/F868/81/AKJ

1982 Bom./8 III

on 7th/8th Jan. 1976, in First Appeal No. 666 of 1973 in this Court. It is the agreed position that, although respondents Nos. 10 to 12 have not been served, as no Bhatta has been paid for serving them, they are not necessary parties for the disposal of this appeal. At the hearing it appeared that the disposal of this appeal might involve a question affecting a public charitable purpose and hence notice should be given to the Charity Commissioner, Bombay, regarding this appeal. Mr. Kotwal, the learned Government Pleader, has taken instructions from the Charity Commissioner and is appearing for the learned Charity Commissioner before us and hence no formal notice need be given to the Charity Commissioner. As there is no dispute regarding the order which should be passed in this appeal, it is necessary to set out only very briefly the relevant facts.

2. On 27th Oct. 1967, Dhanaji Fakira Mokashi, appellant No. 1 herein, filed an application under S. 18 of the Bombay Public Trusts Act, 1950 (referred to hereinafter as "the said Act") before the Assistant Charity Commissioner, Nasik Region, Nasik for registration of "Koli Gramsevak Samiti, Vitave" (referred to hereinafter as 'the said alleged trust') as a public trust under the said Act. By his order dated 30th Jan. 1969, the Assistant Charity Commissioner ordered that the said alleged trust be registered as a public trust under the said Act and the necessary certificate issued. The said order also determined that the properties mentioned in the application made by appellant No. 1 belonged to the said alleged trust. Respondents 1 to 3, who claim to be the owners of the land bearing survey No. 363, Hissa No. 1/1, being one of the properties held to belong to the said alleged trust, filed a revision application under S. 70 of the said Act before the Charity Commissioner, Bombay. This revisional application was disposed of by the Deputy Charity Commissioner with appellate powers, by his order dated 12th June, 1972. The Deputy Charity Commissioner partially allowed the revision application and set aside the order and findings of the Assistant Charity Commissioner in respect of the land bearing survey No. 363, Hissa No. 1/1, and re-

manded the matter back for a fresh hearing on the question whether the said land was the property of the said alleged trust. On the other questions the learned Deputy Charity Commissioner confirmed the findings of the learned Assistant Charity Commissioner. Respondents 1 to 9 then filed an appeal by way of a miscellaneous application under S. 72 of the said Act in the Court of the learned District Judge, Thana. This appeal was numbered as Miscellaneous Application No. 156 of 1972 and was disposed of by the learned Assistant Judge, Thana. The learned Assistant Judge held that the appeal or application before him was restricted only to one composite question, viz., whether the said alleged trust really existed and whether it was a public trust within the said Act, and that question had not been decided by the learned Deputy Charity Commissioner. On this footing the learned Assistant Judge held that the appeal or application before him under S. 72 (1) of the said Act was not maintainable. Respondents 1 to 9 preferred the said Appeal No. 666 of 1973 referred to earlier against this order.

3. Mukhi, J. before whom the said appeal came up for hearing, set aside the order and judgment of the learned Assistant Judge, Thana, the order and judgment of the Deputy Charity Commr. in the aforesaid revisional application, as well as the order and judgment of the Assistant Charity Commissioner passed on the application made by appellant No. 1 herein. In the course of his judgment, Mukhi, J., has rightly pointed out that an application, such as the one which was made by appellant No. 1 herein, should not have been disposed of in the somewhat casual manner in which it appears to have been disposed of by the learned Assistant Charity Commissioner. It should be appreciated that very often persons who are interested in properties which are alleged in an application under S. 18 of the said Act to belong to a public trust might not come to know of a public notice issued by way of a newspaper advertisement and hence, even if the application is disposed of without contest, it is desirable that the Assistant Charity Commissioner or the Deputy Charity Commissioner, who disposes of the same,

should apply his mind and determine as to whether (1) a trust existed on the date of the application, (2) the said trust was a public trust, and (3) the properties mentioned in the application belonged to the said public trust. On these points none of the Counsel before us has disputed the correctness of the judgment of Mukhi, J.

4. However, it was urged by Mr. Inamdar that Mukhi, J. was in error, when he rejected the request made by the appellants that the matter should be remanded back to the Assistant Charity Commissioner for a fresh enquiry and determination on the basis of the said application dated 27th October, 1967 under S. 18 of the said Act, because if this was not done, and the appellants had to file a fresh application, complications might arise in respect of the intervening transactions. Mr. Tipnis has fairly agreed that this difficulty may arise if the appellants are compelled to make a fresh application under S. 18, if they so think fit. In view of this, we set aside the judgment of Mukhi, J., in so far as he has rejected the application of the appellants for remanding the matter to the learned Assistant Charity Commissioner for disposal afresh of the said application dated 27th Oct., 1967, according to law.

5. In the result, the appeal is allowed only to the aforesaid extent and the matter is remanded to the learned Assistant Charity Commissioner for disposal according to law of the application dated 27th Oct. 1967, made under S. 18 of the said Act. There will be no order as to the costs of this appeal as between the appellants and the respondents. The order for costs passed in respect of the other proceedings by Mukhi, J. shall, however, stand. The costs of the learned Charity Commissioner fixed at Rs. 120/- to come out of the funds of the said alleged trust.

6. Mr. Inamdar states that his clients intend to apply for an amendment of the said application dated 27th Oct., 1967, by giving further and better particulars therein. That application for amendment will, of course, have to be decided by the learned Assistant Charity Commissioner according to law. It is agreed between all the parties that the said application dated 27th Oct., 1967,

will be heard completely afresh and right from the commencement.

Order accordingly.

AIR 1982 BOMBAY 115

SHARAD MANOHAR, J.

Pandurang Narayan Mantri (deceased by L. Rs.), Appellant v. Anant Shankarrao Samel, Respondent.

First Appeal No. 409 of 1974, D/-18-11-1980.

Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 5 (11) (c) — Transmitted tenancy — Defendant and wife residing with aged tenant to look after her in her old age — Defendant's wife related to tenant, being niece of tenant's husband — Defendant, his wife and tenant living as one family, defendant defraying all family expenses including rent payable by tenant — Held, on tenant's death, defendant acquired tenancy rights by virtue of S. 5 (11) (c). (1950) 1 All ER 71, Rel. on and (1951) 1 All ER 60, Discussed. (Paras 12, 13)

Cases Referred : Chronological Paras
(1951) 1 All ER 60 : (1951) 1 KB 666 :
(1951) 1 TLR 238, Langdon v. Horton

12, 14, 15
(1950) 1 All ER 71 : (1950) 2 KB 204,
Jones v. Whitehill 12, 14, 15, 16
(1949) 1 All ER 715 : (1949) 2 KB 388,
Brock v. Wollams 14, 16

R. T. Walawalkar, for Appellant;
H. Suresh, for D. N. Hungund, for Respondent.

JUDGMENT:— The appellants are the heirs of the original plaintiff whose suit for possession of the suit premises has been dismissed by the City Civil Court. For the sake of convenience the parties will be referred hereinafter as "plaintiff and defendant".

2. The dispute relates to a flat in the building known as "Shalaka" situated at Shivaji Park, Dadar, Bombay-28. Admittedly the plaintiff was the owner of the said flat and after his death his heirs continued to be the owners thereof. Block No. 1 on the ground floor of the said building is the subject matter of the dispute. The said block was let out by the plaintiff to one Sitaram Tribhuvane sometime prior to 1941. Sitaram was living in that block with his wife Sulochana.

Said Sitaram Tribhuvane died in or about the month of Nov. 1949, and after his death Sulochana continued to occupy the said flat. The plaintiff transferred the rent receipt in respect of the suit premises in her favour. Sulochana herself had become very old and more or less helpless. There was no one to look after her in that age. Moreover, she had no wherewithal to maintain herself with. Defendant's wife was Sitaram's niece. It therefore appears that she invited the defendant and his wife to come and stay with her and occupy the premises. By about Jan., 1950, therefore, the defendant and his wife started living in the suit premises along with said Sulochana. It appears that the plaintiff initially resented this fact and she sent a letter Exhibit 8, dt. 11-1-50, calling upon Sulochana to remove the defendant and his wife from the premises. The plaintiff contended that they were her unlawful sub-tenants. To this letter a reply dt. 17th Jan., 1950, was sent by Sulochana through one R. B. Godambe, Advocate, purporting to act on behalf of Sulochana. In the said reply it was stated that the defendant and his wife were staying with Sulochana in order to keep her company and to give her help in her old age. It was denied that they were strangers or that they were sub-tenants. A positive statement was made that the defendant's wife was Sitaram's niece and that she was not a stranger as such. The demand of removal of the defendant and his wife was resented and turned down. No further reply was given by the plaintiff to this letter and there the matter rested till the death of Sulochanabai and for quite sometime even thereafter. Sulochana died on or about 22nd August, 1952. The defendant and his wife continued to stay there after the death of Sulochanabai and for a period of nearly 10 years the plaintiff took no proceedings for recovery of possession from the defendant. As will be presently pointed out, the plaintiff recovered rent from the defendant strictly in accordance with the provisions of the Bombay Rent Act; sent him notices for payment of permitted increases as required by the Bombay Rent Act; gave him particulars of the various increases and called upon him to pay various taxes recoverable by the landlord from his tenant. It is true that sometime in

the year 1954, the plaintiff gave intimation to the Accommodation Controller to the effect that the suit premises had fallen vacant within the meaning of the Bombay Land Requisition Act which was in force at that time in the City of Bombay. It is common ground that pursuant to the said intimation given by the plaintiff an enquiry was made by the office of the Accommodation Controller. But, in the enquiry, it appears, the Accommodation Controller was satisfied that the defendant was not a stranger to the premises and that the premises could not be said to have fallen "vacant" within the meaning of the relevant Act upon the death of Sulochana. The proceedings under the BLR Act were therefore dropped. The fact, however, remains that the exact date when the proceedings were dropped does not appear to be on record. Mr. Suresh the learned Counsel for the defendant was not able to post me with the information in that behalf. The fact however remains that right from the year 1952 till 1962, the plaintiff went on demanding and recovering rent from the defendant and went on giving every indication that he had accepted the defendant himself as tenant. It is true that the rent receipt continued to be in the name of Sulochana. But as will be presently pointed out this was a meaningless gesture.

3. It appears that there was some correspondence between the parties in which, on some occasions, the plaintiff denied the fact that defendant was his tenant. But the fact remains that he described himself as a landlord and went on recovering rent and permitted increases and taxes etc., from the defendant in strict accordance with the Bombay Act which applies only to tenants. Thereafter on 10th May 1961, all of a sudden he gave a notice to the defendant contending that he was a trespasser in the suit premises and called upon him to vacate the same. Since the defendant denied the allegation, the present suit was filed by the plaintiff, for recovery of the possession of suit premises, in the Bombay City Civil Court on 30th March, 1962. The suit is on title and not on the basis of the landlord-tenant relationship between the parties.

4. In the plaint it was contended that the defendant had no right, title

and interest in the suit premises and that their occupation of the same was unlawful.

5. The defendant filed his written statement and contended that he was a tenant in respect of the suit premises within the meaning of the B. R. Act and that hence, the City Civil Court had no jurisdiction to entertain the said suit. He contended, in the first instance; that he was a member of the family of Sulochanabai who was admittedly a tenant of the suit premises and contended further that being such a member of the family within the meaning of the B. R. Act, after her death, he had become tenant in respect of the suit premises within the meaning of the said Act. In the alternative he contended that during her lifetime itself, Sulochanabai, had sublet the suit premises to him as a sub-tenant of Sulochanabai which sub-tenancy was validated by the relevant Ordinance of 21st May, 1959. Therefore he had become a lawful sub-tenant of the suit premises and as such a lawful tenant of the plaintiff. In the alternative, he further contended that Sulochana had made a Will and in that Will the tenancy rights in respect of the suit premises had been bequeathed upon the defendant.

6. On these pleadings the issues were framed. The issue No. 2, was as to whether the defendant was a trespasser, Issue No. 3, was as to whether Sulochana had sublet the suit premises to the defendant in Jan. 1950. Issue No. 4 was consequential to issue No. 3 and as per the said issue it was to be examined whether the defendant was entitled to take advantage of the Ordinance dt. 21st May, 1959 so as to be clothed with the capacity of a lawful tenant of the suit premises. Issue No. 5, related to the plea of the defendant that he had acquired tenancy right in respect of the suit premises by virtue of the Will executed by Sulochana in his favour. Issue No. 6 is something regarding which strenuous arguments were sought to be advanced. The issue is as to whether the defendant was entitled to the suit premises as a tenant by virtue of Section 5 (11) (c) of the B. R. Act. In reality this issue is the counterpart of issue No. 2 referred to above. I will presently refer to the agreement advanced in this behalf on behalf of the appellant.

7. On these issues evidence was led by the parties. The learned Judge, examined the entire evidence very carefully and upon examining the evidence he came to the conclusion that the plaintiff had himself treated the defendant as his tenant in spite of his frequent intermittent protestations that he was not his tenant. The learned Judge also recorded the finding that the defendant was also treated by Sulochanabai as a member of her family and that at the time of her death defendant, his wife and Sulochana were living as one family. The learned Judge, therefore, held that the defendant was entitled to take advantage of the provisions of S. 5 (11) (c) of the B. R. Act and was justified in contending that he was clothed with the capacity of a tenant by virtue of the said provision. The learned Judge, however, negated the defendant's plea that he was a sub-tenant of Sulochana. He also negated the defendant's plea that the tenancy rights in respect of the suit premises had been bequeathed upon him by Sulochanabai by her last Will. However, in view of the findings recorded by him relating to the abovementioned two questions, namely that the plaintiff had himself treated the defendant to be his tenant and further that the defendant was entitled to claim tenancy by virtue of the provisions of S. 5 (11) (c) of the B. R. Act, he held that the plaintiff was not entitled to any relief against the defendant in the City Civil Court. The plaintiff's suit was, therefore, dismissed by the learned Judge with costs.

8. So far as the present appeal is concerned I find no reason or justification for finding fault with the decree passed by the learned Judge. So far as the two points, upon which the learned Judge has held that the defendant was entitled to claim benefits available for a tenant, under the B. R. Act are concerned, I find absolutely no reason to find fault with the reasoning of the learned Judge. The learned Judge has held that the entire conduct of the plaintiff shows that even while protesting that the defendant was not his tenant, he had conducted his affairs with him in his capacity as a tenant. As for instance, the learned judge has referred to the letter Exhibit 1, dt. 31-3-1954. The letter is addressed by the plaintiff to the defendant as occupant of the suit pre-

mises, in his capacity as "landlord" of the suit premises. He has not stated that he is the "owner" of the suit premises. What he has stated is that he is the "landlord". Hence, it is possible to hold that according to him, qua the defendant, he is a landlord, because the landlord and tenant relationship is after all between two parties; but it must be said that this is more a matter of nomenclature and the circumstance cannot be used all by itself. But if we take this circumstance coupled with the other circumstances no doubt is left that the plaintiff wanted to foist every liability upon the defendant to which liability only a tenant can be subjected. The said letter has been set out in extenso by the learned judge in his judgment. In substance, the letter informs the defendant that the rent that the defendant was paying for the suit premises is increased under the provisions of the B. R. Act. He had increased it to the extent of 7½% from 1st April, 1974. Evidently such a thing could not have been done by him unless, according to him, the defendant was having some kind of relationship with him as that of a tenant.

9. Next, the learned Judge has relied upon the circular Exhibit 2, dt. 26th July, 1958. The said circular is nothing but a letter written by the plaintiff to all the tenants meaning thereby to all the persons who were admittedly his tenants. The significant fact is that this letter was circulated also to the defendant. By the said letter, the defendant was informed that his monthly rent from April, 1958 onwards would be Rupees 27.92 p. It is noteworthy that under the previous letter dt. 31st March, 1954, on the intimation that was given to the defendant was that the rent inclusive of the permissive increase was to be Rs. 27.6.0 whereas the circular letter Exhibit 2, dt. 26th July, 1958 gave an intimation of increase of only a few paise; but even such a paltry increase which could be claimed only from a tenant has been claimed by the defendant (plaintiff?). Even this letter has been set out by the learned Judge in extenso in his judgment.

10. A number of similar letters have been produced by the defendant and have been considered by the learned Judge. It is unnecessary to examine

each of them here. It is sufficient to observe that the only inference that could be drawn from these letters is that — (a) the defendant was in occupation of the suit premises exclusively during the time of death of Sulochana; (b) he was in occupation by asserting his right which right was even noted by the plaintiff and, (c) even, according to the plaintiff, the defendant was subject to the liabilities which are imposed by the statute namely the B. R. Act only on tenants. If this is the position, it is futile on the part of the plaintiff to contend that the defendant had no tenancy right in respect of the suit premises. I would like to emphasise that this position emerges by virtue of the unequivocal conduct of the plaintiff. It is independent of the fact that defendant must be deemed to have got the tenancy right through Sulochana. What I mean to say is that even if it was held that the defendant was not entitled to avail of the rights conferred by S. 5 (11) (c) of the B. R. Act, still the above mentioned conduct of the plaintiff and the state of mind of both the parties for the period of about 10 years would itself result in the effect that the defendant's right in the suit premises as a tenant could not be called in question by the plaintiff by the time he filed the suit.

But in addition to this aspect of the defendant's right, the learned Judge has held that the defendant could be justifiably and legitimately considered to be a member of Sulochana's family for some time before her death and since he was admittedly staying with her at the time of her death, the learned Judge was perfectly justified in coming to the conclusion that the defendant had acquired the rights of a tenant contemplated by B. R. Act under S. 5 (11) (c) of the B. R. Act.

11. In this connection it is to be noted that the learned Judge has given very good reasons to hold that the defendant was not a stranger to Sulochanabai. There is evidence on record to show that the defendant's wife was the niece of Sulochana's husband. In this connection reply given on behalf of Sulochanabai to the plaintiff's letter dt. 11th Jan. 1950 is eloquent. In the letter, in the first place, it is specifically stated that the defendant's wife was the niece

of the husband of Sulochana. There is no reply given by the plaintiff to that letter denying such relationship. In the second place, most significant aspect of the matter is that in the said letter dt. 11th Jan. 1950 the plaintiff had called upon Sulochana to remove the defendant and his wife from the suit premises, because according to him, they were strangers. Sulochanabai stoutly denied that allegation and refused to oblige the plaintiff by removing the defendant and his wife from the suit premises. No action was taken by the plaintiff against such gesture on the part of Sulochanabai for the full period of 10 years, and, on the other hand, he went on making claim against the defendant which claims could be legitimately made only against a tenant governed by the B. R. Act. If an inference, therefore, was raised that even the plaintiff had reconciled himself to the fact that the defendant was always treated by Sulochana as a member of the family, no fault could be found with such an inference and this is the precise inference raised by the learned Judge and I for one am in full agreement with the conclusion arrived at by him in this behalf.

12. Mr. Walawalkar, the learned Advocate for the plaintiff, however, tried to rely upon the judgment in *Langdon v. Horton*, (1951) 1 All ER 60. The said authority has been referred by the learned Judge also. It has been held in that case that even a first cousin is not a member of the tenant's family. I will deal with the said Authority presently. But I have no doubt that the other Authority relied upon by the learned Judge in *Jones v. Whitehill*, (1950) 1 All ER 71, is one which is more apposite. In that case the niece of the tenant's wife went to reside with the tenant. She nursed him and his wife and looked after them till their deaths for a period of about 18 months to two years. In these circumstances it was held that she must be deemed to have been considered and treated as a member of the tenant's family and it was held that she was entitled to inherit the tenancy right in pursuance of the provisions of the B. R. Act. The learned Judge has also analysed the ingredients of the concept of "family". They fall in three categories. A person may be a member of the family by virtue of the

relationship resulting from consanguinity or kinship or just heredity, (b) a person may be related by virtue of matrimonial relationship; and (c) there may be special circumstances which bring about ties of a family. The learned Judge noticed the special circumstances bringing about the family tie, viz., the fact that the defendant and his wife were treated by Sulochanabai as members of her family. I have already pointed out above that in reply to the plaintiff's notice dated 17th Jan. 1950, Sulochanabai had herself asserted that the defendant was her husband's cousin and that the defendant and his wife were helping her in her enfeebled health and on that account she had even refused to accede to the plaintiff's demand to remove the defendant and his wife from the suit premises. In addition to this the learned Judge has noticed the fact that Sulochanabai had left a document. If compliance with the technicalities of a will was sufficiently proved, the document could have been proved as a will. But admittedly those requirements which are conditions precedent for proving a will are not complied with. Hence the document Exhibit 9, dt. 7th Aug. 1952, cannot be said to have been proved as a will. That was the reason why the defendant could not succeed in his contention that he had acquired the tenancy rights by virtue of the will executed by Sulochanabai. But the fact remains that Sulochanabai executed a document, the execution of the document by her not as a will but as a document is borne out by the evidence on record and in that document Sulochanabai has clearly stated that the defendant was considered by her as her own son. It is significant that at that time the defendant was staying with Sulochanabai herself or rather Sulochanabai was staying with him because it was he who was maintaining her and he who was defraying all the family expenses including that of Sulochanabai. These certainly are the special circumstances which engender and foster the ties of family.

13. Mr. Walawalkar tried to criticise the view of the learned Judge by referring to the evidence given by the defendant in his cross-examination wherein he has stated as follows:—

"Suman is the daughter of Dwarkanath Hazare who is my father-in-law.

Dwarkanath's mother whose name I do not know had a brother. I do not know the name of this person also, but Sitaram was the son of Dwarkanath's mother's brother. Sitaram and Dwarkanath were therefore cousin brothers. That is why I have been saying that Suman—my wife was the niece of Sitaram".

Mr. Walawalkar contended that this is not an evidence of relationship at all. According to him, if the defendant did not remember the names of his distant-in-laws, it must be held that there existed no relationship at all. He further contended that if at all any such relationship is to be found from the evidence, the relationship is so distant that such relationship could not be invoked for the purpose of spelling the status of the rights (sic) member of the family upon such relation. To my mind, both these criticisms are wholly unjustified. What the defendant has stated in the above mentioned evidence is that he did not remember the name of his wife's relation but that fact did not mean that the relationship itself did not exist. The learned Judge did not find any difficulty in relying upon the evidence of the defendant in spite of the fact that he was not remembering the names of the particular relations, through whom the relationship was claimed. The evidence read as a whole gives a picture of candidness and straightforwardness. The evidence perfectly justifies the conclusion that the defendant's wife was the niece of Sitaram. Even the second contention of Mr. Walawalkar cannot be accepted. What we have to see is not the degree of the relationship but the nearness felt by the tenant for the relationship concerned. As a matter of fact in the instant case the relationship which is proved has got to be considered in conjunction with the special circumstances, namely, that Sulochanabai was a helpless and enfeebled person and it was in that state of condition that she got help from the defendant and his wife, who were her husband's relations. There was possibly an understanding among all the three of them that they would live as members of one family and an easily conceivable implicit understanding was that the defendant would maintain and look after Sulochanabai in her old age and she would allow them to stay with her as members of one family. The totality of all

this implicit arrangement that remained at the back of the mind of all the three of them could give rise to the situation that they became one family, and if such was the position which in fact resulted, the provision of S. 5 (11) (c) could be legitimately invoked by the defendant to contend that he had acquired the tenancy right as contemplated by the said provisions. I am therefore of the view that the plaintiff's suit must fail even on this short second ground.

14. This brings us to the examination of the Authorities which were cited before the Lower Court and also relied upon before me. It may be mentioned here that no Indian Authority has been cited. Only the two English Authorities which have been referred by the learned Judge were once again relied upon before me. One reported in (1950) 1 All ER 71, *Jones v. Whitehill* has been partially discussed by me above. Mr. Walawalkar, however, strongly relied upon *Langdon v. Horton*, (1951) 1 All ER 60. Reading, apparently, the facts of the case, an impression likely to be conveyed is that two of the first cousins of the deceased tenant who were sisters of each other were not to be held as members of the family of the deceased lady who was the tenant and with whom the two ladies resided for quite a long period. The facts which are to be found from the reported case are as follows:—

One Mrs. Mary Wakefield Prior was a statutory tenant of the premises governed by the Rent Act and her two first cousins — two sisters Miss Horton and Mrs. Selly were residing with her for 29 years, and they stayed with her at the time of her death. The question was whether they were members of the family of the deceased tenant within the meaning of S. 12 (1) (g) of the Rent Act in question. After considering the various aspects of the evidence the High Court came to the conclusion that they could not be considered to be the members of the family, of the deceased tenant, and in the Court of Appeal Sir Singleton and Sir Daneckwerts concurred with the ultimate conclusion arrived at by Sir Raymond Evershed M. R. But what is to be noted is that it was not the view of the Court that in every case the first cousin could not be considered to be the members of the family of the deceased tenant. In this connec-

tion the judgment of Sir Evershed M.R. himself, delivered by him in *Jones v. Whitehill* was examined by them. It was not dissented from. But after considering that judgment and after examining the entire evidence on record in the light of the fact that the High Court had arrived at the conclusion that two sisters did not reside with the deceased as members of the family, they concurred that the conclusion was a finding of fact in the context of the peculiar facts of that case, Sir Raymond Evershed, M.R. while comparing the question with the one which they were dealing with in *Brock v. Wollams* ((1949) 1 All ER 715) stated as follows:—

"I think, however, that in posing the question, which I have taken from its original formulation in *Brock v. Wollams*, there may be two distinct and rather different classes of cases. The first is where the only really relevant consideration is that of blood relationship of consanguinity. The second is whether, apart from or in addition to consanguinity, there are special circumstances which require an affirmative answer to the material question."

Thereafter he considered the position that obtained in *Jones v. Whitehill* ((1950) 1 All ER 71) and with reference to that he stated as follows:—

"An illustration of the second class is *Jones v. Whitehill*. The claimant there was a niece by marriage of the statutory tenant, but she had by her conduct assumed, as it were, a filial character, and it was in the light of those facts that this court concluded that she qualified within para (g). I am not sure that certain passages in my own judgment may not have suggested a wider extension of this formula than is justified. Accordingly, the judgment should be read as meaning that I was not expressing any view on the general question whether nephews and nieces as such were within the compass of the formula."

After considering the facts Sir Evershed M. R. held as follows:—

"The present case, I venture to think, is of the first class. It must be determined by considering whether first cousins of the same generation, as these two defendants are, of the statutory tenant can be within the intendment of this phrase "the tenant's family". The matter is, perhaps, largely one of first

impression, and I think the learned Judge came to the right conclusion, for, if the consanguinity test is satisfied in the present case, it will extend the formula to relations of every degree, and, indeed, would mean that we were substituting for the word "family" in para (g) the word "relations".

It will thus be seen that Sir Raymond Evershed, M. R. was making the distinction between the concept of family and the concept of relations and has implicitly held that every relation does not constitute family. But that is far from saying that only consanguinity brings about family. As a matter of fact, the Court of Appeal was faced also with the question as to whether it was not ultimately a question of fact and this is what they observed in this connection :

"I would add that in one or two of the earlier cases the question was raised whether this is not a question of fact? I am not saying whether or not in the present case or in other cases it is a question of fact. There is much to be said for the view that it is a matter of the construction of the paragraph. On the other hand, where, as here, a county court judge has plainly put to himself the right question, and it is a matter of suggesting the answer that an ordinary man would give to a question put in ordinary conversation, I am disposed to think that this Court should be a little slow to reverse him. If it is the policy of the Act to protect persons in all occupation of their homes, I think it also, in general, is the policy of the Act to leave for the determination of the county court the numerous difficult problems requiring, as has been said in connection with the word "reasonable", the application of a broad, common-sense, man-of-the-world view. On these grounds, therefore, as the question posed by the Judge was right, I should be slow myself to differ on a matter of this kind from his conclusion."

15. It will thus be noticed that in *Langdon v. Horton* ((1951) 1 All ER 60), the dictum laid down by the Court of Appeal in *Jones v. Whitehill* ((1950) 1 All ER 71) was not whittled down in the slightest degree. On the other hand, after examining the ratio of that decision, the Court of Appeal compared the findings of facts of that case with the facts with which they were dealing

themselves. It is therefore futile to contend that it has been held that as a matter of principle or as a matter of rule of law the first cousin could not constitute a family.

16. The decision of the Court of Appeal in *Jones v. Whitehill*, is however, on all fours with the case with which I am dealing. The facts of the case are already set out by me above though very briefly. The judgment in that case also was given by Sir Raymond Evershed M.R. The relevant facts which are set out in the judgment are as follows:—

"The defendant, Mrs. Whitehill, was the niece of a Mrs. Bailey, the wife of the tenant of the premises here in suit. Mrs. Bailey died in July, 1948, and her husband some five months later. At the time of his death he had become a statutory tenant of the premises. He died intestate. The defendant went to live with Mr. and Mrs. Bailey early in 1947 to look after them because they were in poor health. No child of their own was at any material time living with them in the house. There is no question that the residence qualification required by S. 12 (1) (g) is satisfied, but there remains the point whether the defendant is fairly and properly to be described as a member of the tenant's family."

While dealing with the question Sir Raymond Evershed M. R. referred to the judgment of the Court of Appeal in *Brock v. Wollams*, (1949) 1 All ER 715 (717) and the following passage was relied upon by him with approval :

"It has been said in a number of equity cases, relating principally to wills or to settlements under powers of appointment, that the word 'family' is a popular, loose, and flexible expression, and not a technical term. It has been laid down that the primary meaning of the word 'family' is children, but that primary meaning is clearly susceptible of wider interpretation, because the cases decide that the exact scope of the word must depend on the context and the other provisions of the Will or deed in view of the surrounding circumstances I hold that in the section now under consideration the word 'family' includes brothers and sisters of the deceased living with her at the time of her death. I think that that meaning is required by the ordinary acceptance of the word in this connection, and that

the legislature has used the word 'family' to introduce a flexible and wide term."

The argument that the word 'family' connoted either only consanguinity which was the narrow view or extended to cover anybody in the household which was the wider view was rejected, one being too narrow and other being too wide. After setting out his reasoning in that behalf he stated as follows:

"I am not suggesting necessarily that all nephews and nieces by marriage should be regarded as members of the tenant's family, but be it observed here that the defendant, a niece of Mrs. Bailey, assumed, out of natural love and affection, the duties and offices peculiarly attributable to members of a family namely, she went to live with her uncle and aunt and looked after them in their declining years. On those facts I think that, if it were asked in an ordinary conversation: Was the defendant a member of Mr. Bailey's family?, an affirmative answer would be given. I, therefore, come to the conclusion that the defendant should be regarded as within the protection of Sec. 12 (1) (g), and that this appeal should be allowed." This is the reasoning which has prevailed upon the learned Judge of the Lower Court and I, for one, am in complete agreement with the same.

17. After discussing the above case law, a few words of our own on the concept of 'family' may not be out of place. The concept is not a rigid one. It is and it has always been an elastic one. Its content varies with reference to both time and place, historically as well as geographically. In the Indian Society the concept quite often embraces relations quite substantially remote from the Peter Families. The concept of family consisting exclusively of the Peter Families, his spouse and lineal descendants, is of occidental origin, not oriental. But it was not adhered to very stringently even in the West. Here in India the concept of family is of even wider signification. The variations in the contents of the concept are denoted by various qualifications. Thus we have concept of joint family, coparcenary and family simpliciter. Out of these, the concept of family is of the widest amplitude. In the instant case, Sulochanabai, the defendant and his wife

could not be considered to be members of any joint family, they were certainly not coparceners; but there is certainly no reason to hold that they did not live as members of one family. They shared each others weal and woe. They messed together and shared the house-hold expenses together. A bond of family got engendered. Such a bond may not always result by joint residence. A paying guest living with a landlady does not become a member of the family of the landlady and this would be so even if he were a relation of the landlady. There is no family bond in that case, only a strictly business relationship. She gives him shelter, he pays the price. He gets a better or cheaper accommodation, he lives with her; she gets someone who pays more price, she gets rid of him. No family bond. But in the case such as the instant one, price is not the prime consideration. The prime consideration is the mutual bond. This is what converts their joint residence into one of family.

18. In this view of the matter, it is really unnecessary for me to consider the correctness of the view of the learned Judge that the defendant could not be said to be a sub-tenant of Sulochanabai. The learned Judge has no doubt given reasons to come to the conclusion that the kind of evidence led by the defendant would not justify the inference that he was inducted by Sulochanabai as sub-tenant. But I may briefly state that the evidence on record was not insufficient for even coming to the opposite conclusion, namely that Sulochanabai sub-let the suit premises to the defendant. The evidence has been led that from the time when the defendant started living with Sulochanabai he started paying to the landlord the requisite rent. The fact that he in fact paid rent to the plaintiff for and on behalf of Sulochanabai cannot be seriously controverted. The question is whether such conduct on his part could give rise to the inference that the defendant had been constituted as a sub-tenant of the suit premises by Sulochanabai. It was argued that Sulochanabai was staying with the defendant and hence inference of sub-tenancy was impossible. I am not sure about the correctness of this proposition. There are occasions when a tenant becomes landlord and the previous landlord starts living with the

erstwhile tenant as his licensee or tenant. For illustration, 'A' may be the owner of the building in which 'B' is the tenant. 'A' might sell the building to 'B' from which date B's tenancy would vanish but 'B' may allow 'A' to occupy the portion of the building, previously occupied by him as owner, as tenant. Likewise in the present case it is not inconceivable that when the defendant came to live with Sulochanabai, at least after sometime when their mutual relations became perfectly smooth, Sulochanabai decided to create a right in favour of the defendant to live in those premises in his own right. Such a carving out of the right would be nothing but a sub-tenancy, and the very fact that the tenant continued to stay along with the sub-tenant who has been permitted to stay in the premises as a matter of right and not as a mere licensee would not mean that sub-tenancy was impossible or inconceivable. There is evidence on record to be found in the above mentioned reply given on behalf of Sulochanabai D/- 17th Jan. 1952, from which it is found that Sulochanabai was in no frame of mind to disturb the right of defendant and his wife who resided in the suit premises. No doubt the defendant himself has not stated all these things in his evidence. But from the very nature of things these are the matters of result which takes place not after deep deliberations. The result materialises in the course of time. It is therefore possible to take the view that the defendant defrayed all the house-hold expenses including those for the maintenance of Sulochanabai and in return Sulochanabai sublet the suit premises to him. The defendant's admission that he did not pay rent to Sulochanabai but paid directly to the landlord plaintiff would not in any way weaken any such reasoning. If instead of paying the amount of rent to Sulochanabai as sub-tenancy which amount was to be paid by Sulochanabai to the plaintiff's landlord, the defendant chose the modus of paying rent directly to the landlord, the effect of sub-tenancy would not, merely on that count, be in any way wiped off.

19. Mr. Walawalkar naturally tried to contest this process of reasoning by relying heavily upon the reply dated 17th Jan., 1952, in which it was stated by Sulochanabai that the defendant was not

her sub-tenant. But I am not at all sure that the defendant could be bound down by that statement. At that time sub-tenancy was prohibited. It was validated on 21-5-1959 retrospectively. The very fact that an ordinance had to be promulgated for validation of transactions of such sub-tenancies speaks volumes for the fact that sub-tenancies were being created clandestinely and that they had to be protected, though they were unlawful. But the point is that no tenant was admitting or was likely to admit, before 21-5-1959, that he had created a sub-tenancy. He was creating it clandestinely and was keeping it a closely guarded secret so far as the landlord was concerned. It was only after 21-5-1959 that the tenant or the sub-tenants started admitting openly the sub-tenancy which was previously created clandestinely. It is futile condemning such gestures as acts of dishonesty. The legislature saw dishonesty but decided to protect it and to give bonus to those who indulged in such unlawful transactions. It is futile for the Courts condemn such dishonesties when the legislature thought it fit and proper to protect the same.

20. Moreover, Mr. Walwalkar's argument overlooks the fact that if Sulochanabai had denied the sub-tenancy, the plaintiff had himself asserted the same. If the defendant was to be bound down to Sulochanabai's statement there is no reason why the plaintiff should not be bound and pinned down to his own statement contained in his notice dated 11th Jan., 1952.

21. However I may make it clear that I am only presenting the other side of the picture with a view to show that it is possible to accept even the 3rd contention of the defendant that he was a sub-tenant of Sulochanabai during her lifetime. If this contention was accepted then the fact that he continued to be in possession on 21st May 1959, would mean that he had become lawful sub-tenant of Sulochanabai retrospectively and by virtue of the provisions of S. 14 of the B.R. Act he became direct tenant of the plaintiff landlord. The defendant, therefore, might be entitled to claim protection under the B. R. Act even on this ground. However, I may make it clear that I am confirming the decree

passed by the lower Appellate Court merely on the first two grounds upon which the decree dismissing the suit has been passed by the learned Judge.

22. In this view of things, I find no reason to disagree with the final conclusion arrived at by the learned Judge.

The appeal, therefore, fails and the same is dismissed with costs.

Appeal dismissed.

AIR 1982 BOMBAY 124

S. C. PRATAP, J.

Merwanji Dadabhai Mehta and another, Petitioners v. Dr. Mohan Madhav and others, Respondents.

Writ Petn. No. 851 of 1980, D/- 9-4-1980.

Civil P. C. (5 of 1908), O. 41, Rr. 25, 27 — Application for additional evidence — Court cannot set aside entire judgment and decree of trial Court and remand suit for fresh trial — Court must proceed either under R. 25 or R. 27 of O. 41. (Para 4)

S. G. Sheth, for Petitioners; W. S. Devnani, for Respondents Nos. 1 to 6.

ORDER:— This petition by the original defendants is directed against the judgment and order dated 31st Dec. 1977, passed by the learned Extra Assistant Judge, Satara, in Civil Appeal No. 34 of 1977.

2. Original suit by the plaintiffs, being Civil Suit No. 81 of 1972, was filed against the defendants in the Court of the Civil Judge, Junior Division, Wai, for possession of the suit premises under the provisions of the Bombay Rent Act. The trial Court struck nine issues, recorded oral and documentary evidence and on consideration thereof was ultimately, however, pleased by its judgment and order dated 24th December, 1976, to dismiss the said suit. The said decision was challenged by the plaintiffs by preferring against the same Civil Appeal No. 34 of 1977 to the District Court, Satara. The learned Extra Assistant Judge, hearing the said appeal set aside the trial Court's judgment and order and remanded the suit with a direction that the same be heard by allowing both the sides to lead additional evidence, if any, in view of the plaintiffs' application exhibit 10 in appeal

and to then decide the suit in accordance with law. It is against this appellate order dated 31st Dec. 1977 that the present petition has been filed by the original defendants.

3. Hearing Mr. S. G. Sheth, the learned Advocate for the petitioners-defendants and Mr. W. S. Devnani, the learned Advocate for the respondents-plaintiffs, and going through the impugned judgment and order, I find it difficult to uphold the same. Wholesale remand as of the nature directed by the learned Extra Assistant Judge is, in the facts and circumstances of the present case and considering the relevant provisions of law, one which cannot be successfully sustained.

4. If in an appeal an application is made by either parties to the appeal for additional evidence, the Appellate Court is expected to consider the said application not merely in the abstract as appears to have been done in the present case but in the light of the provisions of R. 25 or R. 27 of O. 41 of the Civil P. C. Only thereafter the Appellate Court may pass appropriate orders on the application for additional evidence. Of course, it would be open to the Appellate Court to reject the application for additional evidence if it finds the said rejection justified. But if the Appellate Court finds that a case for additional evidence has been made out, it should normally then proceed in accordance with either R. 25 or R. 27 of O. 41 of the said Code. The present case was not one governed by R. 23 of O. 41 of the Code because the trial Court had heard and decided the suit not on any preliminary point but on all the issues arising before it for determination. In the instant case, a short and cryptic order is passed by the Appellate Court setting aside the entire judgment and decree of the trial Court and remanding the suit for fresh trial with liberty to both the sides to lead evidence and with direction to the trial Court to decide the suit afresh. Such an order is, in my view, highly unsatisfactory. Even if the Appellate Court was inclined to grant the application exhibit 10, appropriate order consequent thereupon was not to set aside the entire judgment and decree passed by the trial Court but would be one either under and in accordance with R. 25 or R. 27 of O. 41 of the Code.

5. In this view of the matter, this petition is allowed. The impugned judgment and decree dated 31st Dec. 1977 passed by the Appellate Court is set aside and Civil Appeal No. 34 of 1977 is sent back to the Appellate Court. The Appellate Court will now hear the plaintiff-appellants' application exhibit 10 in the said appeal in question and proceed further with the matter in the light of the observations made herein and in accordance with law.

6. As the impugned appellate order now set aside by this judgment has resulted in delaying the proceedings, the Appellate Court shall expedite the proceedings hereafter, giving top priority thereto.

7. Rule earlier issued on this petition is made absolute in terms aforesaid. In the circumstances of the case, however, there will be no order as to costs.

Further order on motion by Mr. W. S. Devnani for the respondents for speaking to the minutes:

8. Heard Mr. S. G. Sheth for the petitioners and W. S. Devnani for the respondents.

9. The Appellate Court has rightly observed that in the interests of justice, it was necessary to allow the plaintiffs to lead evidence in respect of certain contentions mentioned in the application exhibit 10. A case for additional evidence having thus been made out, it is now for the Appellate Court to decide whether the said additional evidence should be taken by itself or whether the trial Court or any other subordinate Court should take such evidence and send it to the Appellate Court vide R. 28 of O. 41 of the Civil Procedure. The provisions of R. 29 of O. 41 of the said Code should also be complied with.

Petition allowed.

AIR 1982 BOMBAY 125

S. C. PRATAP, J.

R. J. Mehta, Petitioner v. His Lordship the Chief Justice, Venkat Shrinivas Deshpande and others, Respondents.

Writ Petn. No. 1476 of 1981, D/- 4-2-1982.

(A) Constitution of India, Art. 226 — Scope of judicial review — Existence of visible setting of specific facts and cir-

cumstances is necessary — Mere apprehension that association of Judges with controversial trusts is likely to affect judicial independence is not enough — Judicial independence and public confidence therein cannot be a matter of writ petition.

Shortly stated the writ petitioner averred that in Oct., 1980 a trust, viz., Indira Gandhi Pratibha Pratisthan Trust was set up by Mr. A. R. Antulay, the Ex-Chief Minister of the State of Maharashtra. He is the principal trustee thereof and two sitting Judges of the High Court are two of the other trustees. Though this trust has been "a symbol of political corruption" the two Judges did nothing to disassociate themselves therefrom and "their duties as Judges are likely to conflict with their interest in the said trust as also in the persons who are donors to the trust as also in the Government". The petitioner further averred that there was such a public censure about the transactions of the trust in the press, in Lok Sabha and the Rajya Sabha, that it is considered by the general public as a raging political scandal of the day resulting in tendering of the resignation of the Chief Minister, the principal trustee of the said Trust. A criminal complaint has been filed against the Chief Minister where the two Judges have been cited as witnesses. It is submitted that a Judge should function or be allowed to function or even assigned any work in such a situation is the very negation of all constitutional values viz., the independence of the judiciary,;

Held that howsoever laudable may otherwise be the object of this petition, it reflected at the highest an admirable passion for judicial independence but dehors any specific lis or case. That apart and even otherwise, the circumstances set forth in the petition did not ipso facto lead to the inference loss of confidence in judicial independence.....sought to be so readily drawn therefrom. The advocated anxiety was more conjectural than real. It would be a highly dangerous precedent to lay down by holding as validly subsisting in a Court, power to examine, consider and adjudicate upon a judge's judicial independence. Such a role is plainly beyond the jurisdiction of High Court. Such extraordinary investigation would be an extremely hazardous course to navigate and a wholly unconstitutional exercise of judicial power. AIR 1965 SC 961, AIR 1977 SC 2328, AIR 1982 SC 149, (1969) 1 QB 577, (1970)

26 Law Ed 2d 100 and (1981) 83 Bom LR 251, Referred. (Paras 6, 7)

The principle of high conventions and standards in public offices applies to all the wings of the State but with greater rigour to its judicial wing. If justice must not only be done but must also appear to be done, the effect of controversial trusteeship on the office of judgeship cannot be altogether ignored. Lending one's official prestige and with it albeit sub silentio the high authority and dignity of the High Court to a politically controversial trust cannot but cause great anxiety to all concerned. But these questions are not amenable to judicial process and legal redress. (Paras 17, 18)

Every public question is not capable of constitutional adjudication. Judicial independence and public confidence therein is not and cannot be a matter of writs and injunctions. (Para 18)

In the first instance, grievance to be justiciable should at the minimal be concrete and real. This indeed is the *sine qua non*, an indispensable condition for judicial review. Basic to judicial adjudication is not a general atmospheric situation, howsoever genuine it be, but an active *lis*, an actual case in controversy. An issue or a controversy to be amenable to judicial adjudication and redress, as distinguished from academic or theoretical discussion, must have a visible setting of specific facts and circumstances, in the context whereof alone it can be legally considered and judicially determined. Courts do not decide abstract apprehensions. Writs operational judicial instruments are not issued in isolation or *in vacuo*. There can be no general judicial determination of a hypothetical apprehension. (Para 6)

Though under the recent trend, even a citizen not directly aggrieved may initiate a public interest action, the instant petition in that behalf is not just unusual but also goes too far. It may be that ambition and judicial independence may not happily co-exist. It may also be that continuous close proximity to the powers that be may as well blur the *laxman rekha*, the vital dividing line of thus far and no further. Even so, however, an individual's right to hold on to his independent thinking cannot be judicially abrogated. Freedom for the thought and action one does not like is one of the basic attributes of an independent people wedded to a democratic way of life. It is equally so not

permissible to judicially audit a judge's action dehors or outside his judicial sphere or his reasons for the said action. Stripping a judge of his judicial functions — akin to removing him *pro tanto* or *pro tempore* from office — is an unheard of exercise even in a public interest action, (Para 15)

Public confidence in judicial independence does not depend upon whether a judge is or is not associated with a trust. Judicial independence is not an artificial element. It is a live inner force. If liberty lies in the hearts of the people, judicial independence lies in the hearts of the judges. And that of all is its best guarantee. (Para 16)

(B) Constitution of India, Art. 226 — Assignment of work to Judges by the Chief Justice — Is not justiciable and cannot be judicially reviewed or controlled.

The assignment of work to the Judges is — subject, of course, to the rules of the High Court, — the exclusive right, duty and privilege of the Chief Justice. In a sphere so sensitive and with many a delicate aspect and element entering the field, the norms are best left undefined and best left to the good judgment and discretion of the Chief Justice. A system which has by and large worked well for a century and more is best left undisturbed. Assuming it to be an administrative function, every singular administrative function is not judicially reviewable. Save and except perhaps in a case of a patent and clear breach of the express rules affecting the jurisdiction of the Court, it cannot be held that this function is justiciable and can, therefore, be judicially reviewed, and controlled. To so hold can only open the floodgates for a virtual stalemate and anarchy in administration. (Para 8)

Cases Referred : Chronological Paras

AIR 1982 SC 149 10

(1981) 83 Bom LR 251 13

(1981) Writ Petn. No. 1165 of 1981 (Bom),

The Cement case 17

AIR 1977 SC 2328 : 1977 Lab IC 1857 10

AIR 1971 Bom 305 : 74 Bom LR 67 17

(1970) 26 Law Ed 2d 100 : 398 US 74,

Stephen S. Chandler, United States District Judge for the Western District of Oklahoma v. Judicial Council of the Tenth Circuit of the United States

12, 13

(1969) 1 QB 577 : (1968) 3 WLR 694,

Metropolitan Properties Co. v. Lannon

11

AIR 1965 SC 745

13

AIR 1965 SC 961

9

Miss Indira Jaising, for Petitioner.

ORDER:— This constitutional action stands in a class by itself. Sui generis, if one may say so. The petitioner, one R. J. Mehta, a trade union leader, has moved this Court by this unusual action under Article 226 of the Constitution. Respondent No. 1, Mr. Justice V. S. Deshpande, is the learned Chief Justice of this High Court and the other two respondents, Mr. Justice B. A. Masodkar and Mr. Justice R. L. Aggarwal, are the learned sitting Judges of this High Court. Arguments advanced by the learned Counsel Miss Indira Jaising in support of this petition were heard in extenso. A speaking order was requested. There being precedents of different Courts on speaking orders at the admission stage, I proceed to give one here.

2. Initially to summarise the averments:

In Oct., 1980 a trust viz., Indira Gandhi Pratibha Pratisthan Trust was set up by Mr. A. R. Antulay, till recently the Chief Minister of Maharashtra. Mr. A. R. Antulay is the principal trustee thereof and Mr. Justice B. A. Masodkar and Mr. Justice R. L. Aggarwal, respondents Nos. 2 and 3 respectively, are two of the other trustees. For this trust, huge sums were collected from various persons. Contributions were obtained by Mr. A. R. Antulay and/or the other trustees from persons who had business with the Government such as grant of cement permits, no objection certificates, liquor permits, etc. In receiving these, favours may have been or would be shown to the donors most of whom were wealthy persons who not only have business with the Government but are also often litigants in this Court — these being the obvious reasons for their contributions. Though this trust has been "..... a symbol of political corruption", respondent Nos. 2 and 3 did nothing to dissociate themselves therefrom. "..... their duties as judges are likely to conflict with their interest in the said trust as also in the persons who are donors to the trust as also in the Government." They have, therefore, ceased to possess the necessary qualifications for being judges and are hence disqualified in that behalf or in any event from entertaining and trying matters in which Mr. A. R. Antulay, the State Government, the rul-

ing party viz., Congress (I) and the donors to the said trust are parties impleaded.

3. Reference is then made to:

"(a) "..... an openly political and partisan conference" viz., The All India Conference of the Intelligentsia held in August 1981 under respondent No. 2's chairmanship of its Reception Committee; (b) certain cases involving the trust and the trustees pending under the constitutional as also the criminal processes of this Court;

(c) resolutions of the Bar Council of India and the Bar Council of Maharashtra expressing disapproval to the continued participation by respondent Nos. 2 and 3 as trustees;

(d) press interview by respondent No. 2 identifying himself with the objective of the said trust and declining to resign therefrom."

4. Submitting that he is associated with several petitions pending in this Court against the State of Maharashtra and is, therefore, vitally concerned and affected by administration of justice in this Court, the petitioner, to quote him verbatim, avers:

"..... for the first time issues of great constitutional significance which involve some issues of judicial functioning in an open society, issues which ultimately have a bearing on the basic structure of the Constitution, have been raised by this petition. The questions are: Whether the highest judicial functionary of the State can still discharge judicial functions when he associates with a trust, the funds of which are collected by means considered questionable by the general public, when there is great public resentment about the mode and manner in which the said funds are collected, the misrepresentation made about the true character of the trust in an official publication of the State and moneys are collected on such misrepresentation. The petitioner says that there is such a public censure about the transactions of the trust in the press, in Lok Sabha and the Rajya Sabha, that it is considered by the general public as a raging political scandal of the day resulting in tendering of the resignation of the Chief Minister, Shri Abdul Rehman Antulay, the principal trustee of the said Trust. A criminal complaint has been filed against the Chief Minister (Mr. A. R. Antulay) were respondent Nos. 2 and 3 have been cited as witnesses. It is submitted that a Judge

should function or be allowed to function or even assigned any work in such a situation is the very negation of all constitutional values viz., the independence of the judiciary. It is submitted that the petition is filed to restore the constitutional values and that to do so is not to show disrespect to the Judges. The petitioner submits that he has the highest respect for the Judges and the present petition is confined only to the constitutional issues arising out of their actions which are inconsistent with their function."

5. Reliefs claimed are mainly to the effect that:

(a) The Court should issue a writ of quo warranto declaring respondents Nos. 2 and 3 disqualified from continuing to hold the office of a Judge in this High Court and that the office they enjoy stand vacated;

(b) Respondent Nos. 2 and 3 should be restrained from acting as Judges in all cases to which the State of Maharashtra, Co-trustees of the said trust, the donors to the said trust including the donors listed in Exhibit A to the said trust (deed) and members of the Congress (I) are parties impleaded;

(c) Alternative relief claimed is injunction restraining respondent No. 1, the learned Chief Justice, not to assign any judicial work to respondents Nos. 2 and 3.

6. It is in this overall context that the learned Counsel, Miss Indira Jaising, expressed serious apprehension in the mind of the petitioner — and several like-minded other citizens — on the question of judicial independence with specific reference to the second and third respondents' association as trustees of the trust in dispute. The important question at the outset, however, is:

Is such apprehension justiciable? Equally important next question being:

Is a writ petition such as this an appropriate remedy at all?

My answer to both these questions is in the negative. In the first instance, grievance to be justiciable should at the minimal be concrete and real. This indeed is the sine qua non, an indispensable condition for judicial review. Basic to judicial adjudication is not a general atmospheric situation, howsoever genuine it be, but an active lis, an actual case in controversy. An issue or a controversy to be amenable to judicial adjudication and redress,

as distinguished from academic or theoretical discussion, must have a visible setting of specific facts and circumstances, in the context whereof alone it can be legally considered and judicially determined. Courts do not decide abstract apprehensions. Writs — operational judicial instruments — are not issued in isolation or in vacuo. There can be no general judicial determination of a hypothetical apprehension. Jurisdiction under Art. 226 of the Constitution is not an advisory or consultative jurisdiction. Even the infrequently invoked jurisdiction under Art. 143 of the Constitution has almost always been invoked and exercised in the light initially of one or another concrete setting. Therefore, however laudable may otherwise be the object of this petition, it reflects at the highest an admirable passion for judicial independence but dehors any specific lis or case.

7. That apart and even otherwise, the circumstances set forth in the petition do not ipso facto lead to the inference — loss of confidence in judicial independence — sought to be so readily drawn therefrom. The advocated anxiety is more conjectural than real. The reliefs claimed are also unprecedented. And though a Court need not feel constrained by mere want of precedent, it must nevertheless, when asked to set up one, act with great judicial caution and prudence, restraint and propriety. It would be a highly dangerous precedent to lay down by holding an validly subsisting in a Court, power to examine, consider and adjudicate upon a Judge's judicial independence. Such a role is plainly beyond the jurisdiction of this Court. Such extraordinary investigation would be an extremely hazardous course to navigate and a wholly unconstitutional exercise of judicial power.

8. So far as assignment of work is concerned, it is — subject, of course, to the rules of the High Court, — the exclusive right, duty and privilege of the learned Chief Justice. Contention, however, has been that the time has come to lay down norms in that behalf. But in a sphere so sensitive and with many a delicate aspect and element entering the field, the norms are best left undefined and best left to the good judgment and discretion of the learned Chief Justice. A system which has by and large worked well for a century and more is best left undisturbed. Counsel contends that assignment of work is an administrative func-

tion and, therefore, subject to judicial review. Even assuming it to be so, every singular administrative function is not judicially reviewable. Save and except perhaps in a case of a patent and clear breach of the express rules affecting the jurisdiction of the Court, I am not prepared to go to the length of holding that this function is justiciable and can, therefore, be judicially reviewed, and controlled. To so hold can only open the flood-gates for a virtual stalemate and anarchy in administration. Every assignment list — why, every single unpleasant assignment — can then become amenable to a judicial challenge. The wheels of judicial administration may as well come to a grinding halt. In the very nature of things, therefore, implicit confidence in the bona fide exercise of that function by the learned Chief Justice is necessary. Such confidence is all the more warranted when in a given case a request to the learned Chief Justice to look into and consider any reasonable grievance can always be made.

9. Miss Indira Jaising, however, vehemently continued to pursue her contentions. And this — may it be said to the credit of her efforts in that regard — not by way of mere ipse dixit but by reference to authorities. The first of these is the ruling of the Supreme Court in *Jyoti Prakash Mitter v. The Hon'ble Mr. Justice H. K. Bose, Chief Justice of the High Court, Calcutta*, AIR 1965 SC 961. That matter, however, arose from a concrete case relating to a live dispute on the age of the learned Judge concerned. It was in that context that the observations, to which my attention was invited, were made viz.,

"... If a dispute arises about the age of a Judge, any prudent and wise Chief Justice would naturally think of avoiding unnecessary complications by refusing to assign any work to the sitting Judge, if at the time when the dispute had been raised, it appears that the allegation is that at the relevant time the Judge in question has reached the age of superannuation", it being "... the duty of the Chief Justice to avoid such a complication."

(Vide page 967 of the report.)

The principle of this decision does not help the learned Counsel. The cited observations cannot be delinked from the

very specific nature of the dispute which evoked the same.

10. My attention was also invited to the following observations of the learned Chief Justice of India in *Union of India v. Sankalchand Himatlal Sheth*, AIR 1977 SC 2328.

"It is beyond question that independence of judiciary is one of the foremost concerns of our Constitution."

(Vide page 2328 of the report.)

As also to the following observations of the learned Judge Bhagwati, J. in his recent judgment dated 30th December, 1981 in the Judges' Transfer Case (reported in AIR 1982 SC 149 at p. 196):

"...the principle of independence of the judiciary is not an abstract conception but it is a living faith which must derive its inspiration from the constitutional charter and its nourishment and sustenance from the constitutional values."

As also : (at p. 202)

"The appointment of a Judge of a High Court or the Supreme Court does not depend merely upon the professional or functional suitability of the person concerned in terms of experience or knowledge of law though this requirement is certainly important and vital and ignoring it might result in impairment of the efficiency of administration of Justice, but also on several other considerations such as honesty, integrity and general pattern of behaviour which would ensure dispassionate and objective adjudication with an open mind, free and fearless approach to matters in issue, social acceptability of the person concerned to the high judicial office in terms of current norms and ethos of the society, commitment to democracy and the rule of law, faith in the constitutional objectives indicating his approach towards the Preamble and the Directive Principles of State Policy, sympathy or absence thereof with the constitutional goals and the needs of an activist judicial system."

Now, while dealing with a petition as the present, the context in which the above observations were made cannot be ignored. In cases relating to the scope and ambit of the constitutional power to transfer a High Court Judge from one High Court to another arose the question of the independence of the judiciary from executive interference, untrammelled executive power in that respect said to be

undermining the independence of High Court Judges. It is while dealing with this altogether different question that the aforesaid observations came to be made. It is, therefore, difficult to see how these general observations can be availed of in support of the reliefs prayed for here.

11. Yet another case referred to was a ruling of the Court of Appeal in *Metropolitan Properties Co. v. Lannon*, (1969) 1 QB 577. In the context here, two questions arising there (see page 598) may be referred to viz.,

(a) Was there "direct pecuniary interest"? No; the purported interest in question being held to be too remote, indirect and uncertain and hence not a disqualification.

(b) Was there bias? No; it being observed *inter alia* that there must appear to be "..... real likelihood of bias. Surmise or conjecture is not enough." In the present case there is not even the remotest indication of direct pecuniary interest nor — apart from sheer surmise and conjecture — of real likelihood of bias. This authority also thus has no application here.

12. Coming to yet another authority viz., that of the United States Supreme Court in *Stephen S. Chandler, United States District Judge for the Western District of Oklahoma v. Judicial Council of the Tenth Circuit of the United States*, (1970) 26 Law Ed 2d 100. The same turned on altogether different and peculiar facts and distinguishing features. That was a matter where, unlike here, the learned Judge himself viz., Judge Stephen S. Chandler, who was a Judge of the United States District Court for the Western District of Oklahoma, filed in the Supreme Court of the United States a motion for leave to file a petition for a writ of mandamus or prohibition against the Judicial Council of the Tenth Circuit which Council had by various orders deprived him of the assignment of cases filed in the District Court. The Supreme Court by majority (five to two with one not participating) denied the motion. In the majority as also in the dissenting opinions, observations — on which there cannot be two views — have been made on the independence of the judiciary such as e. g.

"... the imperative need for total and absolute independence of Judges in deciding cases or in any phase of the decisional function."

".....An independent judiciary is one of this nation's outstanding characteristic." These observations, unexceptional as these are, do not, however, take the petitioner's case here any further in relation to the reliefs claimed by him. The authority is clearly distinguishable.

13. The last decision referred to by Miss Indira Jaising is a Division Bench ruling (per Mr. Justice Masodkar and Mr. Justice Aggarwal) of this Court in, *In Re A Letter Dated 2nd/15th Sept., 1981 of Shrikant V. Bhat*, (1981) 83 Bom LR 251. It is a detail speaking order at the admission stage of a proceeding initiated upon an order of the then learned Chief Justice whose attention was invited by an Advocate's letter to a report of the speeches of the (then) Chief Minister Mr. A. R. Antulay and the Sales tax Commissioner Mr. K. Padmanabhaiah. In the context here, the first head note, part of which is actually an extract from Supreme Court's opinion in the matter of Special Reference No 1 of 1964 (reported in AIR 1965 SC 745 at p. 791), runs as follows:—

"..... Wise Judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct."

As in Judge Stephen S. Chandler's case (1970-26 Law Ed 2d 100) (*supra*), this Court's response to the above Division Bench ruling is also the same. And while there need be no conflicting views on a Judge's role as a Judge, the questions here raised and the reliefs here claimed stand on an altogether different footing and substratum.

14. Miss Indira Jaising then referred to the following from the eminent jurist — who was then the Advocate General of Maharashtra — Mr. H. M. Seervai's *Sir Chimanlal Setalvad Lectures on "The Position of the Judiciary under the Constitution of India"*.

"But if the Judge is unable or unwilling to put an end to this perversion of Justice, the Chief Justice is not without a remedy. The Chief Justice sets the tone of the High Court, and is ultimately responsible for all that happens in it. He assigns work to Judges, constitutes benches and where a High Court sits at two

different places in the State, he decides the place at which a Judge is to sit."

(Vide page 116.)

And to the following from the same learned jurist's book on "The Emergency, Future Safeguards And The Habeas Corpus Case: A Criticism":

"The present writer is aware that judicial power, like any other power can be abused It appears to him that two simple rules, which have only to be stated to command general acceptance are necessary. First, no Judge should make any public announcement, whether under the guise of a lecture or a seminar or not on any matter, social, political, economic or legal which is likely to come before him as a Judge. This rule does not prevent a Judge from stating the law as it exists. Secondly, ... No Judge should have frequent social contacts with Ministers and members of the executives The two simple rules we have mentioned earlier should be incorporated in the conditions of service of every Judge, if necessary, by a suitable constitutional amendment. And the contravention of those rules should be made a "misbehaviour" within the meaning of Art. 124 (4)." (Vide pages 126 and 127.)

And finally to item: 3 — Avoidance of appearance of impropriety: 24 — Business promotions and solicitations for charity; 26 — Executorships and trusteeships; and 27 — Partisan politics; — from Appendix II, Canons of Judicial Ethics from the book "Legal and Judicial Ethics" (adapted for the Republic of the Philippines) by George A. Malcolm. Now, in regard to all these citations, suffice it to state that the principles expounded therein, however unexceptional these be, constitute at best a code of conduct and conventions, at highest a charter of judicial ethics. The permissible limits envisaged thereunder are at least in this country and as at present a matter of self-realisation and of self-regulation. Not being law nor part of any adopted code here, such ideals and ethics cannot per se constitute the basis of judicial reliefs and constitutional writs.

15. Though under the recent trend, even a citizen not directly aggrieved may initiate a public interest action, the instant petition in that behalf is not just unusual but also goes too far. It may be that ambition and judicial independence may not happily co-exist. It may also be that continuous close proximity to the powers that be, may as well blur the Laxman

Rekha, the vital dividing line of thus far and no further. Even so, however, an individual's right to hold on to his independent thinking cannot be judicially abrogated. Freedom for the thought — and action — one does not like is one of the basic attributes of an independent people wedded to a democratic way of life. It is equally so not permissible to judicially audit a Judge's action dehors or outside his judicial sphere or his reasons for the said action. Stripping a Judge of his judicial functions — akin to removing him pro tanto or pro tempore from office — is an unheard of exercise even in a public interest action. Guarding the guardians is no function of this Court. Such exercise and function this Court will, therefore, decline to perform. The crescendo of public clamour and the irony of events and times — "times that try men's souls" — may not cloud this fundamental issue.

16. This is not to belittle the forceful contentions of the learned Counsel on the importance and purity of the springs of justice. Far from it. An independent judiciary is not an irrelevant appendage but a priceless asset and conscience keeper of a free and democratic people. Though it has no influence over either the sword or the purse, it has behind it the equally important and more lasting power of truth and justice. It also acts as a safety valve and a balance wheel. It often prevents and pre-empted crisis and chaos. An independent judiciary thus becomes an indispensable essence — the very quintessence — of rule of law. That is its true rationale and *raison d'être*. In the scheme of things, therefore, what is of the highest importance is that a Judge, while on the seat of Justice, is judicially independent and enjoys public confidence in the judicial processes at his hands. The pertinent and relevant question thus is :

Does this public confidence depend upon whether a judge is or is not associated with a trust? I think not.

Judicial independence may not be so easily wished away. It may not so lightly become a forlorn hope. Though a perfect Judge free of human frailties is yet to be born — "Judges are men, not disembodied spirits" — Judges seized of judicial work do not deflect from the path of duty. Those holding the scales of justice do not falter nor fail their sacred oath. Any lesser role would be inappropriate to judgeship itself. Judicial independence is

not an artificial element. It is a live inner force. If liberty lies in the hearts of the people, judicial independence lies in the hearts of the Judges. And that of all is its best guarantee. And if it remains there, the flag of a free and independent judiciary should — nay, it will — continue to fly aloft the temples of Justice for the benefit of all wings of the State and all citizens of the country.

17. It has been a painful task hearing this petition against my colleagues and high constitutional dignitaries of the State. Controversy of a political or a quasi-political character should, one very sincerely feels, be out of bounds for a Judge. The principle of high conventions and standards in public offices applies to all the wings of the State but with greater rigour to its judicial wing. Indeed, the political party constituting the executive wing of the State has after the judgment in Writ Petition No. 1165 of 1981 (the cement case) — and irrespective of appeal therefrom — laid down an ennobling example of first honouring the said judgment by calling upon its party leader in the State Legislature to lay down the highest executive office of the State. If justice must not only be done but must also appear to be done, the effect of controversial trusteeship on the office of judgeship cannot be altogether ignored. Lending one's official prestige and with it albeit sub silentio the high authority and dignity of the High Court to a politically controversial trust cannot but cause great anxiety to all concerned. This anxiety grows all the more by the following observations — in the cement case judgment — to which my attention was pointedly invited: —

"..... inescapable inference in this case is that there is a nexus between allotments and donations — and that one was a quid pro quo for the other — Once nexus is established, mala fides must be the natural sequitur — It cannot be said in defence or mitigation that the donations were openly received by cheque and are accounted for by the Trust or that they did not go into the pocket of the 2nd respondent himself. None of this would make any difference. It would even have made no difference had the 2nd respondent not been connected with these Trusts. That he is, makes it worse."

Surely then, as is seriously contended by the learned Counsel, if this be the finding relating to the main or the chief trustee, can the position of co-trustees remain un-

affected? A cloudy sky is anathema to a judicial universe. Will not the gathering storm amidst a vast section of lawyers and citizens — as witnessed by public statements and resolutions of Bar Councils and leading Bar Associations referred to by the learned Counsel — ipso facto impair the confidence inspiring quality and atmosphere of an independent judiciary? As observed by Chandrachud, J. as the learned Chief Justice of India then was:

"Respect for law is, in a large measure, dependent upon the esteem in which the society holds those whose duty it is to interpret the law."

(1972-74 Bom LR (Jour) 68 at p. 73 cited by Counsel.)

18. Questions raised in this petition are undoubtedly of considerable public importance. But if I am right in the view I have taken, these questions are not amenable to judicial process and legal redress. Every public question is not capable of constitutional adjudication. Judicial independence and public confidence therein is not and cannot be a matter of writs and injunctions. It is much too sacred to be secured and sustained through such strait-jacket formulae. Therefore, whatever else be the remedy, I for one feel certain that a petition such as this is no solution to the problem posed and the reliefs prayed no answer to the questions raised.

19. This petition thus fails and is rejected.

Petition rejected.

AIR 1982 BOMBAY 132

S. C. PRATAP, J.

Shamrao Abaji Jadhav, Petitioner v. Smt. Chaturbai Sidheshwar Javeri, Respondent.

Special Civil Appln. No. 125 of 1978, D/- 1-9-1981.

Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 12 (1) — Readiness and willingness to pay — Tenant depositing rent in standard rent proceedings though proceedings were dismissed for default — Amount thus deposited covered entire period of arrears and also period subsequent thereto — Factually tenant not

AZ/AZ/A73/82/VRK/RSK

in arrears on date of quit notice or date of suit — Held it would be hyper-technical to exclude rent thus paid in ascertaining readiness and willingness of tenant to pay. (Paras 7, 9)

D. S. Marathe, for Petitioner; A. C. Agarwal with Mrs. A. C. Agarwal, and Bhushan Kanade for V. B. Joshi, for Respondent.

ORDER:— This petition arises out of original proceedings instituted by the respondent-plaintiff, inter alia, for possession of the suit premises under the provisions of the Bombay Rent Act.

2. The instant suit for possession was filed in Sept. 1973 on three grounds viz. (a) default in payment of rent, (b) bona fide and reasonable requirement of the suit premises for personal use and occupation and (c) nuisance and annoyance. The trial Court held against the plaintiff on all the said three grounds and dismissed the suit. In plaintiff's appeal against the said dismissal, the appellate Court confirmed the finding of the trial Court on the plaintiff's claim for possession on the ground of bona fide and reasonable requirement as also on the ground of nuisance and annoyance. On the ground of default in the payment of rent, the appellate Court reversed the finding of the trial Court and came to the conclusion that the defendant was liable to be evicted from the suit premises under the provisions of S. 12 (3) (a) of the Rent Act. The appeal was consequently allowed. The trial Court's decree was set aside and instead a decree for possession of the suit premises was passed in favour of the plaintiff. Hence, this petition by the defendant-tenant.

3. In support of the petition, I have heard Mr. D. S. Marathe, learned counsel for the petitioner. The respondent-landlord plaintiff is represented by her learned counsel Mr. A. C. Agarwal.

4. Hearing the rival submissions of the respective Advocates and going through the judgments of the two Courts below as also the record of the case, I find myself unable to sustain the finding of the appellate Court (reversing that of the trial Court) on the question of alleged defaults by the tenant in payment of rent, consequent whereupon he can be said to have rendered himself liable to eviction from the suit premises. Relevant facts in this behalf are

as follows:— Long prior to the institution of the present suit and even long prior to the issuance of the quit notice by the plaintiff to the defendant-tenant herein, the defendant-tenant had himself applied in Jan. 1969 by way of Miscellaneous Application 34 of 1969 for determination of standard rent of the suit premises which consisted of only one room. In the said proceedings, application was made by the tenant on the same day for fixation of interim rent. By order dated 13th Jan. 1969 interim rent was fixed at Rs. 4/- per month. In the said standard rent proceedings and after obtaining an order of the Court on the question of interim rent, the tenant deposited in the said proceedings Rs. 76/- on 5th Feb. 1969, Rs. 12/- on 9th Apr. 1969 and Rs. 20/- on 14th July 1969, thus in all, as at this stage, Rs. 108/-. It so happened that this application for fixation of standard rent was dismissed for default on 21st Nov. 1969. However, little knowing that his application was dismissed for default as aforesaid, the tenant continued to deposit in the said proceedings and the Court continued to accept from the tenant further deposits of rent in the said proceedings. These further deposits are Rs. 16/- on 16-12-1969, Rs. 20/- on 24-4-1970 and Rs. 16/- on 22-9-1970 making of all these three items a total of Rs. 52/-. Thus, all the aforesaid six deposits together made up a total of Rs. 160/-.

5. Having come to know that his application for fixation of standard rent was dismissed for default, the tenant filed another application, being Miscellaneous Application No. 739 of 1969, for the same relief of fixation of standard rent of the suit premises. In these proceedings, the tenant made further deposits in all of Rs. 72/-. Ultimately, in lieu of the agreed rent of Rs. 5/- (five) per month, the standard rent was fixed at Rs. 3/- per month. This order of fixation of standard rent was not challenged by either of the parties any further. After the standard rent of the suit premises was fixed as aforesaid at Rs. 3/- per month, it was the tenant himself who through his Advocate sent a notice dated 21st Feb. 1973 to the plaintiff-landlord (respondent herein) intimating to her that he had in all deposited in the standard rent proceedings a total amount of Rs. 232/- i.e., Rs. 160/- in the

first standard rent proceedings and Rupees 72/- in the second standard rent proceedings. He further informed the landlord that this total deposit of Rupees 232/- covered the entire arrears of rent at the standard rent of Rs. 3/- per month for the period 1st July 1967 to 30th Apr. 1973. Indeed, the aforesaid deposit even covered future rent up to the period Dec. 1973. The plaintiff-landlord sent her reply to the notice and by this reply she also terminated the tenant's tenancy of the suit premises and asked him to handover possession thereof. The tenant having declined to do so, the landlord filed the instant suit in Sept. 1973.

6. Now, it is relevant to note that in this suit a total claim towards rent was Rs. 210/- which was far less than the amount of Rs. 232 already deposited long back by the tenant in two standard rent proceedings aforesaid. There was, therefore, no question of the tenant being in any arrears as such of rent either at the date of the quit notice or on the date of the suit. The trial Court rightly, therefore, came to the conclusion that this was not a case where any decree for possession of the suit premises could be passed in favour of the landlord under the provisions of S. 12 (3) (a) of the Rent Act. The Appellate Court, unfortunately for the tenant, reversed this finding on the ground that the deposit made by the tenant in the first standard rent proceedings after the said proceedings were dismissed for default cannot come to the aid of the tenant in protecting his possession of the suit premises. In other words, the reasoning was that the deposits made in the first standard rent proceedings after the same were dismissed for default were not valid tenders and, therefore, had to be excluded from consideration while determining the readiness and willingness of the tenant in terms of S. 12 (1) of the Rent Act.

7. It is difficult to accept this reasoning and the ultimate conclusion of the Appellate Court. There is no dispute of the fact of the aforesaid deposits. There is also no dispute of the fact that these deposits covered the entire period of arrears. There is also no dispute of the fact that the deposits in fact covered even payment of advance rent. There is also no dispute of the fact that

as at the date of the suit notice issued to the tenant in Mar. 1973, the tenant was factually not in any arrears at all. Nor is there any dispute of the fact that even as at the date of the suit, the tenant was factually not in arrears at all. Whole claim in support of her case for eviction by the plaintiff was that though the tenant had made full deposits and though the tenant was factually not in arrears at the date of the quit notice or at the date of the suit itself, payment made in the standard rent proceedings after the said proceedings stood dismissed for default cannot be termed as valid tenders and, therefore cannot come to the aid of the tenant for protecting his possession of the suit premises. In my view, to accept such a contention would be a hypertechnical approach in a matter relating to eviction of the tenant from the suit premises. In enacting Sec. 12 of the Rent Act, it cannot be said to be the intention of the Legislature to penalise a person such as the tenant herein and visit him with the penalty of eviction even though he has paid the entire arrears in judicial proceedings between the parties and even though he is found factually not to be in any arrears at all either at the date of the quit notice or at the date of the suit itself. Indeed, the intention of the Legislature is, at the outset, clear from the provisions of subsec. (1) of S. 12 of the Rent Act. By virtue of the said provisions, the Legislature has, at the very threshold, put a bar against a landlord's claim for possession by enacting that he shall not be entitled to recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases. Thus, if the tenant is found to have paid or if the tenant is found to be ready and willing to pay, it is not open to the landlord to recover possession. This readiness and willingness has, of course, been interpreted as being, in a case to which S. 12 (3) (a) may apply, readiness and willingness within a period of one month of the receipt of the notice referred to therein. But even in that light, when we see the facts of the present case, it is clear that much prior to the notice in question and even before receipt of any notice by the landlord to the tenant, the tenant had himself deposited in judicial pro-

ceedings between the parties the entire amount of rent which covered not only the entire period of arrears but also period subsequent thereto. Here is, in my view, a case of a tenant who has paid the entire rent long prior to the receipt of the quit notice. On this ground itself, he deserved to be protected in his possession of the suit premises.

8. Even in the alternative, this is a case where the tenant must be held to be one ready and willing to pay. If one were to consider payments made by him in the standard rent proceedings as not (in terms of technicality) a valid tender, the said payments nevertheless constituted a strong circumstance which, in no manner of doubt clinchingly indicated the tenant's readiness and willingness to pay. Even on this latter ground, therefore, the tenant here, on the strong facts in his favour in the present case, was entitled to be protected in his possession of the suit premises.

9. The Appellate Court observes that the payment of Rs. 52/- made in the standard rent proceedings after the said proceedings were disposed of was not a valid tender. Question arising in the mind of the Court in this context would be; Will a payment accepted by a Court in a judicial proceeding between the same parties and credited to the account of the said proceeding be nevertheless termed as not a valid tender? That apart, is a tenant to be blamed and punished with the penalty of eviction if it is a Court which permits him to deposit the amount in the said proceeding, which actually accepts the said amount from him in the said proceeding and which has the said amount credited in the said proceeding? The better view of the matter would be to term the said tender as a valid tender. It was certainly a valid tender so far as the Court was concerned. Having permitted the tenant to deposit and having accepted the said deposit, it would hardly be in consonance with justice for the Court itself to later on term the same as not a valid tender. But apart from the fact whether it was or was not a valid tender, the tender was undisputedly permitted to be made and the tender was undisputedly accepted. Under such circumstances, the tenant surely cannot, by any stretch, be termed or described as one not ready and willing to pay. In-

deed, the case is pre-eminently of a tenant who was ready and willing to pay and who in fact did pay. The tenant was thus entitled to be protected in his possession of the suit premises. This was certainly not a case where a mandatory decree of eviction can be said to be warranted under S. 12 (3) (a) of the Rent Act. This, on the contrary, was a case which was covered fairly and squarely by the provisions of sub-s. (1) of S. 12 of the Rent Act.

10. In this view of the matter that I take, the impugned decree passed by the Appellate Court requires to be set aside and quashed and that passed by the trial Court requires to be restored and confirmed. In the result, this petition succeeds and is allowed. Decree dated 18th Oct. 1977 passed by the Appellate Court in Civil Appeal 329 of 1976 is set aside and quashed and decree dated 12th Apr. 1976 passed by the Court of Small Causes, Poona, in Civil Suit 1803 of 1978 is restored and confirmed. Rule earlier issued on this petition is made absolute. In the circumstances of the case, however, there will be no order as to costs.

Petition allowed.

AIR 1982 BOMBAY 135

MODY, J.

Yousuf Ali Abdulla Fazalbhoys and others, Petitioners v. M. S. Kasbekar and another, Respondents.

Misc. Petn. No. 274 of 1979, D/- 16-4-1981 and 20-4-1981.

(A) Requisitioning and Acquisition of Immovable Property Act (30 of 1952). S. 24 (2) — Continuance of requisition — Section confines continuance of requisition only to purpose of Union — It does not envisage continuance of requisition for purpose of State.

The 1952 Act empowers the requisitioning of property only for a public purpose which is a purpose of the Union and then proceeds to give powers to the Central Government to release the property from requisition. The preamble clearly shows that the intention is to confine the operation of the Act only to the requisition of the property for the purpose of the Union. Section 24 (2) must, therefore, necessarily be read

AZ/AZ/A278/82/JHS/RSK

so as to confine the continuance of requisition only to the purpose of the Union. This interpretation is further fortified by proviso (b) to S. 24 (2) which clearly indicates that the provisions of the earlier Legislation are to continue and any action thereunder would continue only in so far as they are not inconsistent with the provisions of 1952 Act. The test for determining whether there was inconsistency or not is to ascertain whether the property requisitioned could have been requisitioned under the Act of 1952. If the answer is no, such requisitioning would be inconsistent with the provisions of the Act of 1952 and cannot be deemed to have been continued under S. 24. Since the Act of 1952 authorises requisitioning only for the purpose of the Union, the requisitioning of the flats in question which was for State purpose, could not have been done under the 1952 Act. It follows that the requisition for the purpose of the State came to an end on the repeal of the Requisitioned Land (Continuance of Powers) Act, 1947 which repeal became effective in March 1952. (Para 8)

(B) Constitution of India, Art. 226 — Res judicata — Applicability of principles to writ petitions — Earlier petition not disposed of on merits but only withdrawn by petitioner — No res judicata. (Civil P. C. (1908), S. 11).

The principles of res judicata cannot strictly apply to writ petitions by virtue of any enactment but are to be applied by the Court on the ground of public policy meaning thereby Court's policy. This policy is to see that a litigation is put to an end once and for all and a party should not be permitted to create chaos by repeatedly coming to Court for reliefs in respect of the same subject matter by, taking one ground at a time. However, the principles of res judicata or the principles analogous thereto can apply only when the earlier litigation is finally disposed of on merits. In the present case the earlier petition was not disposed of on merits but was only withdrawn by the petitioners and there is no scope for application of principles analogous to those of res judicata. (Para 11)

(C) Constitution of India, Art. 13 — Fundamental rights — Principles of waiver or estoppel not applicable. (Evidence Act (1872), S. 115).

There cannot be an estoppel against exercise of fundamental rights on the same principles as are applicable in the case of waiver thereof. State cannot arrogate to itself a right to commit breach of the fundamental rights of any person by resorting to principles of waiver or estoppel or other similar principles. If there is any continuing action which is violative of fundamental rights of any person that must come to an end. No law or legal principle can prevent a Court from giving remedy for violation of fundamental rights once it is found to exist. AIR 1959 SC 149, Foll.

(Para 13)

(D) Bombay Land Requisition Act (33 of 1948), S. 9 — Government Circular No. CRA/1273/52-XV D/- 6-9-1973 — Duty of Government to release requisitioned premises on public purpose coming to end — Effect of not releasing within reasonable time (Obiter).

Section 9 not only authorises the State Government to release any premises from requisition but also casts a duty on it to do so when the public purpose for which the requisition was made came to an end. It necessarily implies that State Government cannot utilize any premises requisitioned for a particular purpose for another purpose, public or otherwise and once it does so, obviously, for the duration the premises are used or allowed to be used for such other purpose, they are not required for the public purpose for which they were requisitioned and so the original order of requisition must be considered to have lapsed. In case of death or retirement of a government servant, if the premises are allowed to be used by the family members or the retired servant, as the case may be, for a reasonable time there can be no lapse. A statute has to be interpreted in a reasonable way and so it is necessary to engraft such a qualification. Thus where three flats were allotted to three Government Servants and they were allowed by the Government to occupy the same even after their retirement for a period of (1) five months, (2) one year and (3) more than one year respectively : held, the flats must be deemed to be free from requisition and the Government was bound to handover possession thereof to the petitioners. (1969) 71 Bom LR

624, Misc. Petn. No. 535 of 1972, D/- 6-8-1974 (Bom) and Appeal No. 54 of 1973, D/- 18-1-1978 (Bom), Foll. Appeal No. 135 of 1976, D/- 21-3-1981 (Bom), Distinguished. (Paras 15, 18, 23, 24, 25)
Cases Referred : Chronological Paras
 (1981) Appeal No. 135 of 1976, D/- 21-3-1981 (Bom), Chhotulal Pandurang Khandvilkar v. State of Maharashtra 16

(1978) Appeal No. 54 of 1973, in Misc. Petn. No. 753 of 1971, D/- 18-1-1978, (Bom), Union of India v. Kahan Chand Nayar 16, 20

(1975) Misc. Petn. No. 49 of 1975 (Bom) 16

(1974) Misc. Petn. No. 535 of 1972, D/- 6-8-1974, (Bom); Parmanand Karsandas v. State of Maharashtra 16, 19

(1969) 71 Bom LR 624 : 1969 Mah LJ 880 16, 17, 19, 21, 22

(1967) 2 Mad LJ 622 17

AIR 1966 Mad 172 17

AIR 1959 SC 149 12

AIR 1935 PC 79 : 62 Ind App 100 : 1935

All LJ 593 12

A. J. Rana with S. Ganesh, for Petitioners; S. P. Kanuga with Patkar, for Respondent No. 1.

ORDER:— The petitioners who are the trustees of a trust owning a building known as "Fazalbhooy House" at New Marine Lines Bombay, are challenging the continued requisition of four flats in the said building, being flats G and H on the 2nd floor and E and H on the 3rd floor.

2. Originally, under the Defence of India Act read with Defence of India Rules, particularly R. 75A, 8 flats were requisitioned on 25-6-1942. They were flats E, F, G and H on the 2nd and the 3rd floors of the said building. The requisition was for housing police personnel. Subsequently flats F and G on the 3rd floor were released in favour of the allottee on the petitioners' consenting to take them as direct tenants, one in or about Feb. 1973 and other in Sept. 1973. In Nov. 1973, the petitioners filed a writ petition being Misc. Petition 1090 of 1973 in respect of the remaining six flats. In or about the end of 1974 or beginning of 1975 a settlement was arrived at between the parties as a result of which flats E and F on the 2nd floor were released by the State of Maharashtra from requisition. In view of the settlement on 22-1-1975 the petition was withdrawn.

3. Mr. Rana for the petitioners began his arguments by challenging the continued requisition of each of the flats relying on the facts peculiar to them, contending that in view of the facts the public purpose came to an end at one time or the other and continued requisition at the date of this petition was invalid. This contention of Mr. Rana applied really only to three flats, namely, 2/H, 2/G and 3/H and Mr. Rana fairly stated that as regards flat 3/E he was not in a position to challenge the continued requisition on facts. However, by way of an amendment which was granted by an order of 5th December, 1980 he challenged the continued requisition of all the flats on the ground that looking to the legislative provisions the requisition had automatically come to an end sometime in the year 1952 and that thereafter continued exercise of control by the Govt. over all the four flats was illegal and also amounted to violation of the fundamental rights of the petitioners conferred under Arts. 19 (1) (f), (g) and 31 of the Constn. As this subsequent point is capable of disposing of the entire petition, I am dealing with the said contention of Mr. Rana first. However, since the petition is argued fully, I propose to deal with all the contentions advanced by Mr. Rana as well as the contentions advanced by Mr. Kanuga in reply to the contentions of Mr. Rana.

4. To appreciate Mr. Rana's contention regarding the cessation of the requisition by statutory non-extension thereof, it is necessary to set out fully the relevant provisions of the legislation existing from time to time. Rule 75A of the Defence of India Rules was as follows :

"Rule 75-A. (1) If in the opinion of the Central Government or the Provincial Government it is necessary or expedient so to do for securing the defence of British India, public safety, the maintenance of public order or efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, that Government may by order in writing requisition any property, movable or immovable, and may make such further orders as appear to that Government to be necessary or expedient in connection with the requisitioning.

(2) Where the Central Government or the Provincial Government has requisitioned any property under sub-rule (1) that Government may use or deal with the property in such manner as may appear to it to be expedient, and may acquire it by serving on the owner thereof, or where the owner is not readily traceable or the ownership is in dispute, by publishing in the official Gazette, a notice stating that the Central or Provincial Government, as the case may be, has decided to acquire it in pursuance of this rule."

The premises requisitioned under the Defence of India Rules were continued to be the subject to requisition by Government of India Ordinance 19 of 1946. The relevant provisions thereof were as follows :

"2. Definition:— In this Ordinance, unless there is anything repugnant in the subject or context,

(1) "appropriate Government" means, in relation to any requisitioned land, the Central or Provincial Government by which or under the authority of which the land has been requisitioned.

(2) "Provincial Government" means in relation to a Chief Commissioner's Province, the Chief Commissioner.

(3) "requisitioned land" means immovable property which, when the Defence of India Act, 1939 (XXXV of 1939) expires, is subject to any requisition effected under the rules made under that Act.

"3. Continuance of requisitions:— Notwithstanding the expiration of the Defence of India Act, 1939 (XXXV of 1939) and the rules made thereunder, all requisitioned lands shall continue to be subject to requisition until the expiry of this Ordinance and the appropriate Government may use or deal with any requisitioned land in such manner as may appear to it to be expedient.

Provided that the appropriate Government may at any time release from requisition any requisitioned land". This was followed by the Requisitioned Land (Continuance of Powers) Act XVII of 1947. The relevant provisions are Ss. 2 and 3 which are in same terms as in the Ordinance. Then comes Bombay Ordinance, V of 1947, which gives power to the State Government (then Provincial Government) to requisition premises and provides for continuance

of the requisition notwithstanding anything contained in the Requisitioned Land (Continuance of Powers) Act, 1947. This provision of Bombay Ordinance (V of 1947) reads as follows :—

"5. Continuance of requisition.— (1) Notwithstanding anything contained in the Requisitioned Land (Continuance of Powers) Act, 1947 (XVII of 1947), the Provincial Government may, by order in writing, direct that land which was continued under requisition under the said Act, shall continue to be subject to requisition under the Ordinance when it is released from requisition under the said Act or ceases to be subject to requisition for any reason; and the Provincial Government may use or deal with the land so continued to be subject to requisition in such manner as may appear to it to be expedient.

(2) In respect of the continued subsection of the land to requisition under sub-sec. (1) compensation shall be determined and paid in accordance with the provisions of this Ordinance and of the rules made thereunder;

Provided that all agreements and awards made in relation to the land in respect of the payment of compensation for the period before it was continued to be subject to requisition under sub-sec. (1) shall continue to be in force and shall apply to the payment of compensation for the period of requisition under this Ordinance."

It is to be noticed that this Act was passed after the Bombay Ordinance of 1946 and while it was continuing and was to come to an end about couple of years thereafter but was continued by Act, 9 of 1951 till it was repealed in 1952 by an Act which I will refer presently. Next comes the Bombay Land Requisition Act, 1948. The relevant provisions of Section 20 of the said Act are as follows :—

"20. (1) The Bombay Land Requisition Ordinance, 1947, is hereby repealed, and it is hereby declared that the provisions of Sections 7 and 25, Bombay General Clauses Act, 1904, shall apply to the repeal as if that Ordinance were an enactment.

(2) Notwithstanding the repeal of the said Ordinance and anything contained in this Act :—

(i) any intimation given under subsection (1) of Section 5 of that Ordinance

nance within a period of seven days prior to the commencement of this Act shall be deemed to have been given under the corresponding provision of this Act;

(ii) any land requisitioned or continued to be subject to requisition under the said Ordinance shall be deemed to be requisitioned or continued to be subject to requisition under this Act."

Reference to sub-section (1) of Sec. (5) appears to be a mistake for sub-s. (1) of S. 3.

5. Then came the Constitution of India under which there was bifurcation of powers to legislate for requisitioning of property. Under List I the Parliament had exclusive power to legislate on the subjects mentioned in the list and the State legislatures could not impinge on this power. Correspondingly List II contained the subjects reserved exclusively to the State legislatures. In this list I under entry 33 the Parliament had exclusive power to legislate in respect of requisition of property for the purpose of Union subject to entry 42 of list III i.e., concurrent list. Similarly under entry 2 in list II the State Legislature had exclusive power to legislate in respect of police and under entry 36, in respect of requisitioning of property for the purpose of the State. Entry 42 in list III contained the provisions only regarding principles on which compensation for property requisitioned is to be determined. By an amendment of the Constitution entries 33 in list I and 36 in list II were deleted and put in the concurrent list by substitution of the original entry 42. However, we are not concerned with this amendment.

6. After the Constitution came into force, the Central Government promulgated the Requisitioning and Acquisition of Immovable Property Ordinance, 1952 which was replaced by the Act with the same name being Act 30 of 1952. The preamble of the said Act reads: "An Act to provide for the requisitioning and acquisition of immovable property for the purposes of the Union." The relevant provisions of the said Act are as follows:—

"3. (1) Where the competent authority is of opinion that any property is needed or likely to be needed for any public purpose, being a purpose of the

Union, and that the property should be requisitioned, the competent authority

xx xx xx xx

"24. (1) The Requisitioned Land (Continuance of Powers) Act, 1947, the Delhi Premises (Requisition and Eviction) Act, 1947, and the Requisitioning and Acquisition of Immovable Property Ordinance, 1952 are hereby repealed.

(2) For the removal of doubts, it is hereby declared that any property which immediately before such repeal was subject to requisition under the provision of either of the said Acts or the said Ordinance shall, on the commencement of this Act, be deemed to be property requisitioned under Section 3 of this Act, and all the provisions of this Act shall apply accordingly:

Provided that—

(a) all agreements and awards for the payment of compensation in respect of any such property for any period of requisition before the commencement of this Act and in force immediately before such commencement, shall continue to be in force and shall apply to the payment of compensation in respect of that property for any period of requisition after such commencement;

(b) anything done or any action taken (including any orders, notifications or rules made or issued) in exercise of the powers conferred by or under either of the said Act or the said Ordinance shall in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken in the exercise of the powers conferred by or under this Act as if this Act was in force on the day on which such thing was done or action was taken".

7. Analysing the legislative provisions the following position emerges. Under the Defence of India Rules the Central Government as well Provincial Government had power to requisition property. The flats in question were requisitioned by the Commissioner of Police pursuant to the powers vested in him by a notification of the Home Department (Political)-War, No. S.D./N-1742 dt. 29th May 1942. The notification clearly says that the powers are conferred on the Commissioner by the Government of Bombay in exercise of its powers under R. 75A, Defence of India Rules, read with Sec. 2 (5), Defence of India Act, 1939. But for the Ordinance

19 of 1946 followed by Act XVII of 1947 the requisitioning of these 8 flats would have come to an end on the lapsing of Defence of India Act, 1939 on 13-9-1946. The effect of the Ordinance 19 of 1946 read with Act XVII of 1947 is that all the requisitioned premises continued to be subject to requisition and the appropriate Government could use or deal with any requisitioned flat in such manner as may appear to it to be expedient. Therefore, when the requisitioning was for the purpose of the Central Government, Central Government and when the requisitioning was for the purpose of Provincial Government, Provincial Government was entitled to deal with the requisitioned flats and the Government concerned alone had power to derequisition the same. The scheme of the Act shows that it was the appropriate Government which had to make the requisite enquiry before release of the premises from requisition and it is the appropriate Government which had the power to acquire the requisitioned property. The Bombay Ordinance V of 1947 is clearly intended to clothe the Provincial Government with the power of making fresh requisition, which power had come to an end on the Defence of India Rules lapsing. This is apparent also from the statement annexed to the Ordinance. In the interregnum between the lapsing of the Defence of India Rules and the promulgation of this Ordinance the Provincial Government did not have any power to requisition any premises. However, as regards the premises which continued under requisition by virtue of the Central Ordinance of 1946 and the Central Act XVII of 1947 the provisions of Cl. 5 of the Bombay Ordinance V of 1947 set out above require that when any flat was released from requisition under Act XVII of 1947 or ceased to be subject to requisition for any reason, the Provincial Government may by an order in writing direct that any premises which continued to be requisitioned under the said provisions (i. e. Act XVII of 1947) shall continue to be subject to requisition under the said Bombay Ordinance. Mr. Kanuga for the respondents is unable to produce any such order. Moreover, if any such order was passed regarding any flat in particular, it is required to be served individually on the person af-

fected in the manner prescribed by the Code of Civil Procedure for service of summons. Mr. Rana states that no such written order has been served on the trustees of the trust. It is therefore clear that no such written order has been made. The result is that so far as the former Bombay State is concerned there is no continuance of the requisition made under the Defence of India Rules.

8. Mr. Rana contends that even under the Central Legislation there is no such continuance after 1952, Mr. Kanuga contends to the contrary. Both parties rely for this purpose on the Requisitioning and Acquisition of Immovable Property Act, 1952 the relevant provisions thereof have been already extracted earlier. Section 24 (1) repeals the Requisitioned Land (Continuance of Powers) Act, 1947 and the Requisitioning and Acquisition of Immovable Property Ordinance, 1952. Sub-section (2) of Section 24 declares that any property which immediately before such repeal was subject to requisition under the provisions of either of the said Acts or the said Ordinance shall, on the commencement of this Act, be deemed to be property requisitioned under Section 3 of the Act of 1952. Therefore, ordinarily if the amplitude of this subsection was not to be restricted because of other provisions of the said Act or for some other reason, the properties requisitioned whether for the Central purpose or the Provincial purpose (by then State purpose) continued to be subject to the requisition under the said Act of 1952. The question, however, is whether the scope of sub-sec. (2) of Section 24 is so wide. For this purpose the Act not only must be read as a whole but also in consonance with the powers of the Union. This Act empowers the requisitioning of property only for a public purpose which is a purpose of the Union and then proceeds to give powers to the Central Government to release the property from requisition. The preamble clearly shows that the intention is to confine the operation of the Act only to the requisition of the property for the purpose of the Union. Sub-section (2) of S. 24 must, therefore, necessarily be read so as to confine the continuance of requisition only to the purpose of the Union.

This interpretation is further fortified by proviso (b) to Section 24 (2) which says, *inter alia*, to the effect that any orders, notifications or rules made or issued in exercise of the powers conferred by Requisitioned Land (Continuance of Powers) Act, 1947 and the Requisitioning and Acquisition of Immovable Property Ordinance, 1952 shall in so far as it is not inconsistent with the provisions of this Act of 1952 be deemed to have been done or taken in the exercise of the powers conferred by or under this Act as if this Act was in force on the day on which such thing was done or action was taken. This also clearly indicates that the provisions of the earlier Legislation are to continue and any action thereunder would continue only in so far as they are not inconsistent with the provisions of 1952 Act. In my view the test for determining whether there was inconsistency or not is to ascertain whether the property requisitioned could have been requisitioned under the Act of 1952. If the answer is no, such requisitioning would be inconsistent with the provisions of the Act of 1952 and cannot be deemed to have been continued under Sec. 24. Even under S. 24, General Clauses Act, anything done under the repealed provisions of the legislation will continue only in so far as it is not inconsistent with the new legislation. Since the said Act of 1952 authorises requisitioning only for the purpose of the Union, the requisitioning of the flats in question which was for State purpose, could not have been done under the said Act 1952. Therefore all properties requisitioned for the purpose of the State came to an end on the repeal of the Requisitioned Land (Continuance of Powers) Act, 1947 which repeal became effective in March 1952.

9. Another ground on which the operation of Section 24 of the Act, 1952 must be restricted is that if an interpretation was given to it so as to extend the continuance of requisition even when it was for the State purpose it would clearly be in violation of the power as circumscribed by the aforesaid entries in lists I and II as then existing and this Court may have to go to the extent of holding such continuance void and beyond legislative competence of the Union legislature i. e., parliament. It is

well settled principle that the provisions of an enactment should not be so construed as to render them void and as far as possible such interpretation should be given as to make all the legislative enactments valid and if necessary language may be strained to give validity to a Statute. I do not have to go to the length of straining the language because as I have already pointed out, on its true interpretation Section 24 does not extend to the requisitioning done for the purpose of the State. However, if necessary it is not difficult, to confine the operation of Section 24 to the area circumscribed by relevant entry in list 'I' without putting any strain on the language.

10. This being the position the entire exercise of power regarding the allotment of these flats by the State Government after March, 1952, is completely illegal and without power. All the four flats in question as also the flats which were earlier released before the filing of the earlier petition or even thereafter pursuant to the settlement of the petition were held by the State Government illegally.

11. Apart from contending that the position as set out above is not the correct interpretation of the relevant legislative provisions, Mr. Kanuga for the respondents has sought to destroy this contention of Mr. Rana by contending that having filed the earlier petition and withdrawn the same without having a decision on the contentions which are discussed above, the petitioners are now not entitled to urge this contention on the principles analogous to *res judicata* or in the alternative on the ground of estoppel. I may at the outset point out that the principles of *res judicata* cannot strictly apply to writ petitions by virtue of any enactment but are to be applied by the Court on the ground of public policy meaning thereby Court's policy. This policy is to see that a litigation is put to an end once and for all and a party should be permitted to create chaos by repeatedly coming to Court for reliefs in respect of the same subject matter by taking one ground at a time. However, the principles of *res judicata* or the principles analogous thereto can apply only when the earlier litigation is finally disposed of on merits. In the present case the earlier

petition was not disposed of on merits but was only withdrawn by the petitioners and there is no scope for application of principles analogous to those of *res judicata*. As regards the contention of estoppel, Mr. Rana's reply is twofold. He firstly contends that the principle of estoppel is similar to the principle of waiver and that accordingly there cannot be any estoppel against exercise of fundamental rights as it is well established that there cannot be waiver of fundamental rights. According to Mr. Rana the continued occupation of the flats by and on behalf of the State Government is violative of the fundamental rights guaranteed under the Constitution of India. He secondly contends that there cannot be estoppel against law. In my view both these contentions have substance and effectively answer the contention of Mr. Kanuga.

12. In support of his contention that there cannot be waiver of fundamental rights Mr. Rana relied on *Basheshar Nath v. I-T. Commr.*, AIR 1959 SC 149. There is no need to go in the facts of this case but it will be sufficient to reproduce some portions of some of the judgments. S. R. Das, C. J., for himself and Kapur, J., preferred to confine the non-application of the rule of waiver only to Art. 14. I need not, therefore, refer to that judgment for the purpose of this petition. N. H. Bhagwati J. in his separate but concurring judgment has observed as follows (page 161):—

"It is absolutely clear on a perusal of Article 13 (2) of the Constitution that it is a constitutional mandate to the State and no citizen can by any act or conduct relieve the State of the solemn obligation imposed on it by Article 13(2) and no distinction can be made at all between the fundamental rights enacted for the benefit of the individual and those enacted in the public interest or on grounds of public policy."

S. K. Das J. has observed at page 172 as follows :

"The generally accepted connotation is that to constitute "waiver", there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right, or conduct such as warrants an inference of the

relinquishment of a known right or privilege. Waiver differs from estoppel in the sense that it is contractual and is an agreement to release or not to assert a right, estoppel is a rule of evidence. (See *Dawson's Bank Ltd v. Nippon Menkwa Kabushiki Kaisha*, 62 Ind App 100 at p. 108 : (AIR 1935 PC 79 at p. 82). What is the known legal right which the assessee intentionally relinquished or agreed to release in 1953-1954? He did not know then that any part of the Act was invalid, and I doubt if in the circumstances of this case, a plea of "waiver" can be founded on the maxim of 'ignorance of law is no excuse'. I do not think that the maxim 'ignorance of law is no excuse' can be carried to the extent of saying that every person must be presumed to know that a piece of legislation enacted by a legislature of competent jurisdiction must be held to be invalid, in case it prescribes a differential treatment, and he must, therefore, refuse to submit to it or incur the peril of the bar of waiver being raised against him. I do not think that such prescience is a necessary corollary of the maxim. On the contrary, the presumption, if any, which operated at the relevant time was the presumption that a law passed by a competent legislature is valid, unless declared unconstitutional by a Court of competent jurisdiction. Furthermore, I do not think that any inference of the instalments paid in 1956-57, particularly when the question of refund of the amounts already paid is no longer a live issue before us. It would, I think, be going too far to hold that every unsuspecting submission to a law, subsequently declared to be invalid, must give rise to a plea of waiver : this would make constitutional rights depend for their vitality on the accident of a timely challenge and render them illusory to a very large extent."

K. Subba Rao J., held at page 181 as follows :—

".....I would, therefore, hold that the fundamental rights incorporated in Part III of the Constitution cannot be waived.

(83) It is said that such an inflexible rule would, in certain cases, defeat the very object for which the fundamental rights are created. I have carefully scrutinized the Articles in Part III of the Constitution of India, and they do not,

in my view, disclose any such anomaly or create unnecessary hardship to the people for whose benefit the rights are created. Art. 14 embodies the famous principle of equality before the law and equal protection of the laws, and Articles 15 to 18 and Art. 29 (2) relate to particular application of the rule. The principle underlying these Articles is the mainspring of our democratic form of Government and it guarantees to its citizens equal protection in respect of both substantive and procedural laws. If the doctrine of waiver is engrafted to the said fundamental principles, it will mean that a citizen can agree to be discriminated. When one realizes the unequal position occupied by the State and the private citizens, particularly in India where illiteracy is rampant, it is easy to visualize that in a conflict between the State and a citizen, the latter may, by fear of force or hope of preferment, give up his right. It is said that in such a case coercion or influence can be established in a Court of law, but in practice it will be well nigh impossible to do so. The same reasoning will apply to Arts. 15 and 16. Art. 17 illustrates the evil repercussion of the doctrine of waiver in its impact on the fundamental rights. That Article in express terms forbids untouchability; obviously, a person cannot ask the State to treat him as an untouchable. Art. 19 reads :—

"(1) All citizens shall have the right—

- (a) to freedom of speech and expression;
- (b) to assemble peaceably and without arms;
- (c) to form associations or unions;
- (d) to move freely throughout the territory of India;
- (e) to reside and settle in any part of the territory of India;
- (f) to acquire, hold and dispose of property; and
- (g) to practice any profession, or to carry on any occupation, trade or business."

The right to freedom is the essential attribute of a citizen under democratic form of government. The freedoms mentioned in Art. 19 are subject to certain restrictions mentioned in cls. (2) to (6) of that Article. So far as the freedoms narrated in sub-cl. (a) to (g) of Cl. (1) of Art. 19 are concerned, I cannot visu-

alize any contingency where a citizen would be in a worse position than he was if he could not exercise the right of waiver."

13. In my view, therefore, there cannot be an estoppel against exercise of fundamental rights on the same principles as are applicable in the case of waiver thereof. State cannot arrogate to itself a right to commit breach of the fundamental rights of any person by resorting to principles of waiver or estoppel or other similar principles. If there is any continuing action which is violative of fundamental rights of any person that must come to an end. No law or legal principle can prevent a Court from giving remedy for violation of fundamental rights once it is found to exist.

14. This will make it unnecessary for me to go into the question as to whether the requisition order in respect of all or any of the flats have come to an end or lapse because for some period the flats were not used for the purpose for which they were requisitioned. This point was really canvassed before me in December 1980 and the arguments were completed and I had already formed my views in the matter and had indicated them in open Court. It was thereafter that the petition was amended and the point discussed and decided upon above was raised and argued in April, 1981. This being the position and since the matter was fully argued on this point it is necessary that I must express my views in the matter.

15. While interpreting a statute such as the Bombay Land Requisition Act, 1948, one must bear in mind that the provisions thereof seek to deprive a person of his rights to property which till recently were the fundamental rights protected by the Constitution. When the said Act was enacted the property rights were still protected. An exception to the protection of this fundamental rights was made in case public interests so required and the State was therefore given a power to requisition any premises and so continue the requisition of the same strictly in public interest. Section 9 of the said Act not only authorises the State Government to release any premises from requisition but also casts a duty on it to do so when the public purpose for which the requisition was made came to an end. It

necessarily implies that State Government cannot utilise any premises requisitioned for a particular purpose for another purpose, public or otherwise and once it does so, obviously, for the duration the premises are used or allowed to be used for such other purpose, they are not required for the public purpose for which they were requisitioned and so the original order of requisition must be considered to have lapsed. It will be the duty of the Government to forthwith derequisition the same as obviously for sometime the premises were not required for the purpose for which they were requisitioned. This interpretation of mine is supported by the recognized principle that when any land is requisitioned for a particular purpose it cannot be utilized for another public purpose. In such a case the State is required first to derequisition the premises and thereafter requisition the same again in accordance with law.

16. Prior to the latest judgment of the Division Bench consisting of Chandurkar and Sawant, JJ. dt. 21-3-1981, in Chhotulal Pandurang Khandvilkar v. State of Maharashtra, in Appeal No. 135 of 1976 in Misc. Petn. No. 49 of 1975, upholding the judgment of Aggarwal, J. and which was strongly relied on by Mr. Kanuga, there were three judgments of this Court on this point, one of a Division Bench in Rangubai Pandurang Joshi v. State of Maharashtra, (1969) 71 Bom LR 624, another of Lentin J., sitting singly in Parmanand Karsandas v. State of Maharashtra, Misc. Petn. No. 535 of 1972, dt. 6-8-74 and an unreported judgment of another Division Bench of this Court consisting of Kantawala, C. J. & Madon, J. dt. 18-1-1978, in Union of India v. Kahan Chand Nayar, Appeal No. 54 of 1973 in Misc. Petn. No. 753 of 1971. I will at some length refer to the facts of all the three decisions to ascertain the ratio and to see whether the decision relied on by Mr. Kanuga lays down any different ratio.

17. In Rangubai Pandurang v. State, the petitioner's husband was the original owner of the building in which the requisitioned flat was situated. On his death on 6-10-1957, the petitioner became the owner thereof. Respondent 3 in the said matter was a Government servant and an allottee of the flat which

was requisitioned. On coming to learn that respondent 3 was to retire in 1961, the petitioner applied to have the flat back after derequisitioning to the Collector but the request was rejected on 15-10-1961. Soon thereafter, on 9-11-1961 respondent 3 retired from the Government service, but was allowed by the Government to continue in occupation of the requisitioned premises along with members of his family including respondent 4, his daughter. The fact of making of representation was averred in the petition but was denied by respondent 3. It appeared, however, that respondent 3 had represented to the petitioner that it was on a representation made by him an extension was granted to him to continue his occupation till the end of 1963. By a letter dt. 9-2-1967 the petitioner again approached the Collector of Thana with a request for derequisitioning of the premises. In the letter she had also stated that respondent 3 had retired in or about the month of April 1963 but was yet allowed to continue in the occupation which showed that the Government did not require the premises for its purposes. By an order dt. 16-6-1967, the premises were allotted to respondent 4, who by that time had taken up Government employment. In the meantime, after lengthy correspondence between respondent 3 and the Collector, the Collector passed an order dt. 5th April 1967 directing respondent 3 to vacate the premises. In these circumstances it was submitted by the petitioner that when the requisitioned premises are allotted to a Government servant, his continued occupation after the retirement from Government service is not a public purpose under the Bombay Land Requisition Act and that the fact that for a period of six years the said premises were allowed to be used by the State Government for a purpose other than a public purpose would show that the State Government did not require the said premises for any public purpose and therefore under S. 9 (1), Bombay Land Requisition Act, ought to have released the said premises from requisition. It was further submitted that even though the Government may have failed to derequisition the premises, in the circumstances of the case the said requisition order had ceased to be operative or had lapsed by reason of the

State Government not availing itself of it, and the petitioner had become entitled to possession of the said premises and consequently the subsequent allotment order in favour of respondent 4 could not have been passed. Two judgments of the Madras High Court were relied on in support of this contention, namely, *Menghraj v. Accommodation Controller*, AIR 1966 Mad 172 and *Narasinga Rao v. State of Madras*, (1967) 2 Mad LJ 622. The relevant portion of the judgment in *Menghraj's* case which is extracted with approval reads as follows (at p. 173) :

".....If within a reasonable time after the vacating of the premises by a Government servant may be a month or two, the Government allot it to another Government servant or utilise the premises for their own purposes, they would be acting within the statute. But to say that they were ignorant that the Government servant who had been allotted the premises had ceased to be a Government servant and they allowed the premises to be occupied by members of that ex-Government servant's family, and claim that they acted bona fide, passes my comprehension."

Relying on the Madras judgments it is held by this Court in *Rangubai's* case ((1969) 71 Bom LR 624) as follows (at pp. 627-28) :—

"In our opinion, these two decisions correctly lay down the law. Having regard to the nature of a requisition order, the object for which it is made and the fact that the making and the continuance of a requisition order deprives, or in any event imposes restrictions upon, a citizen's right to hold and enjoy his property, it must follow that unless and until the requisitioned property is required by the Government and used by the Government for a purpose authorised by the relevant statute, the Government is under an obligation and a duty to release the premises from requisition. Thus, if the premises are not used for any public purpose for a length of time, which is unreasonable or are allowed to be used for a purpose other than a public purpose, it would show that the Government does not require the premises for the purpose for which they were requisitioned. In such a case, even if the Government chooses

not to derequisition the premises, the order of requisition ceases to be operative and lapses by reason of the Government failing to avail itself of it." It is further held by Madon, J. (p. 628) as follows :

".....The power of the State Government to requisition property arises only under the Bombay Land Requisition Act. The Government is not entitled in law to use the requisitioned premises or to permit its user for any purpose which would not be a public purpose. From this it must follow that if the property is no longer required for such a purpose, the Government is under a duty and an obligation to exercise its powers under S. 9 and to release the property from requisition and to deliver possession to its owner. The failure of the Government to do so cannot entitle it to take advantage of its own breach of duty and to continue to use the property for a purpose which is not a public purpose. In such a case, the Court acting under Art. 226 can compel the Government to carry out its duty."

18. The principles that emerge from the aforesaid judgment are that (a) if the requisitioned premises are not used for an unreasonable length of time or (b) if they are allowed to be used for a purpose other than the public purpose for which they were requisitioned, it can be presumed that the government did not require the premises for the purpose for which they were requisitioned and the order of requisition will without anything further cease to be operative and lapse. So if the requisitioned premises are not used at all for some length of time which can be considered unreasonable or are allowed to be used by a person who never was or has ceased to be a government servant the order of requisition will lapse. I would, however, add a qualification. In case of death or retirement of a government servant, if the premises are allowed to be used by the family members or the retired servant, as the case may be, for a reasonable time there can be no lapse. A statute has to be interpreted in a reasonable way and so it is necessary to engraft such a qualification. The question of such a qualification did not arise

in Rangubai's case and so the judgment is silent on that point.

19. Next comes the judgment of Lentin, J. in *Parmanand Karsandas v. State of Maharashtra*. In that case a flat was requisitioned on 2-6-1953. The allottee retired from the Government service on 15-7-1968. The petitioner came to know about the retirement and addressed through his Attorney a letter dt. 14-7-1969 to the Controller of Accommodation pointing out that respondent 4, the allottee, had retired but continued in occupation of the premises which he was not entitled to, as a result whereof the premises were not being used for a public purpose, and hence should be derequisitioned. On 21-7-1969 an allotment order was issued permitting 4th respondent's son respondent 3 who also was in Government service to occupy the premises. On 4-5-1971 respondent 3 was transferred to Nasik but his father respondent 4 continued to occupy the premises in spite of the fact that respondent 3 was transferred. When the petitioner came to know that respondent 3 was no longer in occupation of the premises, he addressed a letter through his Attorney dt. 1-8-1972 to the Accommodation Officer and filed a petition on 2-8-1972. On 30-9-1972 the State of Maharashtra took possession of the premises from respondent 4. On these facts after referring to the aforesaid judgment in (1969) 71 Bom LR 624, Lentin, J. states that what was held in (1969) 71 Bom LR 624 was that if the premises are not used for the purpose for which they were requisitioned for an unreasonable length of time or are allowed to be used for a purpose other than such public purpose and the Government chose not to derequisition the premises the order of requisition ceased to be operative. The contention which was raised on behalf of the Government and was negatived was that the Government was ignorant of the fact that respondent 3 was no longer in occupation of the premises. Another contention which was raised and negatived was that the impugned order of requisition was not exhausted when respondent 4 retired from service or when respondent 3 was transferred from Bombay. Further contention that was raised and negatived was that the premises were still required for housing Government servants and hence the

public purpose survived and that there was a long waiting list of Government servants who can be housed in the premises. The ratio of this judgment is that once the premises are used for any length of time which can be considered unreasonable for a purpose which is not a public purpose for which they were requisitioned the requisition order automatically comes to an end.

20. This brings me to the unreported Division Bench judgment dt. 18-1-1978 consisting of Kantawala, C. J. and Madon, J. in the *Union of India v. Kahan Chand Nayar*. In that case the flat was requisitioned on 20-10-1956 for a public purpose, namely, "for the office/residential accommodation of a Central Government Officer/Office." It was allotted from time to time to various persons and ultimately to respondent 2 who was a Judicial Member of the Income-tax Appellate Tribunal. He retired as a Government servant in July 1970. He then requested the Central Government for derequisitioning of the premises to which he received a reply that if the petitioner could make the landlords agree to take him as direct tenant the Government could consider the release of the said flat from requisition. The request for taking respondent 2 as direct tenant was rejected by the landlords by their Attorney's letter dt. 22-9-1971. The petitioners-landlords by their Attorney's letter dt. 30-9-1971 called upon the Central Government to withdraw the requisition order and then filed the petition. The principal ground for the relief was that the premises were not required by the Central Government for the purpose for which they were requisitioned. By an amendment another ground was added, namely, that between Sept. 1970 and April 1972 the Government of India released from requisition about 52 flats pursuant to its declared and settled policy of derequisitioning premises requisitioned or continued under requisition under the Act. While considering the first contention it is held as follows :—

"Respondent 2 was a Judicial Member of the Income-tax Appellate Tribunal, Bombay. He retired from service on July 2, 1970, but the said flat was continued to be occupied by him notwithstanding his retirement. The short question that we have to consider in

this appeal is, does the material on record indicate that the said flat was no longer required by the Government for the purpose for which it was requisitioned? If the facts go to indicate such a conclusion then it will be obligatory or incumbent upon the Government to derequisition the said premises. It is not disputed before us that even though respondent 2 retired from service in July 1970 he continued to occupy the said flat. In fact, by letter dt. Sept. 2, 1970 the then Deputy Director of Estates (P) inter alia informed respondent 2 that if he could make the landlords agree to take him as a direct tenant and accept possession of the flat while the same was in occupation by him the Government could consider the release of the flat to the owner. The contents of this letter therefore clearly show that not only the Government was allowing respondent 2 after he ceased to be a Government servant to occupy the said flat contrary to the purpose for which it was requisitioned, but it was prepared to consider the request of respondent 2 to derequisition the said flat in case the petitioners were prepared to accept him as a direct tenant thereof. This letter, therefore, unmistakably goes to show that on the date when this letter was written the Government was not genuinely in need of the said flat for the purpose for which it was requisitioned.

Other circumstances also go to show that the Government was not really in need of these premises for utilising the same for the public purpose for which they were requisitioned. After the Government realised that the petitioners were not willing to accept respondent 2 as a direct tenant, no prompt and effective steps were taken by the Government for taking possession of this flat from respondent 2 and he continued to occupy the same for an abnormally long period. It appears from the affidavits filed on behalf of respondent 1 that proceedings for eviction of respondent 2 were commenced by issuing a show cause notice on Jan. 16, 1971, but the dilatory manner in which these proceedings were continued by the Estate Officer under the Public Premises (Eviction of Unauthorised Occupants) Act, 1958, really goes to show that the Government was not genuinely in need of

these premises for the purpose for which they requisitioned the same". This judgment, therefore, clearly shows that if the Government does not take prompt and effective steps to evict a Government servant after retirement for an abnormally long period it would lead to the conclusion that the premises were no longer required for the public purpose for which they were requisitioned. This judgment was not cited before Aggarwal, J. or Chandurkar and Sawant, JJ., and has not been considered by them. This judgment also clearly shows that the use of the premises for the purpose other than the public purpose for which it was requisitioned will amount to cessation of its use for the public purpose for which it was requisitioned and the Government must be compelled to derequisition the same.

21. In the case before Aggarwal, J. and Chandurkar and Sawant, JJ. on appeal, the relevant facts were that one Gadre, Personal Assistant to late Chief Minister Shri M. S. Kannamwar, was allotted the premises in question. Gadre died on 2-2-1966. His widow requested the Government to permit her to occupy the said premises, but as she had her own house somewhere in Irla in Bombay, the request was rejected by the Government and she was called upon to vacate the premises in Aug. 1966. In order to retain her possession the widow filed a declaratory suit in the Small Cause Court in the year 1966 and obtained an injunction against the Government, restraining the Government from evicting her from the premises. This injunction was subsequently vacated. On appeal, the appellate bench restored the order of injunction. Government took the matter to the High Court by filing Special Civil Application and the order of injunction was quashed by the High Court. While quashing the order the Government was directed to evict the widow and her children before 3-8-1973. The petitioners became owners of the premises, in the meantime on or about 30-9-1972, and addressed a letter dt. 20-7-1973 to the Controller of Accommodation drawing his attention to the order passed in the said Special Civil Application and called upon him to evict Mrs. Gadre and her children and derequisition the premises. The Controller of Accommodation by his letter dt. 10-8-1973 rejected the

request for derequisitioning. This was followed by a letter dt. 12-8-1974 from the petitioners' Advocate to the Chief Secretary to the Government. Thereafter, the Controller of Accommodation by his letter dt. 2-10-1974 stated that Mrs. Gadre and others would be asked to vacate the premises by the end of 1974 under any circumstances. Ultimately they were not evicted by the end of that year and the petition was filed on 21-1-1975. The possession was taken from Mrs. Gadre only on 15-3-1975 and was allotted to another Government employee on or about 19-3-1975. After mentioning the facts in detail which I have enumerated above briefly, Aggarwal, J. proceeded to consider the judgment in (1969) 71 Bom LR 624 and after extracting a portion of the judgment and agreeing with the same proceeded to consider the facts on which decision (1969) 71 Bom LR 624 was arrived at. He has then held that the facts before Madon, J. were clearly distinguishable inasmuch as in the case before Madon, J. the allottee had retired in 1961 and thereafter was allowed to continue in the requisitioned premises for a period of six years with the consent of the Collector, while in the case before him the facts did not show that there had been an unreasonable length of time during which the premises were allowed to remain in the use and occupation of Mrs. Gadre. The learned Judge, therefore, arrived at the decision only on the facts of the particular case but did not lay down any different law. The Division Bench consisting of Chandurkar and Sawant, JJ. on appeal from the judgment has observed as follows :

".....The Government had tolerated the occupation on purely humanitarian considerations and it was not the intention of the Government to use the premises for the benefit of the said occupants. In this view of the matter, the learned Judge dismissed the petition. Hence, the present appeal.

"Shri Madekar, the learned counsel appearing for the appellant-petitioners, advanced the very same arguments before us as were advanced by him before the learned single Judge. We are in complete agreement with the learned Judge that on the facts and circumstances of the case, it is not possible to hold that the Government had used or allowed the user of the suit premises,

deliberately for a purpose other than a public purpose for which the same were requisitioned, viz. to house a Government servant.

"What is argued is that since the Government did not take active steps to evict the occupants after 3-8-1973 till 15-3-1975, the user during the said period was a user allowed by the Government for a purpose other than a public purpose. In this connection, it is relevant to note that admittedly the present petitioners became the owners of the suit premises by a conveyance executed in their favour by the previous landlord on 30-9-1972. The petitioners therefore very well knew, at the time they purchased the suit premises, that they were under requisition. They cannot, therefore, be heard to complain if they did not get the vacant possession of the suit premises or are unable to get the same even now. As regards the occupation allegedly allowed by the Government from 3-8-1973 to 15-3-1975, admittedly there is nothing on record to show that the Government had on its own permitted the occupants to remain in such occupation. All that happened was that in spite of the expiry of the period granted by this Court, Government did not take steps to physically throw out the occupants till 15-3-1975. While examining the alleged inaction on the part of the Government during the period, it should not be forgotten that the Government was faced with the problem of evicting a widow of its former servant with her six children. The Government cannot be said to be unaware of the acute hardship that was going to be caused to the family and hence if the Government did not act hastily and throw out the occupants for a period of about one year and nine months, it cannot be said that the Government had intentionally allowed them the use of the suit premises. It was only if the petitioners had succeeded in showing that the Government had no intention to use the suit premises for the purpose for which they had requisitioned and wanted to use them for the occupation of the said family that the petitioners would have been entitled to the reliefs claimed by them. However, on the facts revealed, it could not be said the Government had abandoned its original intention to use the suit premises for the public purpose."

The learned Judges thereafter proceeded to consider the contention of Shri Madekar for the petitioner that Mrs. Gadre had another residential accommodation available to her at Irla, as follows :

"Had this fact been pointed out at the relevant time, probably the Government would have found no difficulty in using harsh measures at the earliest opportunity and throwing out the occupants from the suit premises earlier than they did. In the circumstances, it cannot be said that the Government delayed the action deliberately."

I may, however, point out that this observation is based on some factual error. I find that Aggarwal, J. has clearly stated in his judgment that in the year 1966 the Government had rejected the application of Mrs. Gadre for permission to continue in occupation specifically on the ground that she had her own house in Irla in Bombay. The Government, therefore, obviously knew that Mrs. Gadre had another premises available. It is quite possible therefore that if this fact was specifically brought to the notice of the Division Bench it may have decided the matter differently. In any event it is clear that the decision turned only on the facts of that case and did not lay down any principle or ratio. This judgment, therefore, cannot help Mr. Kanuga.

22. I must, therefore, apply the principle culled out by me above from Rangubai's case and other judgments and apply the same to each of the four flats in question. The four flats in question are 2G, 2H, 3E and 3H. So far as flat 3E is concerned the person in possession at the relevant time and who is in possession even at the date of the petition is a Government Officer and so this flat 3E is not liable to be derequisitioned by the Government. Mr. Rana has rightly not made any submission in respect of this flat on facts.

23. As regards flat 2G, prior to 30-7-1972 one Fernandes, a Government Officer was an allottee thereof. He died on 30-7-1972 after a short illness. He was in police force for nearly 30 years and had excellent career. After his death his widow Dr. Mrs. Winifred Fernandes by her letter requested the Hon'ble Minister of State for Home Department that the said flat should be released in

her favour pointing out various facts. She was allowed to continue to remain in occupation of the said flat till her request was finally considered. By a letter dated 13-8-1973 her request for derequisitioning was rejected and she was granted time of four months to vacate the same. The period of 4 months expired in December 1973. This flat was allotted to another officer on 11-1-1974. Mr. Kanuga for the State has produced before me a circular letter dt. 6-9-1973 No. RSA./1273/52-XV from Home Department to the Inspector Generals of Police and Commissioner of Police. By the said circular letter it is clearly provided that in certain cases four months' time is to be given for purpose of vacating of the premises instead of normal one month. It would appear that practice was being followed, when the officers raised contentions regarding non-payment of dues like gratuity and provident fund, to grant time to vacate till such dues were paid. This circular directed the discontinuance of this practice and provided for maximum vacating time of four months. I am assuming this period of four months to be a reasonable time up to which requisitioned flat may be allowed to be used by a retired government servant or by the family members of a deceased government servant, without deciding whether it is reasonable or not as for the purpose of this petition it is not necessary for me to decide the same. The widow was allowed to remain in the premises for more than a year. In my view it is not permissible to the Government to allow any person to remain in occupation of such premises for such a long time. The very fact that the person is allowed to remain in possession for such a long period of one year indicates the non-requirement by the State Government of that particular premises for the purpose of which it was requisitioned for that period. It was therefore incumbent on the State Government to derequisition the same. The facts clearly fall within the ratio of Rangubai's case and also Kahan Chand Nayar's case. However, the aforesaid facts cannot help the petitioner inasmuch as the petition based on the said facts was already filed and withdrawn. After Dr. Mrs. Fernandes vacated the flat, it was allotted to one B. T. Rele, Assistant Commissioner of Police who occupied

the flat from 11-1-1974 and retired from the police force on 1-10-1976 after a long and meritorious service. He was initially allowed a period of 4 months to vacate the flat. This was in accordance with the aforesaid circular letter. However, he requested for extension of time to vacate and was granted time till 1-6-1977. He then vacated the flat on 30-9-1977. It is thus clear that after his retirement he was allowed to occupy the flat by consent of the Government for full one year. The use of the flat by him for this one year cannot by any stretch of imagination be said to be for the public purpose for which the flat was requisitioned. In the circumstances the flat was not being used for the public purpose but was used for some other purpose and the requisition automatically came to an end and the Government became bound to hand over possession thereof to the petitioners.

24. Coming to flat 2H on the 2nd floor, the flat was allotted prior to 1-9-1972 to Mr. Bhesadia, who retired from service from 1-9-1978. At his request he was given 5 months time to vacate the flat. He vacated the flat on 31-1-1979. He was thus allowed to occupy the flat for a period of 5 months. The flat was then allotted to one R. N. Dahate. There is controversy as to whether Dahate occupied the flat immediately or occupied it much after the filing of the petition. However, this being the controversial question of fact requiring oral evidence, I do not intend to go into the controversy. Even considering four months time as reasonable as per circular of respondent 1 itself, I do not see how respondent 4 could have allowed the retired servant to continue for a period of 5 months. This period could not be said to be reasonable period and this flat also must be deemed to have been freed of requisition as the order of requisition lapsed and the possession thereof must be restored to the petitioner. I am aware that there cannot be any strict rule as to what period can be said to be reasonable and what period unreasonable, but in view of the Government's own circular a period of more than 4 months cannot be considered reasonable. If it was Government's own flat obtained by it on ownership or lease or similar basis and not requisitioned, no-

body can find fault with the Government allowing its retired employees to continue in occupation for any length of time on ground which is considered reasonable, but looking to the provisions of the Act and the judgments of this Court by which the Government is bound, it cannot allow any person to continue in possession of a requisitioned flat contrary to the intention of the Act.

25. Coming to flat 3H, one M. S. Warty, Assistant Commissioner of Police was an allottee of the flat. He vacated the flat on 15-4-1976 and was occupied by V. N. Samant, Inspector of Police on 16-4-1976. Samant retired on 31-12-1977 and requested that he be allowed to continue to stay in the said flat till May 1978 as his daughters were studying and they should be allowed to complete final examination before he was asked to vacate the flat. Before this request could be considered he addressed a letter dt. 25-1-1978 to the Minister for Home Department for permission to retain the flat and permission was granted to retain the flat up to 31-3-1978 which time was extended to 28-7-1978 at the request of Samant. He then addressed his request to the Chief Minister and was granted time till 3-12-1978. The grounds given by Samant in support of subsequent extensions were non-payment of provident fund and gratuity. These amounts were paid on 30-9-1978. However, on his further request Samant was granted extension up to 3-4-1979. The possession of the said flat was given by Samant on 6-4-1979. The first thing that strikes me is that these extensions were granted on the very grounds on which the extensions were not to be granted under the aforesaid letters addressed by the Home Department to the I. G. Ps. and Commissioners. Even in the absence of the letter such granting of time for such a long period of over one year will show the non-requirement of the flat for the public purpose for which it was requisitioned for that period. In these circumstances this flat must be deemed to be free of requisition and the Government was bound to hand over possession thereof to the petitioner.

26. In the circumstances, if I had to decide whether all or any of the four flats must be deemed to be free of re-

quisition by the reason of the requisition order having lapsed and if the Government is bound to handover possession thereof to the petitioner, I would hold that the Government was bound to handover possession of the three flats, viz., flats G and H on the 2nd floor and flat H on the 3rd floor but not flat 3E. However, in the view that I have taken on the question of law, all the four flats are wrongly continued to be treated by respondent 1 as under requisition and the respondents are bound to handover the possession of all the four flats to the petitioner.

27. In the result, rule is made absolute in terms of prayer (a) as regards all the four flats. Respondent 1 to pay to the petitioner costs of the petition. Looking to the time taken, I quantify the costs at Rs. 1,500/-. The Government is given time up to 31-7-1981 to handover possession.

Order accordingly.

AIR 1982 BOMBAY 151

MODY, J.

Minocher Behramji Damania, Petitioner v. Hema N. Dadachanji and others, Respondents.

Civil Revn. Appln. No. 549 of 1979, D/- 8-4-1981.

(A) Civil P. C. (5 of 1908), S. 10 — Stay of suit — For application under S. 10, mere identity of subject matter of suit is not enough — Court in earlier suit should also have jurisdiction to grant reliefs claimed in subsequent suit.

A suit was filed by A in the Small Cause Court for a declaration that he was a tenant of B in respect of certain premises. Subsequently B filed a suit in City Civil Court for possession on the ground that A was a trespasser and for injunction restraining A from interfering with his possession. The present revision application arose out of a judgment in the City Civil Court staying the said suit under S. 10, C. P. C.

Held, that although the subject matter of both the suits was substantially the same, the subsequent suit viz. City Civil Court suit, could not be stayed since the earlier court viz. Small Cause Court, had no jurisdiction to grant the reliefs which were claimed in the subsequent

suit under the Presidency Small Cause Courts Act, 1882 or the Bombay Rent Act. AIR 1953 Bom 117, Explained. AIR 1954 Bom 100 and AIR 1979 Bom 305, Disting. (Para 6)

(B) Civil P. C. (5 of 1908), Ss. 151, 10 — Inherent power to grant stay — Requisite conditions for stay of suit under S. 10 not fully satisfied — Court cannot exercise its inherent powers under Section 151 to grant stay. AIR 1962 SC 527, Applied. (1977) 79 Bom LR 1, Rel. on. AIR 1954 Bom 100, Disting. (Para 14)

Cases Referred Chronological Paras

AIR 1979 Bom 305	12
(1977) 79 Bom LR 1	14
AIR 1977 Him Pra 38 : ILR (1976) Him Pra 683	13
AIR 1973 Delhi 122 : 1973 Ren CJ 255	7
AIR 1972 Mys 112 : (1971) 2 Mys LJ 449	7
AIR 1962 SC 527 : 1963 All LJ 169 : 1962 Supp (1) SCR 450	14
AIR 1954 Bom 100 : 55 Bom LR 663	12, 13

AIR 1954 Pat 314	7
AIR 1953 Bom 117 : 54 Bom LR 844	9
AIR 1943 Cal 19 : ILR (1942) 2 Cal 194	7
AIR 1942 Bom 314 : 44 Bom LR 699	9

S. N. Variava i/b M/s. D. J. Kamdin & Co., for Petitioner; S. H. Kapadia with F. D. Damani, for Respondents.

ORDER.— This revision application arises out of a judgment in the City Civil Court Suit No. 583 of 1975 dated 16-3-1979 staying the said suit under the provisions of S. 10 of the Civil P. C. This stay was granted not on any notice of motion taken out as is usually done but was granted after framing a preliminary issue at the hearing of the suit as to whether the suit should be stayed under the provisions of S. 10 of the Civil P. C. As I am deciding this application on merits I do not propose to go into the question whether such a stay can be granted without a separate application. I must also point out that there is no pleading and so no issue framed as to whether the stay should be granted in exercise of the inherent powers under S. 151 of the Civil P. C. However, as this point has been argued in detail by both sides and without any objection on behalf of the plaintiff as to want of pleadings or issue I will deal with this point also.

2. Sometime in the year 1939 the plaintiff had given to the defendant its

business of vulcanizing and battery charging carried on in the name and style of "Kingsway Garage" in Shop No. 2 on the ground floor of a building which was then known as "Kingsway Chambers" and now known as "Kalyan Bhavan" situate at King's Circle on what is described as conducting basis under a written agreement. The agreement between the parties was renewed from time to time by written agreements, the last of such agreements being dated 1-4-1970. It would appear that there was litigation between the present defendant as defendant and Shashikant N. Shah and another as plaintiffs being S. C. Suit No. 56 of 1972 in which a Court receiver was appointed. An application was made by the present plaintiff for possession which was decided by the City Civil Court by a judgment and order dated 8-3-1972. The relevant portion of the said order and judgment reads as follows:—

"Though the applicant has established his title and right to possession to the exclusion of the plaintiffs and the defendant, it is not possible to direct the Court receiver to deliver possession to the applicant because he in fact took possession from the defendant who was carrying on business as applicant's licensee. However, the defendant does not dispute that he is a licensee. He undertakes to return possession to the applicant after he receives it from the Court Receiver. The Court receiver shall deliver possession to the defendant from whom he has taken it. He shall thereafter stand discharged without passing accounts. In view of this, I make no order on the applicant's notice of motion dated 29-2-1972. No order as to costs on the applicant's Notice of Motion and the Notice of Motion of the plaintiffs. Court Receiver to act on certified copy of Roznama."

I am unable to follow why an order for direct possession in favour of the applicant could not have been made when the defendant was consenting to it. I am not aware of any law which prevents the Court from making such an order. This question, however, does not arise in the present case.

3. There is dispute between the parties hereto as to when the defendant delivered possession to the plaintiff in

accordance with the said order. The plaintiff contends that it was delivered late, after a lapse of almost a period of about one year and thereafter the defendant took wrongful possession thereof. The defendant contends that it was delivered within one month from the date of the order and the premises were given back by the plaintiff to the defendant again under an oral agreement. After this the present defendant filed a suit in the Small Cause Court at Bombay being R. A. Declaratory Suit No. 1946 of 1973 for a declaration that he was a tenant of the premises and an interim order was sought under which a notice was served on the plaintiff herein. The Small Cause Court suit was dismissed sometime in Nov. 1974 for default of appearance of the defendant, he being the plaintiff in that suit. The plaintiff then filed the present City Civil Court suit. The defendant thereafter got the Small Cause Court suit restored on 2-6-1975 and the writ of summons was served on the plaintiff on or about 25-6-1975. Even after such restoration the defendant again remained absent and the notice for interim order came up for hearing on 7-9-1975 and was dismissed. In the meantime the plaintiff had applied for appointment of receiver and by an order dated 8-7-1975 the City Civil Court appointed the Court Receiver as receiver of the business. An appeal was filed against that order in this Court. On 20-4-1978 by consent of parties a workable arrangement was arrived at as a result of which an order was passed by this Court confirming the appointment of receiver and directing that the Court Receiver should continue and the Court directed the trial Court to dispose of the suit expeditiously. It is further clarified that the arrangement was arrived at without prejudice to the contentions of the defendant that the City Civil Court had no jurisdiction to entertain and try the suit.

4. It is after this that the suit reached hearing before the City Civil Court and the present order came to be passed on the preliminary issue as aforesaid.

5. Mr. Variava for the petitioner contends that this order is wrongly passed as on a true construction of S. 10 of the Civil P. C. one of the requirements for passing such an order is that previously instituted suit must be pending in the

same or in any other Court in India having jurisdiction to grant the relief claimed in the subsequent suit. Mr. Variava does not dispute that the subject matter of both the suits i.e. the City Civil Court suit and the Small Cause Court suit are the same, but he contends that the Small Cause Court has no jurisdiction to grant the reliefs claimed in the City Civil Court suit. The said reliefs are that it may be declared that the defendants are trespassers in the suit premises as also in respect of the goodwill, tenancy rights and the assets lying in the said premises, for possession on the ground of the defendants being trespassers and for injunction restraining the defendants from interfering with the plaintiff's possession and also as the total value of the subject matter of this suit is over Rupees 15,000.

6. In my view the contention of Mr. Variava that it is not enough that there is substantial identity of the subject matter of the suit but that the Court in earlier suit should have jurisdiction to grant the reliefs claimed in the later suit is correct. It is also clear that the Small Cause Court has no jurisdiction to grant the reliefs which are claimed in the City Civil Court suit, under the Presidency Small Cause Courts Act, 1882 or the Bombay Rent Act. In the Small Cause Courts Act amendments were carried out in 1976 which are not relevant as both the suits were filed before the said amendments. By virtue of S. 19 of the Small Cause Courts Act 1882 the Small Cause Court has no jurisdiction in the suit for the recovery of immovable property, suits to obtain an injunction and suits for declaratory decrees. Small Cause Court has, however, jurisdiction to entertain the suits between the landlord and tenants by virtue of the provisions of the Rent Act and also to decide whether the relationship between the landlord and the tenant existed by virtue of S. 39 of the said Act. However, it is clear that the question of jurisdiction under this Special Act can be assumed only when the suit as filed was on the face of it between landlord and tenant. Once the Small Cause Court came to the conclusion that such a relationship did not exist, admittedly it cannot further decide as to what the relationship between the

parties was. It is, therefore, clear that the Small Cause Court does not have jurisdiction to grant reliefs prayed for in the present suit, the plaintiff wherein clearly denies any existence of the relationship of landlord and tenant.

7. In support of his contention Mr. Variava has relied on In the Goods of Mrs. Lilian Singh, AIR 1943 Cal 19. Manu Singh v. Muni Nath Singh, AIR 1954 Pat 314; B. B. Chit Fund v. Ganpat Rai, AIR 1973 Delhi 122, Channabasappa v. Kishan Chand, AIR 1972 Mys 112, As I have independently taken the same view I need not discuss these decisions.

8. Mr. Kapadia for the respondents has strenuously opposed the contentions of Mr. Variava. Mr. Kapadia contends that the principle applicable is that if the decision in the previously instituted suit would become res judicata in the subsequent suit, the provisions of S. 10 are automatically attracted and that the stay must be granted by the Court. He further contends that even when the decision may not be res judicata under S. 11 of the Civil P. C., but can be considered as res judicata by reason of principles analogous to these under S. 11 of the Civil P. C. the provisions of S. 10 will be attracted. He then contends that even if S. 10 of the Civil P. C. does not apply, the Court has inherent jurisdiction to grant such stay under S. 151 of the Civil P. C., and that in the present case this stay should be granted in exercise of such a power in the interest of justice.

9. Mr. Kapadia has strongly relied on the decision in J. H. Iron Mart v. Tulsi-ram, AIR 1953 Bom 117. In that case it is held, inter alia, as follows (at p. 119):

** ** **

".....Apart from any authority, turning to the section itself, it will be clear that S. 10 does not contemplate an identity of issues between the two suits, nor does it require that the matter in issue in the two suits should be entirely the same or identical. What the section requires is that the matter in issue in the two suits should be directly and substantially the same, and proper effect must be given to the language used by the Legislature in S. 10 that the identity required is a substantial identity. It is true, as the authorities have laid down, that there must be an identity of the

subject matter, it is equally true that the field of controversy between the parties in the two suits must also be the same, but the identity contemplated and the field of controversy contemplated should not be identical and the same in every particular, but the identity and the field of controversy must be substantially the same."

**

**

**

Therefore, the principle underlying S. 10 seems to be that the policy of the Legislature is opposed to two Courts with parallel jurisdiction proceeding simultaneously with two suits when there is a possibility of the two Courts coming to different conclusions and thereby resulting in conflict of decisions. If that policy underlying S. 10 is kept in mind, then it would be easier to come to a decision with regard to different cases that arise for decision."

The Court also quoted with approval a portion of another judgment of this Court in *Trikamdas Jethabhai v. Shivraj Kalyanji*, (1942) 44 Bom LR 699 : (AIR 1942 Bom 314) which *inter alia*, says (p. 702) :

"If in the earlier suit that issue is decided against the plaintiffs to the Bombay suit it will operate as *"res judicata"* and the Bombay suit if not earlier determined will necessarily fail. In my opinion it is immaterial that the relief claimed in the earlier suit is of a different character from the relief claimed in the present suit. The real question is whether the matter in issue in the Bombay suit is directly and substantially in issue in the earlier suit."

10. This case, if cursorily read, does tend to give an impression that once the Court comes to the conclusion that the decision in the earlier instituted suit if decided earlier will become *res judicata* in the subsequent suit or that there is likelihood of conflicting decisions by two Courts, the provisions of S. 10 are attracted. However, the decision in the case has to be viewed in the light of the points canvassed. The only point canvassed in that case was regarding the meaning of subject matter in issue, and the whole controversy turned around the interpretation of that portion of S. 10. It was not canvassed at any time that by reason of later portion of S. 10 the Civil P. C. saying that the Court in which earlier suit was filed

must have jurisdiction to grant reliefs claimed in the subsequent suit, did not arise and so was not considered. Indeed such a contention could not have been taken in that case as the earlier suit was filed in Calcutta High Court and the subsequent suit was filed in Bombay High Court and though the reliefs were different in both the suits the Calcutta Court having the same jurisdiction as the Bombay High Court under similar Letter Patent it was not possible to contend that Calcutta High Court had no jurisdiction to grant reliefs claimed in the Bombay suit. It is for this reason that this contention was not taken up in that matter. The effect of this decision therefore is that while considering the identity of the subject matter in issue the Court must bear in mind the provisions of S. 11 of the Civil P. C. and that the two Courts with parallel jurisdiction proceeding simultaneously should not arrive at two conflicting decisions. If the stay was to be granted on this principle even though the earlier Court had no jurisdiction to grant reliefs claimed in the subsequent suit it will have the effect of rendering subsequent portion of S. 10 completely otiose and such an interpretation is not permitted. It should also be noted that one of the principles laid down requires that the two Courts should have parallel jurisdiction and in the present case the two Courts do not have parallel jurisdiction but exclusive jurisdictions. In my view, therefore, this decision does not contain anything contrary to what I have held.

11. It must be further noted that in the judgment cited by Mr. Kapadia the effect of a decision in the Calcutta suit would be that all the material issues in Bombay suit would become *res judicata* and only question that would remain thereafter for the Bombay High Court would be the granting of suitable reliefs, if any. The question of giving any decision on merits would not have survived after the decision of the Calcutta High Court. This is evident from the said judgment when after observing (at p. 120),

"Whatever reliefs the plaintiffs may seek in the Calcutta suit and whatever may be the reliefs which the respondents may seek in the Bombay suit, these reliefs are incidental to the decision which the Court must come to as

to what was the contract between the parties."

it is observed as follows :

".....If once the Calcutta High Court has held what the contract was between the parties and what the terms of the contract were, the Bombay suit would effectively be put an end to because that decision would bind the parties and all that will be required to be done would be to give the necessary reliefs to the respondents in the Bombay suit if they have succeeded and these reliefs will flow from the decisions of the Calcutta High Court and will be consequential upon the decision of the Calcutta suit."

The consequence of the decision of the Calcutta High Court was to put an effective end to the Bombay suit also, whether the decision went one way or the other. As against this in the present case if the Small Cause Court decides that the defendant was a tenant it will put an end to the suit in the Bombay City Civil Court. However, if the decision goes the other way i.e. if it is held by the Small Cause Court that the defendant was not a tenant, the matter will still remain completely open in the City Civil Court, and the City Civil Court will still have to decide on evidence and merits as to whether the defendant has any right or not in respect of the business or the premises and reliefs, if any, to be given will be such as the Small Cause Court has no jurisdiction to grant.

12. Mr. Kapadia then relied on a decision in *Laxman v. Rajaram*, AIR 1979 Bom 305. That decision does not deal with the effect of S. 11 of the Civil P. C. in construing S. 10 of Civil P. C. It only says that the general principles of *res judicata* are applicable even to the cases which are not specifically covered by the provisions of S. 11 of the Civil P. C. Mr. Kapadia then relied on *Dhondi v. Dadoo*, AIR 1954 Bom 100. That case deals neither with Sec. 10 nor with Section 11 of the Civil P. C. That case arose under S. 85 of the Bombay Tenancy and Agricultural Lands Act before its amendment authorising the Civil Courts to refer the question to the Mamlatdar. Under that Act the only authority which has a power to decide whether the person is an agricultural

tenant or not is the Mamlatdar and the jurisdiction of the Civil Courts to give such a decision is barred. A suit was filed in normal Civil Court under which such an issue arose. The question was whether in such circumstances the suit should be dismissed or stayed. In this context an order was passed for staying the suit and not dismissing the same. It was held that in all such cases where the Civil Court cannot entertain the plea and accepts the objection that it has no jurisdiction to try it, it should not proceed to dismiss the suit straightway; the proper procedure to adopt in such cases would be to direct the party who raises such a plea to obtain a decision from the Mamlatdar within a reasonable time. This case has no application in the context of the present case. It is clear that in this case even the City Civil Court has jurisdiction to decide, incidentally, as to whether the relationship between the plaintiff and the defendant is that of a landlord and tenant. The only consequence will be that if the relationship is as contended by the defendant, the City Civil Court will have to return the plaint for want of jurisdiction.

13. Mr. Kapadia then contends that even if S. 10 has no application the Court has jurisdiction under S. 151 of the Civil P. C. to grant such a relief. Mr. Kapadia seeks support from the aforesaid decision in *Dhondi v. Dadoo*, AIR 1954 Bom 100. In my view this decision does not support Mr. Kapadia. The question that arose was not at all of stay of a suit under S. 10 of the Civil P. C. The question was a proper procedure to be followed when the plea of tenancy was taken up. Apart from that there is no reference to S. 151 nor is there any contention raised as to whether the provisions of S. 151 have any application. This case does not say that when S. 10 cannot apply stay can be granted under S. 151. Mr. Kapadia then relies on *Gurudial Singh v. Auckland House School*, AIR 1977 Him Pra 38. That judgment proceeded on an assumption that S. 151 applies. There nobody contended that S. 151 cannot apply if the matter is not covered by Section 10 of Civil P. C.

14. As against this Mr. Variava has drawn my attention to *Manoharlal v. Seth Hiralal*, AIR 1962 SC 527.

In that case a suit was filed by the appellant in 1948 in the Court of the Subordinate Judge at Asansol for recovery of Rs. 1,00,000 on account of share in the capital as well as in the assets of the partnership firm. Subsequent suit was filed by the respondent in the year 1949 in the Court of the District Judge, Indore, for a sum of Rs. 1,90,519-0-6 against the appellant and further interest on the footing of settled accounts and in the alternative for a direction to the appellant to render true and full accounts of the partnership. An application was made to the Court at Asansol for the stay of that suit in exercise of its inherent powers which was rejected holding, *inter alia*, that there was no scope for acting under S. 151, Civil P. C., as S. 10 of the Code had no application to the suit, it having been instituted earlier than the suit at Indore. This order was confirmed by the Calcutta High Court. In these circumstances an application was made to the Indore Court for restraining the plaintiff from continuing the proceedings in the suit filed by him in the Court at Asansol on the ground that Asansol suit was vexatious. This interim injunction was granted by the District Court and an appeal preferred to the High Court of Judicature at Madhya Bharat was dismissed, holding that the order of injunction could be issued in the exercise of the inherent powers of the Court under S. 151 of the Civil P. C. The plaintiff preferred an appeal to the Supreme Court from this dismissal of appeal. In this context a question arose as to whether the Court had inherent powers to grant injunction under S. 151 when S. 94 and O. 39 of the Civil P. C. specifically provided for granting of injunctions. After considering various decisions it is observed in Para 21 of the judgment at page 533 as follows:—

"These observations clearly mean that the inherent powers are not in any way controlled by the provisions of the Code as has been specifically stated in S. 151 itself. But these powers are not to be exercised when their exercise may be in conflict with what had been expressly provided in the Code or against the intentions of the Legislature. This restriction, for practical purposes, on the exercise of these powers is not because those powers are controlled by the provisions of the Code but because it should be

presumed that the procedure specifically provided by the Legislature for orders in certain circumstances is dictated by the interests of justice."

This principle definitely applies to the present case. What Mr. Kapadia canvasses for is the exercise of inherent powers in a field controlled by S. 10 of the Civil P. C. which says that though the matter in issue is also directly and substantially in issue in a previously instituted suit between the parties pending in the same or in any other Court in India having jurisdiction to grant the relief, stay can only be granted if the first Court has jurisdiction to grant reliefs claimed before the second court. The exercise of powers under S. 151 of Civil P. C. to grant stay when not all but only some of the conditions laid down in S. 10 exist will clearly be contrary to the intention of the Legislature. Applying the above dictum of the Supreme Court in *Aminchand Pyaralal v. Union of India*, (1977) 79 Bom LR 1 a specific question whether recourse can be had to S. 151 for staying a suit when the facts did not justify stay under S. 10 was answered in the negative. Not only am I bound by the said judgment but am in respectful agreement with the same.

15. Mr. Variava contends that even if I have powers under S. 151 to grant such stay the facts and circumstances of the cases are such that I should not grant the same. Mr. Kapadia contends to the contrary. Mr. Kapadia says that if the plaintiff was carrying on business as trespasser since 1972 he ought not to have waited for a long period of three years to file the present suit when the defendant had already filed the suit in the Small Cause Court as early as in April 1973. As against this Mr. Variava points out the conduct of the defendants. In the Small Cause Court suit a notice for ad interim injunction was issued sometime in April, 1973. The said notice was, however, not disposed of till Nov. 1974 when the said suit was dismissed for default of appearance. It would appear that the plaintiff came to know about the dismissal and filed the present suit in City Civil Court in Bombay in July 1975. Mr. Variava informs me, and Mr. Kapadia does not deny that in the notice of motion taken out in this suit in the affidavit in sup-

port the plaintiff has stated that the Small Cause Court suit was so dismissed. Thereafter the Small Cause Court suit was got restored on 2-6-1975 by the defendant and the writ of a summons was served on the plaintiff on 25-6-1975. On 17-9-1975 the notice for ad interim order came up for hearing in the Small cause Court and was discharged for default of appearance on the part of the defendant. In the meantime receiver was appointed in the present suit. The defendant preferred an appeal from order appointing receiver and the consent order referred to above came to be passed. With the knowledge of the facts, the defendant consented to the expeditious hearing of the City Civil Court suit and when it reached hearing took up the contention of stay under S. 10 but not under S. 151. It is well known that the suits take several years in both, City Civil Court, Small Cause Court even to reach hearing. By virtue of the order of this Court the plaintiff got an opportunity to have his suit in the City Civil Court tried early. When the suit reached hearing early the defendant took the contention of stay after having agreed to the disposal of the suit by City Civil Court on merits subject to the preliminary contention regarding jurisdiction. The only intention of the defendant appears to be to delay the determination of the question of the respective rights of the parties and in the meantime to continue to enjoy possession. The attitude of the defendant regarding the Small Cause Court suit is also lackadaisical. In the circumstances even if I have a power to stay the suit under S. 151, Civil P. C., I would refuse to exercise the same in favour of this defendant.

16. In the circumstances, I make the rule absolute in terms of prayer (a) with no order as to costs and set aside the order dated 16-3-1979. I direct that the City Civil Court will proceed with the disposal of the suit as expeditiously as possible. I am sure that the City Civil Court will take into consideration the fact that this suit had reached hearing in 1979 and see that the suit is not delayed and retains its priority.

Rule made absolute.

AIR 1982 BOMBAY 157

DHARMADHIKARI, J.

Motilal, Petitioner v. Abdul Mazid, Respondent.

Civil Revn. Appln. No. 1069 of 1980, D/- 24-7-1981.

(A) Hyderabad Houses (Rent, Eviction and Lease) Control Act (20 of 1954), S. 15 (2) (i) r.w. proviso — Payment of rent — Rent deposited in Court under R. 4 of Rules constitutes payment of rent within meaning of S. 15 (2) (i) r.w. proviso. AIR 1980 SC 138, Rel. on. (Para 4)

(B) Hyderabad Houses (Rent, Eviction and Lease) Control Act (20 of 1954), S. 15 (3) (a) (iii) and S. 15 (3) (c) — Cls. (iii) and (c) of S. 15 (3) are mutually exclusive and cl. (c) applies only when additional accommodation is required by landlord for purpose of business which he is carrying on. AIR 1971 Andh Pra 411, Rel. on. (1968) 70 Bom LR 578, Disting. (Para 8)

Cases Referred . Chronological Paras

AIR 1980 SC 138 :	(1980) 1 SCR 836	4
AIR 1977 SC 836 :	(1977) 1 SCJ 566	8
AIR 1971 Andh Pra 411		7, 8
(1968) 70 Bom LR 578.	1968 Mah LJ 897	6, 8

K. J. Abhyankar and V. S. Gokhale, for Petitioner; Narendra P. Chapalgaonkar, for Respondent.

ORDER:— The petitioner-landlord filed an application before the Rent Controller, under S. 15 of the Hyderabad Houses (Rent, Eviction and Lease) Control Act, 1954, hereinafter referred to as the Act, for possession of the suit premises on three grounds viz. (1) that the tenant is in wilful default of the payment of rent. (2) that the landlord requires the premises in possession of the tenant as additional accommodation for the purposes of his business and, (3) that the landlord requires the premises for reconstruction of the building. The Deputy Collector and the Rent Controller, Ambejogai, in Beed district vide his order dt. 30th Aug. 1975 came to the conclusion that the tenant is a wilful defaulter in payment of rent and, therefore, ordered eviction of the respondent-tenant. On other two counts he recorded a finding against the landlord.

2. Being aggrieved by this order the respondent-tenant filed an appeal before

LY/LY/G263/81/HR/RSK

the learned District and Sessions Judge, Bhir. The learned District Judge came to the conclusion that the respondent tenant was not a wilful defaulter and, therefore, set aside the order passed by the Rent Controller. The learned District Judge confirmed the finding recorded by the Rent Controller that the landlord does not require the suit premises for the purposes of business which he is carrying on, nor he requires it for reconstruction. Being aggrieved by this appellate order the petitioner-landlord has filed this revision application.

3. It appears from the record that it was contended by the landlord that he wanted additional premises for purposes of carrying on his business in fertilizer and insecticides, which he is carrying on in a rented premises. It is an admitted position that the premises which are in possession of the landlord are not used by him for this business. It is also an admitted position that the business of fertilizer and insecticides is being carried on by him in a separate rented house and not in the premises belonging to him. It is contended by Shri Abhyankar learned counsel appearing for the landlord that in these circumstances he is entitled to claim possession of the suit premises under S. 15 (3) cl. (c) of the Act. He also contended that the tenant was a wilful defaulter because the deposit of rent in the Court of the Rent Controller cannot be equated with the payment of rent or its tender, within the meaning of S. 15 (2) (i) of the Act read with the proviso. It is also not possible for me to accept these contentions.

4. So far as the contention based on S. 15 (2) (i) read with the proviso is concerned, it is an admitted position that the rent was deposited by the tenant in Court of the Rent Controller in the proceeding under S. 9 of the Act for payment to the landlord. The Rent Controller as well as the learned District Judge have rightly come to the conclusion that the rules framed under S. 35 of the Act and particularly R. 4 thereof provide that the tenant can deposit the rent in the office of the Rent Controller. Therefore, such a deposit made under the rules can safely be termed as rent paid within the meaning of S. 15 (1) of the Act. In this context a reference could usefully be made to

the decision of the Supreme Court in Sheo Narain v. Sher Singh, AIR 1980 SC 138. Therefore, there is no substance in this contention.

5. So far as the second contention based on construction of S. 15 (3) (a) (iii) and (c) of the Act is concerned, in my opinion there is no substance in this contention also. The relevant provisions which are relied upon by the learned counsel in support of his contention read as under:—

"15.....

(3) (a)

(iii) in case it is any other non-residential house, if the landlord is not occupying for purpose of a business which he is carrying on, a non-residential house in the city, town or village concerned which is his own or to the possession of which he is entitled.

.....

(c) A landlord who is occupying only a part of a house, whether residential or non-residential may notwithstanding anything contained in cl. (a) apply to the Controller for an order directing any tenant occupying the whole or any portion of the remaining part of the house to put the landlord in possession thereof, if he requires additional accommodation for residential purposes or for the purposes of a business which he is carrying on, as the case may be

6. According to Shri Abhyankar, the term and expression used in sub-sec. (iii) "business which he is carrying on" as used in the said sub-section being identical with the term and expression as used in Cl. (c) it must be construed and interpreted to have the same meaning and, therefore, it is not necessary that the additional accommodation should be claimed for the purpose of business which the landlord is carrying on. In support of this contention Shri Abhyankar has placed reliance upon a decision of this Court in Madanlal Ranglal Daga v. Gurunath Laxman Patange, (1968) 70 Bom LR 578.

7. On the other hand it is contended by Shri Chapalgaonkar, learned Counsel appearing for the respondent-tenant that these two sub-sections are mutually exclusive and that the petitioner is not entitled to additional accommodation, unless it is established that he wants accommodation for the purpose of busi-

ness, which he is carrying on in other part of the premises concerned. In support of this contention Shri Chapalgaonkar has placed reliance upon a decision of the Andhra Pradesh High Court in Pyari Bai v. Tadaka Gowrama, AIR 1971 Andh Pra 411.

8. It cannot be forgotten that S. 15 of the Act deals with eviction of tenant. From the preamble of the Act it is quite clear that this Act was enacted for making provision for the better control of rent of houses and to prevent unreasonable eviction of tenants therefrom and for regulation of leasing of houses etc. This Act has been enacted to protect tenants against unreasonable evictions and therefore it will have to be construed strictly against the landlord so as to cut as little as possible into the protection afforded to the tenant. The Scheme of the Act is to prevent unreasonable eviction of tenants by landlords and to provide for eviction on specified grounds only. As observed by the Supreme Court in Mohammad Shafi v. Addl. District & Sessions, Judge, AIR 1977 SC 836, if any of the sections is susceptible of two interpretations, the interpretation which enlarges the protection of the tenant will have to be preferred rather than the one which restricts it. Therefore, S. 15 (c) of the Act will have to be construed bearing in mind this principle of interpretation. The section provides for grounds for eviction of tenant. It is divided into various sub-sections. Therefore, all these sub-sections will have to be read harmoniously as every sub-section throws light upon another. To seek the legislative intent all the constituent parts of the provisions will have to be construed together, considering every part thereof in the light of general purpose and object of the Act. An effort will have to be made to make every part effective, harmonious and sensible. This is a well settled rule of construction. Section 15 (3) (iii) deals with the requirement of the landlord regarding a non-residential house, if he is not occupying in the city or town any non-residential house for the purpose of business which he is carrying on. Thus the area and field covered by this sub-section is wholly different. This Court in Madanlal v. Gurunath Patange, (1968) 70 Bom LR 578, had an occasion to consider this sub-section only and was not concerned

with Cl. (c) which covers different area and the field. Sub-sec. (c) with which we are concerned in this petition deals with the claim of the landlord for additional accommodation, when he is occupying a part of the house, whether residential or non-residential. This clause applies and takes in its import special types of cases i.e. building which is partly occupied by the landlord and partly by tenant and the landlord is in need of additional accommodation. It involves the principle of 'live and let live'. If the landlord is already occupying a part of the house and wants additional accommodation, then sub-sec. (c) enjoins upon him to prove that he requires this additional accommodation for the purpose of business which he is carrying on. Thus from the bare reading of sub-sec. (3) (iii) and (c) it is clear that they are mutually exclusive. A construction cannot be put upon these sub-sections which will make one of them redundant or surplusage, more so as the area and the field covered by these two sub-clauses is distinct and different. It is well settled principle of interpretation of statute that it will have to be presumed that the Legislature enacted different sub-sections with definite purpose and intention and it is the legislative mandate that every part of the statutes should have its own effect. Legislature is deemed not to waste its words or say something in vain. Therefore in my opinion the Andhra Pradesh High Court in Pyari Bai v. Tadaka, AIR 1971 Andh Pra 411, was right in coming to the conclusion that these sub-sections are mutually exclusive and, therefore, Cl. (c) is applicable only when the additional accommodation is required by the landlord for the purpose of business which he is carrying on. In this view of the matter the authorities below were right in coming to the conclusion that the petitioner-landlord had not made out a case under sub-cl. (c) of S. 15 of the Act.

9. So far as the ground based on requirement of reconstruction of the building is concerned, it appears from the order passed by the learned District Judge that it was already given up before him and is also not pressed before me.

10. In the result, therefore, there is no substance in this petition. Hence rule

is discharged. However, in the circumstances of the case there will be no order as to costs.

Petition dismissed.

AIR 1982 BOMBAY 160

MODY, J.

Indian Hotel Co. Ltd., Plaintiff v. Mrs. T. Stevenson, Defendant.

Chamber Summons No. 85 of 1981, in Suit No. 179 of 1965, D/- 13-4-1981.

(A) **Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 5 (8) (b) — Words 'a room or other accommodation in a hotel or lodging house' — Meaning of — Area occupied by hairdressing saloon is a room or accommodation in a hotel — Not being premises — Act does not apply thereto.** AIR 1959 SC 1262, Explained.

(Para 12)

(B) **Bombay Rents Hotel and Lodging House Rates Control Act (57 of 1947), Section 5 (4A) — Licensee — Shopowner is not a protected "licensee".**

It is now so well known as can be taken judicial notice of, that many hotels give out shops as licensees to various parties for running banks, travel agencies, boutiques, shoe shops, drug stores, hair dressing saloon, book shop etc. The intention of giving accommodation for these purposes is mainly that the clientele of the hotel gets the benefit thereof and can meet its requirements in the very premises of the hotel rather than go out. The clientele of the hotel may not be sufficient to enable the shop owners to run them profitably, and therefore, they are also allowed to cater to the outside market but this does not take away or in any way affect the basic idea and intention of attracting clients and of making the stay more comfortable for the clients who are lodgers. If this is the intention the hotels must necessarily have some control over these shop owners. It is possible that keeping this in mind the initial exemption is granted to room or other accommodation in a hotel or lodging house from it being a premises and exclusion is made while giving protection to the licensees. There was no necessity of excluding a person occupying any accommodation in a hotel while defining licensee, the same

having been excluded from the definition of "premises" but this appears to have been done by way of abundant caution. (Para 13)

(C) **Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 15A — Undertaking given by licensee before enactment of S. 15A to a court to hand over possession on expiry of license — Whether licensee can be relieved of undertaking on ground of public policy.**

It lies ill in the mouth of any party to say "though I have given a solemn undertaking which I had given for obtaining concession from the opponent and thought I have now enjoyed the full benefit of the concession, please relieve me of the same because though it is within my power to comply with the undertaking the Legislature has now sought to give me further benefit". The benefit given by the Legislature is a right conferred on the party but it does not take away the power of the party to comply with the undertaking and this by itself cannot be a ground for holding that the party is not bound by the undertaking or for relieving the party from the undertaking. AIR 1981 SC 537, Disting. (1978) 80 Bom LR 196, Rel. on.

(Para 21)

In this respect no distinction can be made between an undertaking given to Court to obtain concession from the Court and undertaking given as a part of a compromise between the parties. If it is to be held that the two types of undertakings stand on a different footing several questions would immediately arise. What is the distinction? In what way one has higher sanctity than the other? To what extent is the sanctity higher? Does a breach of one type of undertaking lead to higher punishment than the other? Is the relief from one to be granted for grounds more stringent than the other? Acceptance of such a contention would lead to invidious distinction between the different undertakings given to the Court and to unnecessary legal gymnastics. Undertaking given to Court for whatever reason must always remain an undertaking to the Court and the purpose for which it is given cannot make any difference to its ultimate effect. Judgment of Lentin, J., dt. 21-12-1973 in C. A. No. 120 of 1973 in C. P. No. 170 of 1967 (Bom). Explained. (Para 20)

Cases Referred : Chronological Paras

AIR 1981 SC 537	15
(1978) 80 Bom LR 196	16
AIR 1974 Bom 245 (FB)	16
(1973) Company Appln. No. 120 of 1973 in Company Petn. No. 170 of 1967, D/- 21-12-1973, (Bom), R. N. Bhagat v. Official Liquidator.	18
AIR 1959 SC 1262	8
(1888) 38 Ch D 51:58 LT 61:57 LJ Ch 850, Re West Devon Great Consols Mine	18
I. M. Chagla with G. A. Thakkar, N. G. Thakkar, J. R. Gagrati and V. B. Agarwala, for Plaintiff; K. S. Cooper with Mrs. S. D. Nanavati and S. R. Mishra, for Defendant.	

ORDER :— The present chamber summons is taken out by the defendant for a relief from an undertaking given to this Court contained in the consent terms which disposed of the suit.

2. On 28th March, 1941, the plaintiff who owns the Taj Mahal Hotel in Bombay, entered into lease and hire agreement in writing, registered, with Jacques M. Stevenson in respect of a premises admeasuring about 2,375 sq. ft. The plaintiff was running a hair dressing saloon in the said premises and Jacques Stevenson was to do the same business. The lease was renewed twice, once on 22nd Feb. 1943, and again on 5th March 1946. The defendant joined Jacques M. Stevenson as a partner on 15th Mar., 1944, and then took an assignment of the right, title and interest of Jacques M. Stevenson on 19th September, 1947. There were further registered renewals of lease on 17th Mar., 1949, 1st April, 1952 and 12th February, 1955. A portion of the said premises was surrendered on 4th July, 1952, with a consequent reduction in the rent. On 9th June, 1958, an agreement described as leave and licence agreement was signed between the plaintiff and the defendant with some changes in the terms from those in the previous agreements. According to the defendant, this agreement was surreptitiously and fraudulently got signed by the plaintiff from the defendant on a representation that the terms and conditions were the same as in previous agreements. In Sept., 1958, the defendant got the agreement scrutinized and discovered these changes. From about this time the disputes started between the plaintiff and

the defendant resulting in this suit being filed by the plaintiff against the defendant for possession in which the defendant filed her written statement. Ultimately, the suit reached hearing on 15th April, 1969, before Nain J. Consent-Terms were arrived at between the plaintiff and the defendant and a decree was obtained in terms thereof. The relevant terms thereof are as follows:

"1. Ordered that the defendant do vacate the suit premises within one month of the plaintiffs intimating to the defendant to occupy the area admeasuring about 1,100 sq. ft. on the southern side of the Taj Mahal Hotel Building shown bounded in red on the plan annexed hereto".

"2. At the time the defendant vacates the suit premises, she shall hand over to the plaintiffs all the articles and things mentioned in the leave and licence agreement dated 26th Feb., 1964."

"3. Agreed that the plaintiffs will paint the walls and the ceiling of the area shown in the plan hereto annexed and provide flooring windows therein. The plaintiffs will also provide therein electric points and water connections as required by the defendant".

"4. Agreed that the defendant do pay to the plaintiff Rs. 2,850/- per month as compensation for the use and occupation of the said area shown in the plan hereto annexed inclusive of air-conditioning charges. The air-conditioning will be provided by the plaintiff for 10 hours daily only during the defendant's working hours".

"6. The defendant shall occupy the said area shown in the plan hereto annexed as a mere licensee of the plaintiff and on the terms and conditions contained in the agreement dated 26th Feb., 1964, except as modified herein. The license shall be personal to the defendant alone."

"7. The license period shall be for 6 years in the first instance beginning from 15th April, 1969, with an option to the defendant to renew the said license for a further period of 6 years on the same terms and conditions except as to renewal and provided that the defendant observes and performs all the terms and conditions of the leave and license agreement".

"9. The defendant undertakes to this Hon'ble Court that she shall hand over to the plaintiffs quiet and peaceful possession of the said area shown in the plan hereto annexed on the expiration of the period of the said license or the sooner determination thereof under the said agreement of the leave and license".

3. Pursuant to the said consent-terms, the defendant vacated the portion originally in her possession and took possession of the new premises ad-measuring about 1100 sq. ft. on the southern side of the hotel building.

4. The Bombay Rents Hotel & Lodging House Rates (Control) Act, 1947, was amended by the Amending Act XVII of 1973, by which certain rights were conferred on the licensees which till then were not available to them provided the licensees were in possession of the premises under a subsisting agreement on 1st Feb., 1973. After the commencement of the Amending Act, according to the plaintiff, the defendant by her advocate's letter dated 1st April, 1975, exercised her option to renew the license but the defendant denies any exercise of option by her and denies authority of the advocate to exercise such an option and alleges a collusion between the plaintiff and the advocate. Mr. Chagla has stated that for the purpose of this application he does not desire to lead any oral evidence to prove the authority of the advocate. He only points out that this advocate had earlier acted for the defendant and says that he will only rely on the affidavits filed.

5. Based on the amendment of the Rent Act, the defendant contends that she has become a protected licensee and that it being the policy of the Legislature to protect licensees, the Court should relieve her from the undertaking which she has given. Mr. Cooper for the defendant has contended that the portion occupied by the defendant which is admittedly an enclosed portion, and therefore, can be called a 'room' is premises within the meaning of the Bombay Rent Act, and that consequently the Rent Act and the protection given thereby in 1973 is available to the defendant, a licensee thereof. The contention on behalf of the defendant is countered on behalf of the plaintiff on the ground that the saloon is not premises within

the meaning of the Bombay Rent Act as it will be "room or other accommodation in a hotel or lodging house" as such specifically excluded from the definition of premises. It is contended in the alternative that the defendant is not a licensee within the meaning of sub-section (4A) of S. 5 of the said Act so not entitled to the protection conferred by the amendment. It is further contended that in any event, in the facts and circumstances of this case, the defendant is not entitled to and should not be relieved from the undertaking solemnly given.

6. Mr. Cooper took me through the scheme of the Rent Act in support of his contention. Section 5 (2) defines hotel or lodging house to mean "a building or part of a building where lodging with or without board or other services by way of business is provided for a monetary consideration". Section 5 (8) defines premises and goes on to say "but does not include a room or other accommodation in the hotel or lodging house". The full title and the preamble of the Act show that the Act is enacted to amend and consolidate the law relating to, inter alia, control of rates of hotels and lodging houses and of evictions and also to control the charges for licence of premises etc. Mr. Cooper then referred to Part II of the Act to show that it deals with the residential and business premises and contended that the business premises would normally include a part of a hotel building given for a shop. This contention of Mr. Cooper is not disputable. Looking to the provisions of Part II it is clear that it does not deal as such with a relationship between the hotels and its lodgers but deals only with the premises let out for residential and business purposes. The relationship between the hotel or lodging house and lodger which is normally not that of landlord and tenant, is clearly dealt with by Part III as pointed out by Mr. Cooper. Section 33 in Part III provides for fixation by the Controller of fair rate to be charged for boarding, lodging or other services in a hotel or lodging house. The Controller may also fix percentage of accommodation of daily and monthly lodgers as also the number of lodgers to be accommodated in each room or specified accommodation. Section 37 prohibits recovery by a hotel

of charges in excess of the fair rate. Section 38 prohibits ejectment if fair rate is not paid. According to me it is clear that the provisions of the Rent Act divide themselves into two main parts, one relating to the premises let out for residential or business purposes and the other regulating the relationship between the hotel owners and lodgers. The contention of Mr. Cooper is that the intention of the Legislature in excluding the room or other accommodation from the definition of the premises was to exclude from the operation of Part II, only such portions and relationships as were to be controlled under Part III and no other. I am unable to accept this contention of Mr. Cooper.

7. It is rarely, if at all, that a hotel or a lodging house lets out a room or accommodation to a lodger. Basically the relationship between the hotel and its lodger is that of the licensor and licensee. The definition in the Act was there even before the amendment giving protection to licensees. If the intention of the Legislature, therefore, was to exclude only those rooms or accommodations which are given out to the lodger as licensee, it was not necessary for the Legislature to exclude the room or accommodation as it has done from the definition of "premises". It is contended by Mr. Chagla that when any land or building is given out on lease for running a hotel, the protection of Rent Act is available to the hotel owner as it will be a lease of premises within the meaning of S. 5 (8) and this is not disputed on behalf of the defendant. The question is when the hotel owner in his turn gives a room to a lodger what would be the relationship and what would have been the effect if room or other accommodation in a hotel were not excluded from "premises". In such a case lodger not being a tenant is not protected. In my view the exclusion of room or other accommodation from the premises was not intended to exclude the room and accommodation which were being given out by the hotels to the lodgers in normal way inasmuch as such exclusion was not necessary there being no relationship of landlord and tenant which alone was sought to be protected under Part II. In most of the cases a lodger could not have taken a contention that he is a tenant. In any case, the

provisions of Part III which specifically apply as between a hotel and a lodger would be sufficient to destroy any such contention. Therefore, the words "room or other accommodation" must include something else than the portions being given to the lodgers. This being the position, I must consider as to what was intended to be excluded by those words.

8. I felt happy when on behalf of the plaintiff it was pointed out to me that the Supreme Court has already spoken on the subject while interpreting a cognate statute applicable in Delhi in *Associated Hotels Ltd. v. R. N. Kapoor*, AIR 1959 SC 1262. The happiness that I felt was short lived and was brought to an end when Mr. Cooper contended with considerable force that there are three varying judgments given by the Bench consisting of three Judges and that though the appellant succeeded on the majority views there is no common ratio deducible from these judgments and what binds me is the ratio and not the conclusion on the facts of the case. Though I was hard put to do so I believe I have been able to discern the ratio of the majority decision but after considerable effort and struggle. In this I was also helped by the decision of this Court in *Narendra Bachubhai Dave v. Jethalal S. Dave*, (1976) 78 BLR 196* wherein it is said "the ratio of the Supreme Court case is that the rooms sublet must be room in a hotel not only in physical sense but in the sense that it is directly or indirectly used by the hotel". Though the ratio as culled out in the said judgment of this Court is binding upon me I think it is necessary to analyse the judgments in the Supreme Court once again to do justice to the forceful contention of Mr. Cooper regarding absence of any ratio and the difficulty I faced in discovering the ratio.

9. In that matter before the Supreme Court, the appellant was the proprietor of a hotel called Imperial Hotel housed in a building on Queens Road New Delhi. One R. N. Kapoor was the proprietor of a business carried on under the name of Madam Janes. Under an agreement with the appellant, he came to occupy certain space in the ladies and gents cloak room of the Imperial Hotel.

*It seems that citation and names of parties do not correspond.....Ed.

paying initially at the rate of Rs. 800/- and subsequently Rs. 700/- per month. The business being carried on was that of a barber shop and lodgers in the hotel as also outsiders were entitled to visit the said shop i. e. the shop was not meant exclusively for the residents of the hotel. The question was whether the relationship was governed by the Rent Control Act applicable in Delhi which excluded from the meaning of the word premises, a room in dharamshala hotel or lodging house. However, the word hotel was not defined in the said Act. The first question that arose was whether the relationship was that of landlord and tenant or licensor and licensee and it was held that the agreement really amounted to a lease and not a license as is apparent from the discussion in the judgment of Subba Rao, J., with which S. K. Das, J., concurred in his separate judgment. As regards the next question as to availability of the protection of the Rent Act, after comparing the proviso of the Act applicable in Delhi and the Bombay Rent Act and noting the absence of definition of hotel and lodging house in the Act under his consideration, it is held by S. K. Das, J.:-

"(5) Passing now from definitions which are apt not to be uniform, the question is whether the partitioned spaces in the two cloak rooms let out to the respondent were rooms in that hotel. In a physical sense they were undoubtedly rooms in that hotel. I am prepared, however, to say that a strictly literal construction may not be justified and the word 'room' in the composite expression 'room in a hotel' must take colour from the context of or the collocation of words in which it has been used; in other words, its meaning should be determined *noscitur a sociis*. The reason why I think so may be explained by an illustration. Suppose there is a big room inside a hotel; in a physical sense it is a room in a hotel, but let us suppose that it is let out, to take an extreme example, as a timber godown. Will it still be a room in a hotel, though in a physical sense it is a room of the building which is used as a hotel? I think it would be doing violence to the context if the expression 'room' in a hotel' is interpreted in a strictly literal sense. On the view

which I take a room in a hotel must fulfil two conditions: (1) it must be part of a hotel in the physical sense and (2) its user must be connected with the general purpose of the hotel of which it is a part. In the case under our consideration the spaces were let out for carrying on the business of a hair dresser. Such a business I consider to be one of the amenities which a modern hotel provides. The circumstances that people not resident in the hotel might also be served by the hair dresser does not alter the position. It is still an amenity for the residents in the hotel to have a hair dressing saloon within the hotel itself. A modern hotel provides many facilities to its residents; some hotels have billiard rooms let out to a private person where residents of the hotel as also non-residents can play billiards on payment of a small fee; other hotels provide post office and banking facilities by letting out rooms in the hotel for that purpose. All these amenities are connected with the hotel business and a barber's shop within the hotel premises is no exception."

Thus, according to S. K. Das, J., to be a room in the hotel, two factors are required to be considered, viz; physical connection with the hotel and the purpose for which it was used.

10. On reading the judgment of Sarkar, J., it did appear on first reading that, as contended by Mr. Cooper he takes a view which is different from the one taken by S. K. Das, J., though he comes to the same conclusion that the room in question was a room in a hotel and so not "premises" and the Rent Act did not apply. However, on close scrutiny the difference between the two judgments disappears and common ratio emerges. After discussing and stating that a lodger in a hotel is a mere licensee and not a tenant, Sarkar J., proceeds to consider to what extent the barber shop can get protection of the Act and for that purpose the meaning of a room in a hotel. First he disagrees with what Khosla, J., held in the High Court viz; that a room must be so intimately connected with the hotel as to be a part and parcel of it. He then says (at Pp. 1266-67 of AIR 1959 SC):-

"I do not appreciate why any room in an hotel is not intimately connected with it, by which apparently is meant,

the business of the hotel. The business of the hotel is carried on in the whole building and therefore, in every part of it. It would be difficult to say that one part of the building is more intimately connected with the hotel business than another. Nor do I see any reason why the Act should exempt from its protection a part which is intimately connected as it is said, and which I confess I do not understand, and not a part not so intimately connected. I also do not understand what is meant by saying that a part of an hotel supplies essential amenities. The idea of essentiality of an amenity is so vague as to be unworkable. This test would introduce great uncertainty in the working of the Act which could not have been intended. Nor do I see any reason why the Act should have left out of its protection in a room which is an essential amenity of the hotel and not other rooms in it."

He then disapproves the part of the judgment of Khosla, J., where Khosla, J., says that in order that a room in a hotel may be within the definition, it must be let out for the purpose of the hotel. Sarkar, J., says (at p. 1267 of AIR 1959 SC) :

"By this it is apparently meant that the room must be let out to supply board or give other services to the guests, to do which are the purposes of a hotel. Again I find no justification for the view. There is nothing in the definition about the purposes of the letting out. Nor am I aware that hotel proprietors are in the habit of letting out portions of the hotel premises to others for supplying board and services to the guests in the hotels. It may be that a hotel proprietor grants licenses to contractors to use parts of his premises to provide board and services to the guests in the hotel. This however is a different matter and with such licenses we are not concerned. Again, a proprietor of a different kind of business who lets out a portion of his business premises for the purposes of his business does not get an exemption from the operation of the Act. I am unable to see why the proprietor of a hotel business should have special consideration. The Act no doubt exempts a room in a hotel but it says nothing about the purposes for which the room must be let out to get the exemption. Further, not only a

room in a hotel is exempted by the definition but at the same time also a room in a dharamsala. If a room in a hotel within the Act is a room let out for the purposes of the hotel so must therefore be a room in a dharamsala. It would however be difficult to see how a room in a dharamsala can be let out for the purposes of the dharamsala for a dharamsala does not as a rule supply food or give any services, properly so called".

He thereafter observes (at p. 1267 of AIR 1959 S. C.):

"Having given the matter my best consideration, I have not been able to find any reason why the words used in the definition should not have their plain meaning given to them. I therefore come to the conclusion that a room in a hotel within the definition is any room in a building in the whole of which the business of a hotel is run. So understood, the definition would include the spaces in the cloak rooms of the Imperial Hotel with which we are concerned. These spaces are, in my view, rooms in a hotel and excluded from the operation of the Act. The Rent Controller had no power to fix any standard rent in respect of them".

11. The view of Sarkar, J., appears to me to be that one must first apply the 2nd test laid down by S.K. Das, J., about the purpose for which the entire building or portions thereof is used to find out whether the entire building or only a part thereof is being used for running a hotel and thereafter any room in the building or the part, as the case may be, is to be excluded from the 'premises'. In my view there is not much difference between the tests laid down by the two learned Judges of the Supreme Court and the application of the tests laid down in both the judgments will ultimately give the same result when applied for determining whether a particular room is a room in a hotel. The ratio of the two judgments is that one must ascertain whether the portion in question is part of the same building or definable portion thereof which is used for the purpose of the hotel or the purpose connected therewith directly or indirectly. Whichever of the two judgments are applied in the present case the conclusion must be that the

room occupied by the defendant is a room or accommodation in a hotel.

12. If I have had to choose between the ratio of three judgments on the basis that there is no common ratio, I would have preferred to follow the judgment of S. K. Das, J. I am therefore, of the opinion that the area occupied by the hairdressing saloon of the defendant is a room or an accommodation in a hotel and, therefore, not premises within the meaning of the Rent Act and hence Rent Act does not apply thereto. Consequently, even if the protection given to a licensee would have become available in case of the relationship between the plaintiff and the defendant, it is not available as that area is not 'premises' to which the Rent Act applies.

13. Mr. Chagla has further contended that assuming that it is such premises as is covered by the definition in the Rent Act, the defendant does not get the protection as a licensee because she is not a licensee within the definition contained in Section 5 (4A) of the said Act. He relies on the following portion of the definitions:

"Licensee, in respect of any premises or part thereof means but does not include..... a person having any accommodation in a hotel, lodging house, hostel, guest house, club, nursing home, hospital, sanatorium, dharmashala, home for widows, orphans or like premises marriage or public hall or like premises or in a place of amusement or entertainment or like institutions..... or a person having accommodation in any premises or part thereof for conducting a canteen, creche, dispensary or other services as amenities by any undertaking or institution."

According to Mr. Chagla either one or the other part of the said portion will cover the relationship between the plaintiff and the defendant, and therefore, she will not get the protection of the Rent Act. The words "a person having any accommodation" applies to the accommodation not only in a hotel but also in such other institutions as hospitals, marriage or public halls, or places of amusement or entertainment or like institution. The clear intention is not to confine the exception in respect of a person who is a lodger or an accommodation occu-

pied by a lodger. The words "person" and "accommodation" have a wider meaning and any person who has been given any accommodation (emphasis supplied) in the types of establishments mentioned is excluded from the definition of "licensee". There is no reason to give a narrower meaning to these words. They would, therefore, include any type of accommodation given to any person provided the accommodation has some connection with or nexus to such establishments. It is now so well-known as can be taken judicial notice of, that many hotels give out shops as licensees to various parties for running banks, travel agencies, boutiques, shoe shops, drug stores, hair dressing saloon, book shop, etc. The intention of giving accommodation for these purposes is mainly that the clientele of the hotel gets the benefit thereof and can meet its requirements in the very premises of the hotel rather than go out. The clientele of the hotel may not be sufficient to enable the shop owners to run them profitably, and therefore, they are also allowed to cater to the outside market but this does not take away or in any way affect the basic idea and intention of attracting clients and of making the stay more comfortable for the clients who are lodgers. If this is the intention, the hotels must necessarily have some control over these shop owners. It is quite possible, looking to the business methods, that in a desire to steal a march over competitors, a hotel owner or a group of hotel owners may himself or itself acquire shops through nominees or buy up the shop owners and such shops may be deliberately made to so run as to drive away the clientele. In such cases, it is the reputation of the hotel in which the shops are situated that will suffer. If in respect of a top grade luxury hotel words get around that you cannot get a proper hair cut or hairdressing or that it has a useless book shop or that there are several shops which sell sub-standard goods or are cheating, it will affect the whole hotel. It is possible, that keeping this in mind the initial exemption is granted to room or other accommodation in a hotel or lodging house from it being a premises and exclusion is made while giving protection to the licensees. On the interpretation that I have given to the

definition of 'premises' there was no necessity of excluding a person occupying any accommodation in a hotel while defining licensee, the same having been excluded from the definition of 'premises'. However, this appears to have been done by way of abundant caution. The contention of Mr. Chagla that even if the portion occupied by the defendant is 'premises', she is not a licensee who is protected by the 1973 amendment to the Rent Act has to be accepted.

14. Mr. Cooper then contended on the assumption that the defendant is entitled to the protection of the Rent Act, that the defendant should be relieved from the undertaking. Mr. Cooper has very fairly stated that he does not want to contend in the present proceedings that if the defendant has acquired the protection of the Rent Act she ceased to be bound by the undertaking on acquiring such protection but has argued the entire matter on the basis that even if she is protected by the Rent Act, she has to seek relief from the undertaking. In the view that I have taken, it is not necessary to decide this question but since this question was debated fully before me I am expressing my opinion.

15. Mr. Cooper contends as follows. At the time when the undertaking was given, under the law it was the legal obligation of the defendant as a licensee to deliver back possession on the license coming to an end by efflux of time or otherwise and correspondingly there was a legal right in the plaintiff to take possession; however, as the subject matter in respect of which undertaking was given was not part of the subject matter of the suit and consequently in view of legal position then obtainable under O. 23, R. 3, a decree for possession of the licenced premises could not have been passed, while arriving at the agreement for giving licence with option of renewal, this undertaking was given so as to obviate the plaintiff being driven to filing of a fresh suit for possession. According to Mr. Cooper, the undertaking was only a method of ensuring by pressure of courts sanction that the defendant carried out her obligations. He contends that the entire basis viz.; the legal right to obtain possession of the shop has vanished as a result of Legislative enactment and the

defendant is now entitled to retain the premises by reason of the protection afforded by the amendment to a licensee. Mr. Cooper says that this granting of protection to licensees being a legislative policy is public policy and the Court must fall in line and relieve the defendant from the undertaking. In support of his contention that such public policy should prevail and Court should act in accordance therewith, he relied on *Natraj Studios (P) Ltd. v. Navrang Studios*, AIR 1981 SC 537. In that case there was an agreement to refer to arbitration the disputes as may arise between the parties. The Bombay Rent Act applied to the relationship between the parties. The question arose as to whether the matter is referable to arbitration or that because of special jurisdiction conferred on the Small Causes Court, the arbitration agreement cannot be effective. While considering this position, it is observed as follows :

"17. The Bombay Rent Act is a welfare legislation aimed at the definite social objective of protection of tenants against harassment by landlords in various ways. It is a matter of public policy. The scheme of the Act shows that the conferment of exclusive jurisdiction on certain Courts is pursuant to the social objective at which the legislation aims. Public policy requires that contracts to the contrary which nullify the rights conferred on tenants by the Act cannot be permitted. Therefore, public policy requires that parties cannot also be permitted to contract out of the legislative mandate which requires certain kind of disputes to be settled by special Courts constituted by the Act. It follows that arbitration agreements between parties whose rights are regulated by the Bombay Rent Act cannot be recognised by a Court of Law."

16. It is to be noticed that the aid of the public policy, obviously meaning thereby the legislative policy, was taken to interpret the intention of the Legislature in conferring special jurisdiction. Here the question that has arisen is very different. In the present case the conflict, if any, is between the protection afforded by the Legislature and the undertaking given by the defendant. The Legislature has not given protection to the licensees notwithstanding any decree or order of the Court. The intention of the Legislature is clearly not

to give protection against the decree or order of the Court. Even though protection of licensees may be a matter of public policy it will on the other hand be dangerous and contrary to public policy to allow a person who has solemnly given an undertaking to Court to commit a breach thereof or grant exemption therefrom to enable him to avail of the protection under the Act. The policy of Legislature cannot be taken to be to allow a person to commit such breach unless it was so specifically indicated by the normal words such as "notwithstanding any decree or order of the Court" which are to be found in other provisions of the Rent Act. For example such words were used while introducing in S. 15, the amendment granting protection to a sub-tenant, in the year 1959. Accordingly, I do not see any substance in the contention of Mr. Cooper that public policy requires granting of exemption from the undertaking. I find support for my view from the judgment of this Court in *Narendra v. Jethalal*, (1978) 80 Bom LR 196, wherein similar question arose. In that case there was an operative decree for possession with the undertaking that it was not to be executed till a particular time and a corresponding undertaking to hand over possession on the due date. It was contended therein as in the present case that by virtue of the consent decree the defendant therein was a licensee and the defendant being in possession on 1st. Feb. 1973, under a subsisting agreement of license, had acquired protection under the Rent Act. This contention was negated as in that case it was clear that the defendant was not a licensee even under general law. However, it is not possible to say so in the present case and it is agreed on both the sides that the defendant is a licensee within its meaning under general law; the only dispute being whether she is a licensee within the meaning of Rent Act and protected by the provisions of the Rent Act and which question is decided in the negative for reasons already mentioned. After holding that the defendant was not a licensee, the learned Judge proceeded to consider the other contentions also since all the contentions were fully argued before the Court, and therefore, though the remaining portion of the judgment

can be said to be obiter will be of very high persuasive value. I need not refer to the various contentions or the facts of that case but it will be sufficient to quote certain portions of the judgment, which relevant portions are as follows :

"In the present case, as we shall presently show, there are no words used in S. 15A of the Bombay Rent Act which in express terms override the effect of any decree for possession passed in favour of a party. Moreover, in that case the rights under the decree were proprietary rights which vested in the State with retrospective effect. The decree, therefore, was executable, in any event, only at the instance of the State and the right of the appellant to be continued in possession of the land as *malik makbuza* had been recognised by the State itself. The observation in the judgment that the decree had become inexecutable, on which strong reliance has been placed by Mr. Mehta, must be considered in the light of these facts. In the case before us, apart from there being no words in S. 15A of the Bombay Rent Act which express an intention to override any decree, there is no provision which takes away the right of the decree-holder or vests it in the State or any other authority as in the case before the Supreme Court. In these circumstances, it appears to us that the ratio in that decision has no application to the case before us. On the other hand, we find that in *Ramdas v. Monica* (AIR 1974 Bom 245), it has been held by a Full Bench of this Court that the provisions of the Bombay Rent Act do not apply to appeals pending on the date on which the provisions of Parts II and III of the Act were applied to the premises which were the subject-matter of the proceedings. In that case, the view previously taken, that S. 12 of the Bombay Rent Act is prospective and not retrospective, has been clearly approved. It appears to us that in the light of this decision, there is substance in the submission of Mr. Sorabjee that the appellants are not entitled to claim protection of the provisions of Sec. 12 (1) of the Bombay Rent Act. The provisions of S. 15A are prospective as from Feb. 1, 1973. On the plain terms of S. 15A of the Bombay Rent Act, there is nothing to show that it was intended to override any decree for possession which might

have been passed prior to its coming into force".

"In view of these decisions, it appears to us that although certain consequences which may result from a contract might also result from a consent decree, nevertheless a consent decree passed by a Court on the basis of compromise between the parties cannot be equated with a contract, but must be regarded as something more than a contract. In our opinion, the mere use of the word "contract" in the non obstante clause in S. 15A of the Bombay Rent Act is not enough to override a consent decree which provides for possession being handed over".

17. No doubt the words used are in the context of that decree which provide for an executable decree for possession but in my view it will make no difference whether the decree provided for possession or that the right of the plaintiff was sought to be protected by an undertaking. The ultimate object of both the provisions will be to ensure that the plaintiff gets his possession through intervention of Court in case of default. In case of a decree for possession, by execution and in case of an undertaking by forcing a person to give possession under a threat of contempt proceedings, which may result in his imprisonment or imposition of fine. It is not necessary for me to decide whether in case of a breach of an undertaking to give possession as in the present case, a Court on a proper application can make an order for possession also, apart from punishing the person for contempt.

18. Mr. Chagla relied on the judgment of Lentin, J. dated 21st Dec. 1973, in Company Application No. 120 of 1973, in Company Petition No. 170 of 1967 R. N. Bhagat v. Official Liquidator. In that case, on or about 2nd April 1970 Bhagat had given an undertaking to Court in consideration of permission granted to him by the official liquidator to continue to use and occupy the company flat at Kanta Nivas. The undertaking, inter alia, was that in the event of certain contingencies arising, on the Official Liquidator calling upon him to hand over the flat, he and his family members will forthwith remove themselves from the said flat and hand over peaceful possession to the official liqui-

dator without claiming any right or interest therein. Thereafter, the landlords (respondents Nos. 2 to 5 before Lentin, J.) took out a chamber summons against the official liquidator for order and direction against the official liquidator to deliver to them the possession of the said flat. The applicant was not made a party to nor was he given notice of the judge's summons taken out by the landlord. The said Bhagat sought to appear at the hearing of the said judge's summons but was not allowed to appear. The judge's summons taken out by the landlord was made absolute and the official liquidator was directed to get possession from Bhagat and hand over possession to the landlord. Bhagat sought to oppose handing over possession, inter alia, on the ground that he had acquired protection under S. 15A of the Rent Act since Feb. 1973 and that the appellant was relieved of or was discharged from his undertaking by reason thereof. Contentions made on behalf of Bhagat were negatived and certain observations made were relied on by Mr. Chagla. These observations were:

"Does it now behove the applicant to come forth and ask that he be discharged from his undertaking or that the same be modified when on the faith thereof he obtained from the Court, which otherwise he would not have the indulgence and concession to occupy the suit premises? In my opinion, the answer is in the negative. To answer otherwise would be to shake the very foundation of the confidence reposed by the public at large in the solemnity of assurances given to the Court. If the Court were to find itself helpless in such circumstances, the value of such solemn assurances given by a party to the Court, on the faith whereof he obtains a concession, indulgence, or relief from the Court would be nil, and would result in subversion of judicial authority to the detriment of public interest".

"It must be remembered that even prior to S. 15A coming to the statute book, it was open to the applicant if he had not given the undertaking to have claimed a sub-tenancy as he was in exclusive possession of the flat since 1955. It was in order to ensure that he would not make any such claim, that not only was he required to execute the under-

taking to that effect on 2nd April 1970, but in addition to make assurance doubly sure, Kantawala, J., as he then was took a further personal undertaking from him to vacate as and when called upon to do by the Court. In view of these undertakings, the applicant could not have successfully set up a claim to tenancy even if Section 15A of the Rent Act had not been enacted. In my opinion, the position is in no way different, and has in no way changed, merely by reason of the enactment of S. 15A. Assuming that under S. 15A he is deemed to be a tenant, the undertakings given by him mean, as they necessarily must, that he will not stake a claim to tenancy but that as a gentleman and in pursuance of the undertaking given by him he would vacate as and when called upon by the Court. In other words, even if under S. 15A of the Rent Act, the applicant is deemed to be a tenant, it is for him to say that in spite thereof, he will carry out the solemn assurance given by him to the Court, and not claim any interest in the property which though in law he might be entitled to do. In *re West Devon Great Consols Mine*, reported in (1888) 38 Ch D 51, it was held that an undertaking not to appeal is binding even though the right to appeal existed. On the same ratio, even assuming that the applicant is deemed to be a tenant under S. 15A, in view of the personal undertaking given by him to Kantawala, J. as he then was, not to claim any interest in the flat save and except by way of permissive use, he cannot now avail himself of the title, if any endowed upon him by S. 15A of the Rent Act. Greater the reason why the undertakings must be carried out and must be enforced is because the undertakings given by the applicant were not the result of any agreement or compromise between him and any party to the proceedings but were solemn assurances given in order, to obtain and on the faith of which he obtained a relief, indulgence and concession from the Court to continue to occupy the flat. There is no question of the applicant and the Court having arrived at a contract. There can be no contract between a party and the Court¹.

"In my opinion, it does not behove the applicant to contend that he is pro-

tested from eviction merely because a status, if any, of a tenant, has been conferred upon him by S. 15A of the Rent Act."

19. In reply Mr. Cooper pointed out some portions of the judgment and contended that an undertaking given to the Court to get a concession from the court stands on a different footing from an undertaking given to court to get concession from a party to the litigation, and therefore, when the defendant in the present case has acquired a right to continue in possession of the property subsequent to giving of an undertaking the defendant who did not obtain any concession from the court but gave the undertaking only as a part of the settlement, should be relieved from the undertaking. The portions relied on by Mr. Cooper read as follows :

"As far as the present summons is concerned, what must be ascertained is, whether by giving his undertaking to the Court, the applicant obtained an indulgence or concession from the Court but for which undertaking he would not have obtained. The answer is obviously in the affirmative. An undertaking given by a party to the Court on the faith whereof he obtains an indulgence or concession from the Court which otherwise he would not have obtained, must necessarily stand on a higher footing than an undertaking given to the Court for a concession or indulgence received by that party from the opposite party. An undertaking to the Court constitutes more than a solemn promise, assurance and guarantee given by a person to the Court in order to obtain a relief or concession from the Court and hence such an undertaking is and must necessarily be more sacrosanct than a mere order of the Court, passed with or without the consent of the other party. While a consent order taken by two parties may merely be a bargain arrived at between them with the imprimatur of the Court, such an imprimatur does not and cannot make the Court itself a party to the bargain embodied in such consent order. However, in the case of an undertaking given by a person to the Court on the faith whereof the Court gives that person relief, indulgence or concession which the Court would not have done but for the solemnity of his assurances, it is not only in the public interest and public policy,

but also for the more effective administration of justice that the Court should hold that person to his obligation solemnity given by the undertaking and on the faith of which the Court has acted. To allow the applicant to reprobate his solemn obligation to carry out his undertaking after approbating the indulgence, concession and relief given to him by the Court on the faith of his undertaking, would be an impediment to the smooth administration of justice and an encouragement of breach of faith towards the Court by others like-minded".

"The undertaking given in person by the applicant to Kantawala, J., as he then was and the undertakings executed by him on 2nd April 1970 stand on a higher footing than had he given similar undertakings to the Court to obtain an indulgence, relief, and concession from the opposite party which in this case there was none."

"None of these decisions can be of assistance to the applicant. The facts and circumstances in those cases have not the slightest semblance or bearing to those in the matter before me. There is no decree in the matter before me. There is no opposite party in the matter before me. Before me is a simple undertaking given by the applicant, to the Court on the faith and bona fides whereof an indulgence was given to the applicant by the Court to occupy the premises. To my mind, such an undertaking would not attract the provisions of S. 15A of the Bombay Rent Act or fall within the ratio of the decisions relied on by Mr. Shah".

"Mr. Shah finally contended that this was a fit case where the applicant should be relieved from his undertakings on the following grounds. Firstly, the background and the context in which the earlier undertaking was given was designed merely for preventing the applicant from committing default in the payment of monthly compensation. Secondly, that the object of enforcing the undertaking today was to aid, implement, perpetrate and approve of an illegal compromise or to sanction an illegality. Mr. Shah elaborated that if the landlords were to file a suit against the applicant for recovery of possession such compromise could never be enforced nor could the applicant be evict-

ed for reasons other than those contemplated by the Bombay Rent Act. According to Mr. Shah, through the medium of the Official Liquidator and/or the Court, the landlords are attempting to bypass by provisions of the amended Act and the Court should not give assistance to such landlords by taking advantage of its dominant position qua the applicant."

"Coming to the first ground urged by Mr. Shah, the same can be repelled briefly by stating that the background and the context of the undertaking originally given by the applicant, namely that he would pay the monthly compensation without making any default, can possibly have no relevance to the undertakings executed by him on 2nd April 1970 and the personal undertaking given by him to Kantawala, J., as he then was.

Regarding the second ground urged by Mr. Shah it is difficult to see how the question of any compromise, legal or illegal, arises. It can never be said that by accepting the undertakings of the applicant, there was a "compromise" between the applicant and the Court. The contention that the Court would be sanctioning an illegality must be urged to be rejected. Success or failure by the landlords in eviction proceedings against the applicant in the Court of Small Causes can in no way militate from the undertaking given by the applicant, not by way of any compromise but in order to obtain relief and concession from the Court but for which undertaking such relief or concession would never have been given to him. There is no question of the landlords attempting to bypass S. 15A. The applicant having given his undertakings must stand by them and must hand over possession to the Official Liquidator which the latter was directed to take from the applicant by Nain J. by his order dated 6th July, 1973."

20. The question before Lentin J. was the effect of the undertaking given to the Court to get a concession from the court and while considering certain cases cited several observations are made which create an impression that there is some difference between the two types of undertakings mentioned above. However, on a close reading of the judgment this subtle distinction is not supported. The observations made

in the said judgment which tend to draw distinction between the undertaking given to the Court to obtain concession from the Court and the undertaking given to the court whilst settling the disputes between two parties were made only with a view to emphasise the fact that the undertaking was not given pursuant to any contract as there can be no contract between any party and the court, and the learned Judge did not intend to say that the undertaking given to the Court in implementation of a settlement between the parties are on a different footing. In any event, the question before the learned Judge was not whether the undertaking given to Court to obtain concession from the Court stands on different and higher footing than one given as a part of a compromise between the parties. None of the parties were in any way concerned with effect of the latter type of undertaking and obviously no arguments were advanced for or against such a distinction. The judgment then is not an authority for the proposition that the two types of undertakings stand on a different footing. If such a proposition is to be accepted several questions will immediately arise. What is the distinction? In what way one has higher sanctity than the other? To what extent is the sanctity higher? Does a breach of one type of undertaking lead to higher punishment than the other? Is the relief from one to be granted for grounds more stringent than the other? In my view acceptance of such a contention would lead to invidious distinction between the different undertakings given to the Court and to unnecessary legal gymnastics. Undertaking given to Court for whatever reason must always remain an undertaking to the Court and the purpose for which it is given cannot make any difference to its ultimate effect. The principle to be borne in mind in considering the effect of an undertaking is to be found in the very passages in the judgment recited above and which is to the effect that if a person is to be deemed to be discharged or is to be discharged from an undertaking because of such subsequent events as in that case, which are similar to those in the present case, the very foundations of the confidence reposed by the public at large in solemnity of assurances

given to the Court will be shaken and would result in subversion of the judicial authority to the detriment of public interest. The observation in the said judgment to the effect that it was in order to ensure that Bhagat would not make any claim in future as he may otherwise be free to make that he was required to execute an undertaking as also was required to give further personal undertaking to vacate and that the position had not in any way changed merely by reason of the enactment of S. 15A even assuming that Bhagat could be deemed to be a tenant under S. 15A, are according to me, equally applicable in case of an undertaking given to the Court whilst settling a matter and arriving at consent-terms between the parties.

21. This being the position I am of the view that it lies ill in the mouth of any party to say "though I have given a solemn undertaking which I had given for obtaining concession from the opponent and though I have now enjoyed the full benefit of the concession, please relieve me of the same because though it is within my power to comply with the undertaking the Legislature has now sought to give me further benefit". The benefit given by the Legislature is a right conferred on the party but it does not take away the power of the party to comply with the undertaking and this by itself cannot be a ground for holding that the party is not bound by the undertaking or for relieving the party from the undertaking.

22. In the present case, in the suit in which the undertaking was given there were disputed claims and counter-claims between the plaintiff and the defendant. Without going into the merits of the case, the parties decided to obtain concession from each other and an undertaking to Court was the basis for such concession. It is possible that the plaintiff would have succeeded in the suit and the defendant would have had to vacate forthwith. It is possible that the plaintiff would have lost the suit and the defendant would have continued in possession as a protected tenant and the plaintiff would have been driven to eviction proceedings if necessary grounds then existed. In this position, the defendant obtained concession from the

plaintiff as a result of which she became entitled to continue in possession for a period of 6 years as a licensee in the alternative premises with an option to continue for a further period of six years and the plaintiff ensured to itself (and if Mr. Cooper's contention was to be accepted, unsuccessfully attempted to ensure) that the plaintiff will get possession at the end of 12 years maximum. With a view to see that the plaintiff gave such a concession and to ensure that the plaintiff stuck to and honoured his concession the result of which was that the defendant was able to continue in the portion originally given or in the portion which was to be given alternatively, a mandatory provision in the decree was made and in return with a view to ensure that the defendant vacated the accommodation in her possession the plaintiff required her to give an undertaking to Court and the undertaking was given by her to the Court. Having obtained and fully enjoyed this concession in such a manner and now when it is not possible to restore the benefit obtained by her the defendant has come to the Court for relief from her undertaking. It can hardly lie in the mouth of the defendant to say that it is just and equitable that she should be relieved of her undertaking. The equitable relief to be given to the plaintiff on relieving the defendant from her undertaking would be that both parties should be relegated to the same position as it was obtainable at the time it was given and which is impossible to do today. In the circumstances, it is not just or equitable to relieve the defendant from her undertaking.

23. Apart from the ground of public policy no other grounds are urged for granting such a relief and this I have negatived. However, I must point out certain disturbing aspect of this application and which makes it thoroughly unjustified and dishonest for the defendant to apply for the relief in the manner she has done. In the affidavit-in-support of the chamber summons for relief from undertaking it is stated in paragraph 3 thereof as follows:—

"3. Upon the defendant making the aforesaid statements and giving the aforesaid undertaking the plaintiffs accepted the defendant as a licensee of the suit premises referred in the con-

sent decree in the above matter and defendant became entitled to remain in possession of the suit premises as a licensee of the plaintiffs on the terms and conditions contained in the agreement dated 26th February 1964 except as modified by the said consent decree and the said licence was for first instance for six years beginning from 15th April 1969 with an option to the defendant to renew the said licence for a period of further six years on the same terms and conditions provided that the defendant observes and performs all the terms and conditions of the leave and licence as provided in the consent terms and consent decree the defendant was to remain in the possession of the suit premises till 14th April 1981 as the licensee of the plaintiffs on the payment of the monthly compensation as provided therein. Accordingly, the defendant continued to pay such licence fee regularly every month as a compensation for the use and occupation of the area described in the plan annexed to the said consent decree".

It is clear therefore that according to the defendant she was to remain in possession of the suit premises till 14th Apr. 1981. The consent-terms are clear that she was to remain in possession till that date only if she exercised her option, and therefore, this statement clearly implies that she has exercised her option. It is again stated in para 6 towards the end to the effect that the defendant is entitled to remain and to continue in possession notwithstanding the undertaking even after 24th Apr. 1981 (which is admitted to be a mistake for 14th Apr. 1981). It is difficult to see how this date could have been mentioned if the defendant had not exercised the option as she is now suggesting. The plaintiff in its affidavit-in-reply, had relied on a letter from one Mr. Rizvi, advocate, acting on behalf of the defendant, by which the option to renew the licence was exercised. The fact of exercise of option was first mentioned in the affidavit of 19th Feb. 1981. The letter was specifically referred to and annexed to the further affidavit dated 3rd April, 1981. The defendant in her affidavit of 22nd Feb. 1981 has denied the exercise of option completely as follows:

"I deny that I have enjoyed the benefit of the said consent decree and had exercised the option mentioned in the

consent decree and has taken out this chamber summons only when the time to vacate the premises mentioned in plan Ex. 'B' to the consent decree is about to reach as alleged. I say that neither I nor my advocates M/s. Pathare & Co. to my knowledge have exercised the option".

At the hearing the defendant has through her counsel specifically denied the authority of Mr. Rizvi to write such a letter. To me this denial appears to be false and dishonest. If she had no knowledge about the option having been exercised she could not have mentioned the date of 14th Apr. 1981 as the date when licence will expire. She has not contended anywhere that there was implied exercise of option. Apart from the above two indications Mr. Cooper appearing for the defendant had on 6th Feb., 1981, applied to me that I should hear this matter urgently on the ground that the licence was to come to an end on 14th Apr. 1981 and that if the defendant continued in occupation thereafter, it may amount to a breach of the undertaking. The denial by the defendant of the exercise of option appears to be a false denial. If it is assumed that there is no exercise of option at all as contended by the defendant the position of defendant becomes worse. In that case the defendant on her own admission is guilty of gross breach of the undertaking as she was bound to hand over possession on the expiration of 6 years as the option was not exercised. She has come to Court over five years after committing breach. It will be highly unjust and inequitable to grant any relief to the defendant who is guilty of either making false denial with a view to obtain relief or is in gross contempt for a number of years.

24. I must point out that if any relief from undertaking is granted to a person who has behaved in this fashion it will be a wrong exercise of power to grant relief from undertaking and the only result will be of complete loss of confidence of the public in undertakings given to the Court and in judicial decrees and orders generally. To the general litigant what is important is not the niceties of law and distinctions between decree and order on one hand and undertaking to Court on the other or the distinctions between executable

and non-executable decrees but what is important is that once the dispute is finally put an end to by way of consent terms which are accepted by the parties as binding, the result contemplated by parties must follow. It is the duty of the Court to see that as far as it can help such result as contemplated by parties follows and the confidence of litigant in Court of Law is not shaken.

25. In the result I dismiss the chamber summons with costs. Looking to the time the matter has taken, I quantify the cost at Rs. 1,500/-.

Order accordingly.

AIR 1982 BOMBAY 174

DHARMADHIKARI, J.

Anna Tatoba Jadhav and others, Petitioners v. Anna Bhaui Chougule and others, Respondents.

Civil Revn. Appln. No. 283 of 1981, D/- 31-3-1981.

Civil P. C. (5 of 1908), S. 2 (2), O. 22, R. 1; O. 41, R. 1 — Order holding that right to sue did not survive after death of original plaintiff — Such adjudication and final determination of right of legal representatives amounts to a decree under S. 2 (2) and appeal is maintainable under O. 41, R. 1. AIR 1916 Lah 245 (FB), AIR 1950 All 57, AIR 1928 Oudh 362 (FB), AIR 1954 Madh Bha 45 and AIR 1981 Madh Pra 1 (FB), Rel. on.

(Para 7)

Cases Referred : Chronological Paras

AIR 1981 Madh Pra 1 (FB)	5, 7
AIR 1977 SC 1666: 1977 Lab IC 897	4, 6
AIR 1954 Madh Bha 45	5, 7
AIR 1950 All 57	5, 7
AIR 1949 Mad 404	5
AIR 1928 Oudh 362 (FB)	5, 7
AIR 1922 All 113 (2): 20 All LJ 214	4
AIR 1916 Lah 245 (FB)	5, 7

Dr. R. S. Kulkarni, for Petitioners.
S. S. Pandit, for Respondents.

ORDER :— This is a civil revision application filed by the original respondents against the order passed by the learned Extra Assistant Judge, Kolhapur dated 10th Mar. 1981 admitting the appeal and holding that it is maintainable.

AZ/AZ/A74/82/VRK/RSK

2. Late Shri Bhau Narsu Choughule, original plaintiff filed a Regular Civil Suit bearing No. 1006 of 1977 in the Court of the Civil Judge, Senior Division, Kolhapur against the defendants for a declaration that the resolution dated 24th July, 1976 passed by Shri Ram Shetkari Pani Puravatha Mandal (hereinafter referred to as "the Mandal") is illegal. In the said suit he asked for a further relief claiming a declaration that the cancellation of his membership of the Mandal was also illegal and, therefore, he is entitled to an injunction for restraining the defendants from making any change in the pipe line scheme by which his right of taking water under the Scheme is put in jeopardy. The claim of the plaintiff was contested by the defendants. In this suit an application for temporary injunction was also filed. During the pendency of these proceedings Shri Bhau Narsu Chougule died on 8-12-1980. Therefore present opponents filed an application under O. 22, R. 1 of the Code of Civil Procedure for bringing them on record and adding them as party-applicants, they being the legal representatives of the deceased Bhau Narsu Chougule. This application was opposed by the present petitioners on the ground that the right to sue does not survive, as the right claimed in the suit was a personal right of the deceased Bhau Narsu Chougule based upon his membership of the Mandal. After hearing both the sides the learned Judge of the trial Court came to the conclusion that as right to sue does not survive after the death of original plaintiff, the legal representatives have no right to proceed further with the suit. In this view of the matter, he dismissed the suit as abated.

3. Being aggrieved by this order the legal representatives of the deceased plaintiff filed an appeal before the District Court, Kolhapur. In the said appeal a preliminary objection was raised by the respondents, defendants, that the order passed by the trial Court does not amount to a "decree" and therefore the appeal itself is not maintainable. After hearing both sides, the learned Second Extra Assistant Judge, Kolhapur came to the conclusion that by holding that right to sue does not survive, the Court has adjudicated upon and has conclu-

sively determined the right of the appellants and therefore the said order amounted to a 'decree' and hence the appeal was maintainable under O. 41, R. 1 of the Civil P. C. It is against this order dated 10-3-1981 that the present revision application has been filed by the petitioners.

4. Shri Kulkarni, learned counsel appearing for the petitioners—original defendants has contended before me that in view of the definition of the term "decree" in S. 2 (2) of the Civil P. C. it cannot be said that the order passed by the trial Court amounted to a 'decree' against which an appeal could be filed under O. XLI, R. 1 of the Code of Civil Procedure. In support of his contention Shri Kulkarni has relied upon the decision of the Supreme Court in *Cox and Kings v. Their Workmen*, AIR 1977 SC 1666 as well as the decision of the Allahabad High Court in *Muhammad Ismail v. Manohar Das*, AIR 1922 All 113-114.

5. On the other hand it is contended by Shri Pandit, learned counsel appearing for the respondents, that by holding that the right to sue does not survive after the death of the original plaintiff, the trial Court has finally and conclusively determined, the rights of the legal representatives qua controversy in the suit, which in terms amounts to a 'decree' within the meaning of S. 2 (2) of the Civil P. C. Therefore, the appeal Court was right in coming to the conclusion that the appeal is maintainable under O. 41, R. 1 of the Civil P. C. In support of his contention Shri Pandit has placed a strong reliance upon the following decisions (1) *Niranjan Nath v. Afzal Hussain*, AIR 1916 Lah 245 (FB), (2) *Brij Jivan Lal v. Shiam Lal*, AIR 1950 All 57, (3) *Rampal Singh v. Abdul Hamid*, AIR 1928 Oudh 362 (FB), (4) *Arjun v. Balwant*, AIR 1954 Madh Bha 45 and (5) *Mithu Lal v. Badri Prasad*, AIR 1981 Madh Pra 1 (FB) and (6) *Maramreddi Ramireddi v. Vallappareddi Ramkrishna Reddi*, AIR 1949 Mad 404.

6. With the assistance of the learned counsel appearing for both sides I have gone through the decisions cited before me. So far as the Supreme Court decision in *Cox and Kings v. Their Workmen* (AIR 1977 SC 1666) on which reliance is placed by Shri Kulkarni, is concerned, in my opinion the said deci-

sion is not applicable to the facts and circumstances of the present case. The said decision dealt with the scope of the term 'award' as defined in S. 2 (b) of the Industrial Disputes Act, with which we are not concerned in the present Civil Revision Application,

7. This is not a case wherein merely a formal order of abatement of the suit has been passed by the trial Court because the legal representatives of the deceased Bhaū Narsu Chougule had not filed any application for bringing them on record within time or otherwise. As a matter of fact in this case the legal representatives of the deceased-plaintiff had filed an application for bringing them on record. It was not disputed at any stage that they are legal representatives of the deceased. However, a contention was raised that they have no right to proceed with the suit as right to sue does not survive. After hearing both sides the trial Court rejected their application on the ground that the right to sue did not survive and this was the reason why the trial Court dismissed the suit as abated. Thus, in substance the right of the legal representatives to proceed with the suit was wholly adjudicated upon and conclusively determined. This adjudication and final determination of the right of the legal representatives obviously amounts to a decree within the meaning of S. 2 (2) of the Civil P. C. In this view of the matter the learned Judge of the appellate Court was right in coming to the conclusion that the appeal was maintainable under O. 41, R. 1 of the Civil P. C. I am fortified in this view by the following decisions of the various High Courts, viz. (1) Niranjan Nath v. Afzal Hussein, AIR 1916 Lah 245 (FB); (2) Brij Jiwan Lal v. Shiam Lal, AIR 1950 All 57; (3) Rampal Singh v. Abdul Hamid, AIR 1928 Oudh 362 (FB); (4) Arjun v. Balwant, AIR 1954 Madh Bha 45, as well as the decision of the Madhya Pradesh High Court in Mithulal v. Badriprasad, AIR 1981 Madh Pra 1 (FB). As in the present case the trial Court has rejected the application filed by the legal representatives because he came to the conclusion that the right to sue does not survive on the death of the sole plaintiff, the order passed is not a formal order of abatement of suit on the death of the plaintiff. Therefore, it is not necessary for me

to decide any wider question in this civil revision application. At this stage I am also not concerned with the merits of the controversy and, therefore, it is not necessary to deal with it or to decide it at this stage because by the order dated 10-3-1981, the learned Extra Assistant Judge has only held that the appeal is maintainable and has further directed that the notice of appeal should be issued to the petitioners — original respondents.

8. In the result, therefore, the civil revision application fails and is dismissed. In view of the dismissal of civil revision application, the interlocutory order passed by this Court also stands vacated.

Revision dismissed.

AIR 1982 BOMBAY 176

(AT NAGPUR)

GADGIL AND PADHYE, JJ.

Prasanna Dinkar Sohale and etc. etc.,
Petitioners v. The Director-in-charge,
Laxminarayan Institute of Technology,
Nagpur and others, Respondents.

Writ Petns. Nos. 2706, 2714 to 2716,
2730, 2761, 2854, 2905 and 2906 of 1979,
D/- 12-8-1980.

(A) Constitution of India, Arts. 14, 226 — Educational institutions — Admission — No rules framed — Does not mean that plea of discrimination would not be maintainable as in absence of rules there would be no question of the rules being discriminatory or breach thereof. AIR 1979 SC 1628, Rel. on.

(Para 11)

(B) Constitution of India, Art. 14 — Reasonable classification — Test — Admission to University Degree course — Reservation of seats for "Wards of University Employees" — Classification is unreasonable and have no nexus with object to be achieved — (Nagpur University Act (26 of 1974), Ss. 4 (23), 4 (30) and 75).

The principles of equality no doubt allow classification. However, it is well settled that such classification is permissible only if the two conditions exist namely, in the first instance the classification must be based on intelligible differentia which distinguishes the class so formed from others left out of the

BZ/BZ/A504/82/DVT

class. Secondly, the differentia must have a rational relation to the object sought to be achieved by the rules or the procedure that is being followed.

(Para 11)

In the instant case, 4 seats in the Degree course of Chemical Engineering at Laxminarayan Institute of Technology, Nagpur were reserved for the "Wards of the University Employees".

Held that such reservation contravened Art. 14 of the Constitution. It could not be said that the welfare of the University employees would be a good basis for differentiating them from other persons who are not employees. In the first place while deciding the admission of students to the degree course the object can be (1) imparting education, and (2) selection of appropriate students for the course. Secondly, the welfare of the employees cannot have any relevance while deciding this function of admitting the students to the various courses. The object in running a college or other institution cannot be intermingled with the objects of certain provisions in the Nagpur University Act which are meant for the benefit of the employees. While working in the field of running a college or an institution, the object would be to admit students in a fair and equitable manner. The University cannot introduce the idea of doing benefit to its employees while discharging its duty of running a college or any other institution. Thus the fact that the University wants to bestow some benefits to its employees in the shape of reservation of seats would be a foreign matter and it would not have any direct nexus in the objects of admission of the students to the University college. There is no intelligible differentia while classifying the University employees separately. Case law discussed.

(Paras 17, 18, 19)

(C) Constitution of India, Arts. 14, 226 — Educational Institutions — "Spot admissions" on last date — Not invalid, provided equitable procedure is followed and due and wide publicity is given. (Education — Spot admissions).

(Para 24)

(D) Constitution of India, Arts. 14, 226 — Educational Institutions — Spot admissions on last date — Seats remaining vacant from reserved quota at initial

1982 Bom./12 IV G—19A

admissions would not go to general quota — Principle of reservation can be followed even at the stage of "spot admission". (Education — Reservation quota). (Para 25)

Cases Referred : Chronological Paras

AIR 1979 SC 1628	11
AIR 1975 SC 266	11
ILR 1972 Bom 279	15
AIR 1971 SC 1762	14, 17
AIR 1971 Pat 374	15
AIR 1970 SC 35	14
AIR 1968 SC 1012	12
AIR 1968 Pat 3 (FB)	16

P. V. Holey, A. P. Deshpande, M. Hussain, R. R. Pillai, A. V. Gupte, V. Y. Nilawar and S. P. Dharmadhikari, for Petitioners; S. K. Sanyal, P. N. Chandurkar, Subhas Paliwal S. A. Bobde and Anthony, for Respondents.

GADGIL, J.— These nine writ petitions can be conveniently decided by a common judgment as in each of them a challenge is made to the validity and correctness of the admissions and the Rules for the admissions for the 4 year B. Tech (Chemical Engineering) Examination Course (hereinafter referred to as the Degree Course) of the Laxminarayan Institute of Technology, Nagpur (hereinafter referred to as the L. I. T.). This L. I. T. is being run by the University of Nagpur.

2. There is no dispute that the minimum qualification for the admission of the degree course is 12th standard higher secondary school certificate or first year B. Sc. or its equivalent. The applicant has to pass in physics, chemistry and mathematics with 50% marks. In addition, he has also to pass in language examination. The L. I. T. admits students to the degree course every year. For the year 1979-80 the L. I. T. issued prospectus for all the courses that are run by the Institute including the degree course in question. In the prospectus it was stated that there would be 60 seats for the degree course and the allocation of those seats would be as follows:

18 seats As per allocation of Government of India.

3 — Jammu and Kashmir

8 — 1 seat for each of the States namely, Rajasthan, Assam, Orissa

Karnataka, Bihar, Gujarat, Kerala
and Nagaland,

7 — Unreserved.

18

14 Seats For old Madhya Pradesh,

28 Seats For Maharashtra including
Vidarbha

60

Candidates were required to submit their applications not later than 1-7-1979. However, the time was ultimately extended to 20-7-1979. In order to understand the rival contentions of the parties, we would initially state the averments made in Writ Petition No. 2706 of 1979 and the returns of the respective respondents in that petition. If necessary, we would also narrate in brief the contentions raised in the other writ petitions.

3. Prasanna, the petitioner in Writ petition No. 2706/79 has passed the qualifying examination with 215 marks in the three concerned subjects namely, physics, chemistry and mathematics. The percentage of these marks is 71.66 per cent. He filed an application for admission to the degree course with the L. I. T. The Selection Committee prepared the select list in two instalments. Firstly, it was published in the middle of August 1979 and chance calls were also sent to those candidates who had secured up to 80% marks. Prasanna did not receive any such chance call, as his percentage was 71.66. The L.I.T. increased the number of admissions from 60 to about 121. A news item appeared in the Nagpur Times dated 5-9-1979 that the last date for admission to the degree course would be 6-9-1979. Prasanna attended the Office of L. I. T. on 6-9-1979. Similarly, the petitioners in Writ Petitions Nos. 2714/79, 2715/79, 2905/79 and 2906/79 were also present while the petitioners in Writ Petition Nos. 2716/79, 2730/79 and 2854/79 were not present. The grievance of the petitioner Prasanna is that he has been improperly refused admission though he has secured better percentage of marks as compared to some of the students who have been admitted. For example, respondent No. 3 in Writ Petition No. 2706/79 was admitted though his marks in the science subjects were 212. Another grievance is that on 6-9-1979 a peculiarly irregular procedure was followed for admitting the students.

What was done was that the L.I.T. took into account the merits of the students who were present in the office on 6-9-1979 and on the basis of that merit, the admissions were made. The contention of Prasanna is that this procedure is bad inasmuch as there was no publications that the process of admission will be completed by filling the vacancies or amongst those applicants who would be present on 6-9-1979. The applicants were kept in dark and as such the students having better merit than those admitted on 6-9-1979 could not attend the office. Prasanna has described this procedure of admission on 6-9-1979 as 'spot admission' and has stated that this is highly illegal and discriminatory. According to him, the L. I. T. authorities were expected to prepare the select list on the basis of comparative merits of the applicants. The admissions should have been granted with the help of such select list. Some times the selected students might not join the degree course and, therefore, the L.I. T. should have prepared a waiting list which should also have been prepared on the basis of merits and thereafter should have offered admissions to the students mentioned in the waiting list, as per the serial number in the list. Prasanna has contended that the type of admission that was effected on 6-9-1979 is unheard of and it is liable to be quashed as the L. I. T. authorities have used double standard while making admissions namely, (1) the standard of merit in case of some students and (2) the presence on the last date of admission. It is alleged that all this is discriminatory and liable to be struck down. Another contention of Prasanna is that after issue of the prospectus, the L. I. T., authorities decided to reserve four seats for the Wards of the University employees and that on the basis of that reservation, respondents Nos. 3, 6, 7 and 8 have been admitted though they could not have secured admission if the test of merit alone would have been applied. It was contended that the classification of 'wards of the University employees' is not a reasonable classification and that it has no nexus with the related object.

4. When the hearing of these matters began on 10-7-1980, the counsel for the L. I. T. produced before the Court a list of the students admitted for the

'degree course in 1979-80 with the necessary break-up of the various categories or reservations in such admissions. The petitioner Prasanna, therefore, filed Civil Application No. 1537 of 1980 making some additional averments. The list so produced by the respondents showed that in all 121 admissions were effected. The list has given separate categories about reservations and has mentioned the names of the applicants admitted under each category. Prasanna has prepared a statement on the basis of that list and by Civil Application No. 1537 of 1980, he wants that the said statement should be attached as Annexures E and F to the main petition. In Annexure E he was shown that instead of original 60 seats, in all 79 candidates were allotted as per the various categories mentioned in the prospectus. As the seats have been increased, there is consequential increase in some of the categories. For example, 23 admissions were allotted for old Madhya Pradesh instead of 14, while 46 admissions for open competition instead of 28. In Annexure-E Prasanna has thereafter given break-up of the remaining 40 seats as follows:

- 4 Wards of Nagpur University Employees,
- 8 Bombay University,
- 3 Poona University
- 2 Shivaji University
- 3 Marathwada University
- 1 Madras University
- 6 Scheduled Castes
- 4 Scheduled Tribes
- 3 Nomadic Tribes
- 5 Other Backward classes,
- 1 Political Sufferer

40

Prasanna has also filed Civil Application No. 1548 of 1980 challenging the formation of the above-mentioned Categories and allotment of seats for each of these categories. In Annexure-E (sought to be produced by Civil Application No. 1537 of 1979), Prasanna has stated that these students having marks less than him, have been allotted from Madhya Pradesh and that 4 seats from Jammu and Kashmir were admitted though they had secured marks less than him. There is another statement in Annexure-F that 11 students (as mentioned in that Annexure) from the

categories of scheduled caste, scheduled tribes and nomadic tribes were admitted though they had secured marks less than Prasanna. Thus Prasanna has challenged the creation of new categories (including the one meant for the Wards of the University employees). His contention is that the L. I. T. is bound to admit the students as per the categories mentioned in the prospectus and that the said Institution is estopped from altering or adding to the categories to the prejudice of Prasanna. Prasanna has also alleged that on the increase of seats from 60 to 121, there should have been proportionate increase of seats under each of the categories. He wants to state that in the prospectus there were 28 general seats and that they should have been increased to 56. He has also alleged in Civil Application No. 1548 of 1980 that the reservation for the categories as mentioned in the original prospectus and also as subsequently effected is liable to be struck down as it is excessive reservation.

5. With these another (sic) averments Prasanna has challenged the admissions made on 6-9-1979 as 'spot admission' and also the admissions of respondents Nos. 3, 6, 7 and 8. As the petition could not be decided before the completion of the academic year 1979-80, Prasanna has amended the relief clause by praying that he may be ordered to be admitted for the academic year 1980-81.

6. The respondents 1, 2 and 4 have filed their return. They admitted that after the issue of the prospectus, seats have been increased and the last date for admission was fixed as 6-9-1979. A Press Note dated 4-9-1979 has been issued by the Nagpur University. It is at Annexure-B to the return page 49 of the paper book. It reads as follows:

"It is notified for general information of the students, guardians and colleges/institutions affiliated to Nagpur University that the permission shall not be granted for admission/enrolment of students after Thursday, the 6th of September, 1979, under any circumstances."

The respondents contended that no account of reservations for the different categories there could not be a single merit list. As far as the reservation for the Wards of the University employees is concerned, these respondents contended that a representation to that effect

was received from the employees, A meeting of the L. I. T. committee was not likely to be held immediately. Hence the report of the Director recommending such reservations was accepted by the Vice Chancellor under S. 11 (4) of the Nagpur University Act, 1974. This was done as an urgent action was necessary. In due course, the meeting of the L.I.T. committee was held on 29-12-1979 and the reservations for the Wards of the University employees had been approved in that meeting. It was denied that this reservation was discriminatory or was in any way bad.

7. The respondents admitted that on the last date i. e., 6-9-1979 there were still some admissions to be granted. On that date a roll call was taken of the applicants who were present in the office and from amongst them those students who had preferential merit were admitted. It was contended that Prasanna was entitled to an admission in the general and not in reserved categories. There were in all 226 students who were having marks between 79.66 percentage to 81.66 percentage from the general category. These students were not admitted. Prasanna, therefore, has no right to claim admission in preference to these students. It was alleged that the petition is bad as these students are not made parties. Prasanna has described the admissions made on 6-9-1979 as 'spot admission'. The respondents contended that there was nothing like 'spot admission' and that this phrase is creation of Prasanna's imagination. At the same time, the averments in paragraphs 9 and 18 of the return do indicate that on 6-9-1979 a general roll call was taken of those applicants who were present and from amongst them admission was granted. The respondents have pleaded that this is general practice and it is good and legal. The respondents further pleaded that the First Year course was practically complete and that Prasanna cannot claim any admission to that course. They also alleged that Prasanna's prayer for admission for the course beginning in 1980-81 is not legal and proper. As far as the two civil applications filed by Prasanna are concerned, these respondents have contended that the list filed on 10-7-1979 was not an authenticated list and it was supplied at the petitioner's request.

There is also a statement in paragraph 1 of the reply that the list was produced as cursory query was made by this Court. However, this statement appears to be an incorrect one. As far as the reservations for Scheduled Castes, Scheduled Tribes, Nomadic Tribes and political sufferers etc., are concerned, the respondents contended that the Government has made resolutions from time to time for such type of reservations and the University has accepted them and as such these resolutions are quite legal. It was then alleged that the L. I. T. is the only Technical Institution in the Maharashtra which provides instructions in Chemical Engineering and that reservation for other States was necessary as these States did not have provisions for such types of course. Respondent No. 4 who is Vice-Chancellor of the University and respondent No. 5, who is the Director of L. I. T., have filed affidavits as to how representation was made for making reservations for the Wards of the University employees and that the Director has recommended such reservation, the Vice Chancellor approved it and later on the L. I. T. committee has approved this action in its meeting dated 29-12-1979. Respondents 7 and 8 are the two students who are admitted in the quota reserved for the Wards of the University employees. They have filed their return. In substance, they contended that the reservation is quite legal and proper.

8. In the remaining writ petitions there are similar challenges for the reservation in favour of the Wards of the University employees. The admission known as 'spot admission' that took place on 6-9-1979 was challenged on similar grounds. These challenges have been disputed by the respondents by raising contentions similar to those in Prasanna's writ petition. Hence it is not necessary to reproduce all these rival contentions in the rest of the petitions. However, there are certain other additional allegations and we would like to state them in brief.

9. Milind is the petitioner in Writ Petition No. 2714 of 1979. He has secured 77 per cent marks i. e. 231 marks out of 300. Ganesh is the petitioner in writ petition No. 2715 of 1979. He has also secured 77 per cent marks. The additional contentions of both these

petitioners are also similar. Respondent No. 4 in these petitions is one Ratankumar Shrivastav. He has secured 76.66 per cent marks and he was admitted though Milind and Ganesh were refused admission. These two petitioners have also challenged the admission of respondent No. 3 who has secured admission in the reserved category of the Wards of the University employees. This respondent No. 3 has obtained 74 per cent marks. As far as the 'spot admission' that is admission on 6-9-1979 is concerned, Milind and Ganesh have contended that the two students V. M. Deshpande and S. L. Pandharipande were not present at the L. I. T. office on 6-9-1979 and still they were admitted. According to them, this is also discriminatory. Respondents 1 and 2 have contended that V. M. Deshpande and S. L. Pandharipande were admitted on 6-9-1979 after verification of their marks and after the fees have been paid. There is no specific denial that these two students were not present on 6-9-1979. According to the respondents 1 and 2, respondent No. 3 was properly admitted in the reserved quota for the Wards of the University employees. As far as the admission of respondent No. 4 is concerned, it was alleged that Milind's percentage of marks was 76 per cent and as such respondent No. 4 who has secured 76.6 per cent has been properly admitted on 6-9-1979. The presence of petitioners Milind and Ganesh in the office of the L. I. T. on 6-9-1979 was denied, Milind and Ganesh have filed counter affidavits. Milind has denied that his percentage of marks was 76%. In these two affidavits they have also alleged that those persons who have secured less marks than these petitioners, have been admitted.

9-A. Sarvat Javed is the petitioner in writ petition No. 2716 of 1979. He has secured 75.6% marks. His additional contention is that he belongs to JULAHA community which is declared as 'other backward class'. The respondents had nowhere mentioned or published that some seats were reserved for 'other backward class' and as such Javed could not at any time press his claim in this category of 'other backward class'. Javed, therefore, contended that the selection of some other students as

other backward class' in preference to Javed was bad, particularly when Javed has secured more percentage of marks.

10. Vikas is the petitioner in Writ Petition No. 2905 of 1979, while Sanjay has filed writ petition No. 2906 of 1979. Their ground is that respondent No. 3 P. V. Sane whose percentage of marks was 70.33 has been wrongly admitted in preference to Vikas and Sanjay. Their percentage respectively is 70.76 and 74. The respondents contended that as the admissions were to be initially finalised before 20-8-1979 and as respondent No. 3 was the only applicant present on that day, was admitted and that Vikas and Sanjay could have secured admissions on 20-8-1979 had they remained present.

11. It was contended on behalf of the respondents that the grievances made by the petitioners are not justiciable on account of any discrimination said to have been in contravention of Art. 14 of the Constitution of India. What is contemplated by Art. 14 is that the State shall not deny to any person equality before law or equal protection of law. The argument is that the petitioners have not produced any rules framed for the admission of the students and that they have not contended that there was a breach of such Rules, so as to cause discrimination. The petitioners submitted that the prospectus that have been issued by the University would constitute such Rules and Regulations. In our opinion, the University authorities would not be able to support the discriminative action simply because they have not framed Rules about the admission. Apart from that the scope of Art. 14 cannot be interpreted in a restrictive manner. This aspect has been considered by the Supreme Court in the case of *Ramana v. I. A. Authority of India*, reported in, AIR 1979 SC 1628. It was a case of grant of right to run a restaurant at the Bombay Airport. We need not refer to the facts in that case. Suffice it to say that the following observations in paragraphs 20, 21 and 34 would show that even an administrative action can be attacked on the ground of discrimination.

"The rule inhibiting arbitrary action by Government which we have discussed above must apply equally where such corporation is dealing with the public,

whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance."

"The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law. This principle was recognised and applied by a Bench of this Court presided over by Ray, C. J., in *Erusian Equipment and Chemicals Ltd. v. State of West Bengal* (AIR 1975 SC 266) (supra) where the learned Chief Justice pointed out that the State can carry an executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution."

"It is, therefore, obvious that both having regard to the constitutional mandate of Article 14 as also "the judicially evolved rule of administrative law, the 1st respondent was not entitled to act arbitrarily in accepting the tender of the 4th respondents, ... The action of the 1st respondent in accepting the tender of the 4th respondents, even though they did not satisfy the prescribed condition of eligibility; was clearly discriminatory since it excluded other persons similarly situate from tendering for the contract and it was also arbitrary and without reason. The acceptance of the tender of the 4th respondents was, in the circumstances invalid as being violative of the equality clause of the Constitution as also of the rule of administrative law inhibiting arbitrary action."

In view of this position of law, it will be very difficult for the respondents to contend that the University authorities have not framed any rules for the admission and that consequently, the petitioners would not be able to urge that any of those rules were discriminatory. It would, therefore, be necessary to consider as to whether the action of the University authorities stands the test of equality.

12. There are two main contentions which are for our decision. We have already observed that on the basis of the representation of the University employees, the Director of the L. I. T., recommended the reservation of four seats for the 'Wards of the University employees' and the Vice-Chancellor under S. 11 (4) of the Nagpur University Act, 1974 has accepted that recommendation. * (It is in this manner that some of the respondents out of respondents Nos. 3, 6, 7 and 8 in writ petition No. 2706 of 1979 were admitted though they had lesser percentage of marks as compared to some of the petitioners. These respondents have respectively secured 70.6%, 74%, 75.3% & 82% of marks.) As against this, percentage of marks of the nine petitioners ranges from 71.66% to 78.33%. The argument on behalf of the petitioners is that the University as also the L. I. T. Committee which functions under the University Ordinance No. 26 were bound by the principles of equality and that while admitting students to the degree course, a discrimination on the basis of any irrational basis is not permissible. The principles of equality no doubt allow classification. However, it is now well settled that such classification is permissible only if the two conditions exist namely, in the first instance the classification must be based on intelligible differentia which distinguishes the class so formed from others left out of the class. Secondly, the differentia must have a rational relation to the object sought to be achieved by the rules or the procedure that is being followed. It was contended by Shri Holay that a class of 'Wards of the University employees' cannot stand these two tests and hence the reservation in favour of such 'Wards of the University employees' is not permissible. As to which classification is permissible will depend upon the facts and circumstances of each case. The field in which the classification is to operate and the object for which the classification is made will have to be considered in order to find out as to whether such classification disturbs the equality of equal treatment to all. A question about a few types

*Bracketed portion substituted as per correction order dt. 28-8-1980, in C. A. No. 1914 of 1980—Ed.

of classifications for admission to the medical and other colleges has arisen before the Supreme Court in a number of cases. It will not be out of place to briefly refer to those cases for the purpose of seeing the principles laid down by the Supreme Court in the respect. In the case of *P. Rajendra v. State of Madras*, reported in AIR 1968 SC 1012, there was a provision for districtwise allocation of seats in the medical college. Seats were allocated to various districts on the basis of ratio of the population of each district to the total population of the State. This type of reservation or allocation was held to be bad after considering the classification on the basis of the abovementioned two tests. We would like to reproduce the following observations in paragraph 11:

"The fact, however, that the classification by itself is reasonable is not enough to support it unless there is nexus between the classification and the object to be achieved. Therefore, as the object to be achieved in a case of the kind with which we are concerned is to get the best talent for admission to professional colleges, the allocation of seats districtwise has no reasonable relation with the object to be achieved. If anything, such allocation will result 'in many cases in the object being destroyed, and if that is so, the classification, even if reasonable, would result in discrimination, inasmuch as better qualified candidates from one district may be rejected while less qualified candidates from other districts may be admitted from either of the two sources."

13. An argument was advanced before the Supreme Court that the above mentioned classification was necessary as the educational facilities in Madras city were better as compared to other districts of the State and the students from Madras city would have an advantage over the students of other districts. This argument was repelled by the Supreme Court in the following words :

"Further even if we were to accept this contention that would only justify allocation of seats between the city of Madras on one side and the rest of the State on the other and not a districtwise allocation throughout."

14. It is true that the Universitywise reservation for admission to the Medical Colleges has been upheld by the Supreme Court in the case of *D. N. Chanchala v. State of Mysore*, reported in AIR 1971 SC 1762. In the facts and circumstances in that case, the Supreme Court held that the University classification was reasonable and had a nexus with the objects. There were three Universities in the State of Mysore namely, Mysore University, Bangalore University and Karnataka University and the rules for the admission to the Medical Colleges have provided distribution of seats on the basis of these Universities. The Supreme Court has held that the Government has laid down the criteria for admission to the Colleges and also decided the sources from which the admission should be made and that there was nothing arbitrary in this process. The Supreme Court has held as follows in paragraph 22:

"In our view, there is nothing undesirable in ensuring that those attached to such Universities have their ambitions to have training in specialised subjects, like medicine, satisfied through colleges affiliated to their own Universities. Such a basis for selection has not the disadvantage of districtwise or unitwise selection as any student from any part of the State can pass the qualifying examination in any of the three Universities irrespective of the place of his birth or residence.....".

In that very case there was also a question about the validity of reservation in favour of the wards of the political sufferers. That reservation was upheld in the following words :

"The object of the rules for admission can obviously be to secure a fair and equitable distribution of seats amongst those seeking admission and who are eligible under the University Regulations. Such distribution can be on the principle that admission should be available to the best and the most meritorious. But an equally fair and equitable principle would also be that which secures admission in a just proportion to this who are handicapped and who, but for the preferential treatment given to them, would not stand a chance against those who are not so handicapped and are, therefore, in a superior

position. The principle underlying Article 15 (4) is that a preferential treatment can validly be given because the socially and educationally backward classes need it, so that in course of time they stand in equal position with the more advanced sections of the society. It would not in any way be improper if that principle were also to be applied to those who are handicapped but do not fall under Article 15 (4). It is on such a principle that reservation for children of Defence personnel and Ex-Defence personnel appears to have been upheld. The criteria for such reservation is that those serving in the Defence forces or those who had so served are and were at a disadvantage in giving education to their children since they had to live, while discharging their duties, in difficult places where normal facilities available elsewhere are and were not available. In our view it is not unreasonable to extend that principle to the children of political sufferers who in consequence of their participation in the emancipation struggle became unsettled in life....."

The reservation in favour of sons and daughters of the residents of Union territories and of the Central Government servants attached to Foreign Missions has been upheld by the Supreme Court in the case of *Chitra Ghosh v. Union of India*, reported in AIR 1970 SC 35. The relevant headnote reads as follows (at p. 38):

"The first group of persons for whom seats have been reserved are the sons and daughters of residents of Union territories other than Delhi. These areas are well known to be comparatively backward and with the exception of Himachal Pradesh they do not have any Medical College of their own. It was necessary that persons desirous of receiving medical education from these areas should be provided some facility for doing so. As regards the sons and daughters of Central Government servants posted in India Missions abroad it is equally well known that due to exigencies of their service these persons are faced with lot of difficulties in the matter of education. Apart from the problems of language, it is not easy or always possible to get admission into institutions imparting medical education in foreign countries..... The classi-

fication in all these cases is based on intelligible differentia which distinguished them from the group to which the petitioners belonged."

15. This Court in the case of *Ram Gopal Mangilal v. Dean, Medical College, Nagpur*, reported in ILR 1972 Bom 279, has upheld the reservations for the wards of the employees of the State Government and the Central Government. The relevant headnote reads as follows :

"These two categories stand differently from the rest and in view of the fact that the employees of the State Government are, by the terms of their service, required to go on transfer or on deputation to different places, a provision had to be made for the children and wards of such servants who, in the absence of such a provision, would suffer and their children and wards would be deprived of the facilities of further studies if such a provision was not made and they would so suffer not for their fault but because their parents and guardians are transferred from one place to another by the orders of the Government. Similar is the case with the Central Government servants and these two categories of persons could, therefore, be separately classified and such a classification cannot be said to be unreasonable or arbitrary."

It is thus clear that in the case of admissions in medical and other professional colleges there can be reservation in favour of a particular class. *Shri Anthony* for the University authorities contended that in this background a classification of 'Wards of the University employees' would be a reasonable classification and that it has a nexus with the relevant objects. He also relied upon the decision of the Patna High Court in the case of *Shiv Shankar v. State*, reported in AIR 1971 Pat 374. There was a Residential School which was in remote corner of the State and the School had a sanctioned strength. A provision was made that the wards of the teachers in the school can be admitted as day-students. This admission would be over and above the sanctioned strength. The said provision was challenged. The challenge was rejected in the following words (at p. 377):

"Without affecting the accommodation of fixed number of seats in each class,

and without incurring extra expenditure, Government extended certain facilities to school employees to attract efficient teachers for efficient running of the school which was in a remote corner where facilities for wards of employees even up to secondary standard were not available. It was not a case of increasing seats in school but it was a case of giving special facilities by way of service condition of the employees of school....."

In paragraph 12, it is observed as follows :

"To reserve seats in colleges for the University education and specially in technical lines cannot be equated with giving of facilities for school education to the children of the employees of the school."

It would thus be seen that the facts before the Patna High Court were different and distinguishable and in the peculiar circumstances it was held that there was nothing discriminatory.

16. Shri Holay relied upon another decision of the Patna High Court in the case of Umesh Chandra v. V. N. Singh, reported in AIR 1968 Pat 3 (FB). It was a case of admission to the medical college and under the Rules certain reservations were made in favour of the sons and daughters of the employees of the University receiving salary up to 100 rupees per month. This reservation was on the ground of extreme pecuniary difficulties even though they were not included in the merit list. Second provision was made for the sons and daughters of the employees rendering meritorious service to the University. The Full Bench of the Patna High Court has held that there was no rational nexus between this reservation on the one hand and the admission of the candidates to the medical college on the other. It was found that such a reservation constitutes a concession to the employees and it is discriminatory. The concession to the employees was a part of condition of service and such condition of service cannot have relevance while deciding the question of admission to the students to the medical college.

17. Shri Anthony drew our attention to certain provisions to the Nagpur University Act, 1974 for the purpose of contending that reservation in favour of

the 'Wards of the University employees' has direct relevant bearing.

He relied on Ss. 4 and 75 which read as follows :

"4. Subject to such conditions as may be prescribed by or under the provisions of this Act, the University shall have the following powers and perform the following duties, that is to say,—

(1)

(30) make arrangement for promoting the health and general welfare of the employees of the University."

"75. The University shall make such provision for the "benefit of its officers, teachers and other employees in matters like insurance, pension and provident fund or other benefits, as it thinks fit, and in the manner and subject to the conditions, if any, prescribed by the Statutes."

The contention is that the University is under the obligation to look after the welfare of its employees and that reserving four seats for the degree course would be an action in the direction of the said welfare. It was contended that the welfare of the employees would be a good basis for differentiating them from other persons who are not employees. In our opinion, this contention cannot be accepted for two reasons. In the first place while deciding the admission of students to the degree course the object can be (1) imparting education, and (2) selection of appropriate students for the course. Secondly, the welfare of the employees cannot have any relevance while deciding this function of admitting the students to the various courses. It may be material to note that the running of courses and the admissions of students thereto would be the power and duty within the category of Sec. 4 (23) which reads as follows:

"4 (23) make the University the centre of social and economic transformation through education as envisaged in the preamble, directive principles and other provisions in the Constitution of India;"

It was rightly urged by Shri Deshpande for some of the petitioners that the object in running a college or other institution cannot be intermingled with the objects of certain provisions which are meant for the benefit of the employees. According to him, the Uni-

versity authorities would have full powers to make provisions for the benefit of its employees. However, those powers cannot form a basis for making a class (Wards of the University Employees) while admitting the students to the educational courses. While working in the field of running a college or an institution, the object would be to admit students in a fair and equitable manner as has been held by the Supreme Court in the case of *D. N. Chanchala v. State of Mysore*, reported in AIR 1971 SC 1762. It was rightly urged by Shri Deshpande that the University cannot introduce the idea of doing benefit to its employees while discharging its duty of running a college or any other institution. Thus the fact that the University wants to bestow some benefits to its employees in the shape of reservation of seats would be a foreign matter and it would not have any direct nexus in the objects of admission of the students to the University college.

18. Another important factor deserves to be considered. While making a classification there must be some peculiarities which distinguish that class from the rest. For example, the State and Central Government servants can be classified separately, because they are liable to transfer. The staff employed in the foreign Mission would be a separate class as such staff would be experiencing difficulties in the education of their children. Similarly, the wards of the political sufferers would be a different class as such wards on account of the activities of their parents (in the freedom fight) would not have the usual educational facilities which others will get. In the present case, there is no such intelligible differentia while classifying the University employees separately. There is no possibility of such employees being transferred from one place to another. Similarly, the University employees cannot be termed as those who could not arrange for the education of their children on account of any other peculiar difficulties. The 'Wards of the University employees' are thus at par with the Wards of any other employees. Not only that but they are also at par with wards of other persons such as petty traders, businessmen, artisans etc. In view of this discussion, it is clear that by creat-

ing four reservations in favour of the 'Wards of the University employees', the University has acted in a discriminatory manner and the principles of equality has not been followed. The discrimination can be seen from the fact that the four students of this category (who are respondents Nos. 3, 6, 7 and 8 in Writ Petition No. 2706/79) were admitted though on merit, they could not have been admitted. Their (except respondent No. 8)* percentage of marks was far below that of many of the petitioners before us.

19. Initially these seats were reserved for the repeaters i.e. those who have failed in the previous year and who would intend to prosecute their studies in the next year. Shri Anthony submitted that the four reservations in question have been carved out from this quota for repeaters and the students seeking admissions from the general quota cannot make any grievance. We do not think that reservation in favour of the 'Wards of the University employees' can be supported on this ground. If the reserved seats for repeaters are not filled in on account of the absence of such repeater students the unfilled number of seats would be available to the students seeking admission from the general quota. It is in this way that the petitioners are entitled to say that the reservation in question is bad. The result, therefore, is that the four reservations in favour of the 'Wards of the University employees' cannot be allowed to stand.

20. It was contended by Shri Deshpande for some of the respondents that the classification of 'Wards of the University employees' would not be permissible in view of the provisions of S. 7 of the Nagpur University Act, 1974. That section reads as follows:—

"7. (1) No person shall be excluded from any office of the University, or from membership of any of its authorities, bodies or committees or from admission to any degree, diploma, certificate or other academic distinction or course of study, on the ground only of sex, race, creed, class, place of birth, religious belief or profession, or political or other opinion."

*underlined portion substituted as per High Court order. See FNR p. 182 ed.

The contention is that the University has created a separate class of 'Wards of University employees' and that that class cannot be differently treated. It was contended on behalf of the respondents that the scope of S. 7 of the Nagpur University Act, 1974 should not be interpreted in such a limited manner and the main crux of the matter would be as to whether the classification so made is reasonable one and whether it has a nexus with the objects to be achieved. It was also submitted that the petitioners would not be able to contend that S. 7 prohibits each and every classification for different treatment. However, we need not go into this aspect in details as in view of the above discussion, the classification made by the University is bad.

21. The second important question is as to whether the 'spot admission' effected on 6-9-1979 is in any way illegal or irregular. We have already observed that the last date for admission was initially fixed as 1st of July, 1979. It was later on postponed to 10-7-1979, 27-7-1979 and ultimately to 6-9-1979. The University authorities had issued a Press Note dated 4-9-1979 about this extension to 6-9-1979. We have reproduced that Press Note in paragraph 6 of the judgment. It is on that date that 26 students have been admitted to the degree course. The procedure that was followed for such admission was that a roll call was taken of the applicants who were present in the office and from amongst them, those students who had preferential merits were admitted. The learned advocates appearing on behalf of the petitioners have challenged the 'spot admission' on two grounds, it was contended that such admissions should not be permitted as it has a tendency of discriminating students not on account of merits but only due to the fact as to whether a particular student was or was not present in the office on 6-9-1979. Another contention is that the 'spot admission' if assumed to be permissible, has been effected in such an irregular manner that it is liable to be struck down. As against this, the respondents contended that the 'spot admission' is permissible and that there is nothing irregular in the process

of admissions that took place on 6-9-1979.

22. Shri Anthony for the respondents contended that it is necessary that admissions are completed by the end of the last date of admissions and that this could be done only if the procedure that has been adopted by the University authorities is allowed. In our opinion, there would not be any illegality in the 'spot admission' as such. However, the important aspect is as to whether this 'spot admission' suffers from such type of irregular procedure that there is an obvious discrimination as alleged by the petitioners. After hearing the learned advocates on behalf of both the sides, we think that there was such an irregularity.

23. That all the remaining admissions will be effected on the last date of admissions has not been previously published or notified either in the prospectus or in any other manner. The Press Note mentioned in paragraph 6 of the judgment has simply stated that permission shall not be granted for admission of students after 6th of Sept., 1979. This is a general Press Note issued by the University for all types of admissions to various courses and colleges. It nowhere states that on 6th of Sept., 1979, the vacant seats would be filled in and that the students desirous of seeking admissions in these vacant seats should remain present in the office. There is also no publication that the admissions will be completed from amongst the students so present in the office on 6-9-1979. At one stage of the arguments, it was faintly suggested that an individual notice to each of the applicants that the admissions will be completed on 6-9-1979 from amongst the students who were present in the office was necessary. But we think that such an individual notice would not be necessary if in the prospectus and the application form this fact has been properly published and at any rate if a wide publication was given in due course of this procedure. The necessary publication in the prospectus should convey to all the applicants as to how the vacant seats would be filled in on the last date. Even the Press Note dated 4-9-1979 has not been published by the University in the newspapers. It is true that the said Press Note has been sent

to the newspapers with a request that the contents of the Press Note should be included in the news item. There would, thus be a discretion to the Editors as to whether the publication should be given or not. Our attention is drawn to the fact that some of the students are from Bhusawal. It will be very difficult to hold that these students could receive the intimation that the last date of admission was 6th of Sept. 1979. Apart from that even that type of intimation would be insufficient as the Press Note did not say that on 6-9-1979 the vacant seats will be filled in on merits from amongst those students who will be present in the office on that date. It will not be for us to lay down the procedure that is to be adopted by the University authorities for effecting admissions on the last date. However, the petitioners are right when they contend that the type of procedure that has been followed in the present case is highly irregular and has caused discrimination and prejudice to the petitioners. During the arguments of these petitions, the respondents have produced a list of the candidates who have been admitted to the degree course. The percentage of marks obtained by each of them is mentioned against their names and in the remarks column, there is also a statement that the particular student is admitted in the 'Reserved Seat' or in the 'General Seats'. A scrutiny of admissions with the help of this list would reveal a position which cannot be ignored. For example, the petitioners in Writ Petitions Nos. 2714/79, 2715/79, 2730/79 and 2761 of 1979 had secured 77%, 77%, 77.66 per cent and 78.33 per cent marks respectively. But the list of the admissions shows that the admitted candidate at serial Nos. 107 and 112 had only secured 75.66 per cent marks. The petitioners in Writ Petitions Nos. 2714/79 and 2715/79 have alleged that by chance they were actually present in the office on 6-9-1979 and even then they have not been admitted. Of course the respondents University authorities have denied this allegation. Even if we left out of consideration the question as to whether these two petitioners were present or not, the position is that they along with the other petitioners could not remain present as obviously the University authorities have not given a

proper publication that on the last date of admission the vacant seats cannot (can?) be filled in on merits from amongst those students who would be present in the office on that date. Sarvat Javed who is the petitioner in Writ Petition No. 2716/79 has contended that he belonged to Julaha community which is declared as 'other backward community'. He has secured 75.66% of marks but he was not selected on 6-9-1979. Instead, the selected candidate at serial No. 113 one S. S. Gupta (who is O.B.C.) was selected when he had secured only 75.60% marks. It may be noted that at the time of the arguments of these petitions, the original form of Sarvat Javed was shown to us and it does state that he was seeking selection as a candidate belonging to 'other backward community', but he was not selected. It is true that the contention of the University authorities is that Sarvat Javed was not present on 6-9-1979 and hence he was not admitted. But the absence of this petitioner as also the other petitioners will have to be considered in the background of the fact that the concerned authorities have not at all properly published the necessity of the presence of the students for seeking 'spot admission' in the seats that were vacant on 6-9-1979.

24. In view of the above discussion, we are satisfied that though the 'spot admission' is permissible in a given state of circumstances, still the principles to be adopted in such admissions should be equitable so as not to cause undue discrimination. In the present case the students who by chance remained present on 6-9-1979 were given favourable discriminatory treatment as against the students who could not even imagine that such presence was necessary for seeking 'spot admission'. It is for this reason that the 'spot admission' that has been effected on 6-9-1979 is found by us to be discriminatory. As stated above, it will be for the respondents University authorities to decide as to how the due and wide publication should be given that on the last date of admissions vacant seats would be filled in from amongst those students who would be present on that date. One of the suggestions of the petitioners is that the prospectus as also the application form should contain such a statement.

We are sure that the concerned authority will evolve a good and proper procedure for effecting admissions on the last date of admissions so as not to cause any injustice of discrimination amongst the students. The result is that the petitioners have a just grievance that their claim for admission was not properly considered even on the last date of admission i.e. on 6-9-1979.

25. One more important contention deserves to be considered at this stage. As per the prospectus, 3 seats were reserved for 'Kashmir'. On the first day of admission i.e. on 20-8-1979, the students at serial Nos. 31 and 32 were selected. In addition, two more students at serial Nos. 93 and 94 were admitted as from Kashmir. These students have obtained 57.11% and 52.60% marks. The contention of the petitioners is that the question of reservation could not exist at the time of 'spot admission' and that the seats from the reserved quota would go to general quota if the applicants for that reserved quota do not appear at the time of the initial admissions. This will be a too broad proposition to be accepted inasmuch as there would not be any impropriety if even at the stage of 'spot admission' the principle of reservation has been followed. But the University authorities have admitted four students of Kashmir when the quota was three. Thus the student at serial No. 94 who has secured only 52.60% marks has been wrongly admitted. This wrong admission has a very important bearing particularly when it can be seen that each and every petitioner before us has secured marks more than 52.60 per cent. The net result is that the students who had secured a lesser percentage of marks have been improperly admitted.

26. The select list shows that a number of students have been admitted as Scheduled Castes, Scheduled Tribes etc. in the reserved quota. It was contended that the prospectus does not indicate that there were any reservations for these categories. However, the application form does contain a column which requires the applicant to show whether he belongs to Scheduled Castes, Scheduled Tribes and Nomadic Tribes etc. Not only that, a certificate to that effect is required to be produced. In addition,

on page 1 of the application form there is a blank rectangle at the right hand top corner and the above-mentioned caste or tribe has to be written in that rectangular column if he belongs to any such caste or tribe. In the background of this procedure, the petitioners cannot make a grievance that there was no specific mention about these reservations in the prospectus. At the same time, it would be advisable that the prospectus contains the fact about these reservations.

27. There are certain other contentions that have been urged before us at the time of the arguments. For example the select list shows that on 20-8-1979, 23 students from old Madhya Pradesh were admitted from out of 82 students admitted on that date. The original reservation for old Madhya Pradesh is 14. The University authorities have not produced any data to show as to how the number of seats from old Madhya Pradesh has been increased from 14 to 23 after the increase of the total number from 60 to 82 up to 20-8-1979. In Writ Petition No. 2716/79, an allegation was made that two students, V. N. Deshpande and S. L. Pandharipande were admitted on 6-9-1979 though they were not physically present. The return of the University authorities alleges that such physical presence was absolutely essential. It was also submitted before us that two students who belonged to Pune University have been admitted on a wrong basis though they were from Shivaji University. It was further submitted that the selected students at serial Nos. 11, 19 and 24 belonged to 'Maharashtra including Vidarbha', still they were admitted on the basis that they are from old Madhya Pradesh. With respect to this contention it was submitted on behalf of the respondents that these students have produced a domicile certificate that they are from old Madhya Pradesh and as such there is no irregularity. We have already discussed that the four seats were reserved for the 'Wards of the University Employees'. The proposal of the Director of the Institute was approved by the Vice-Chancellor by exercising his powers under S. 11 (4) of the University Act, 1974. That section provides that in case of emergency the Vice-Chancellor can take any decision which any other authority is empowered to take. The

decision so taken ultimately goes to the concerned authority for acceptance. The argument of the petitioners is that there was no emergency which required any immediate or urgent action and that the representation of the University employees could have been decided by the concerned authorities in due course. The contentions enumerated in this paragraph, however, need not be gone into in details as the petitioners are entitled to succeed even on the rest of the points which have been discussed and considered by us in this judgment.

28. The net analysis is that the four seats have been improperly admitted as the 'Wards of the University employees', though they have secured lesser percentage of marks as compared with the petitioners. One student at serial No. 94 was admitted in the category of 'Kashmir', though he had less percentage of marks as compared with that of the petitioners. In the process of 'spot admission' certain students who have less percentage of marks as compared to the petitioners in Writ Petitions Nos. 2714/79, 2715/79, 2730/79 and 2761/79 have been admitted. In substance, here is a case where there are at least some instances where the students securing percentage of marks less than each and every petitioner had been wrongly admitted. With this position, it will be necessary to consider as to what just and equitable order should be passed in these petitions.

29. The respondents have contended that the petitions would be bad for non-joinder of parties. Some of the students who are alleged to have been wrongly admitted, are not made parties. This aspect, however, need not detain us as we propose to make it clear that though some of the students have been improperly admitted, still they have completed their studies for one year. In these peculiar circumstances we do not think that their admissions should be cancelled. As far as the petitioners are concerned they have secured more percentage of marks than at least some of the admitted candidates. It is true that the petitioners had initially applied for admission to the degree course which was to begin in July/August 1979. One year of that course is already over. These petitions could not be heard expeditiously and hence this position

occurred. The petitioners cannot be said to be at fault. The petitioners have made an alternative prayer that they should be admitted for the course beginning in 1980-81 and in the peculiar circumstances of this case, we think that as the petitioners have lost one year for no fault of them a just order should be passed that the petitioners should be admitted to the degree course beginning in the year 1980-81 if they had preferential claim over the others who were admitted in 1979-80. If improper admissions would not have been made, some of the petitioners might have been admitted. It is not disputed that with the findings that have been recorded by us, the petitioners would have a preferential claim at least over some of the students, admitted in the last year. In usual course, we would have issued a writ or direction that the petitioners' claim should be considered after omitting those admissions which appear to be improper or irregular. In this process some of the petitioners who have preferential claim amongst themselves would get relief by granting admissions in place of those wrongly admitted. Of course as observed above none of the wrongly admitted students should be ordered to discontinue their studies. We may add that during the course of the arguments Shri Sanyal has made a statement that required number of seats will be kept vacant this year or additional seats will be created for this year if the petitioners succeed in the petitions and if the Court would pass any order in favour of the petitioners. In the peculiar circumstances of the case, it would be in the interest of justice that instead of only some petitioners getting admissions depending upon inter se merits, a provision is made for admitting all the petitioners.

30. The result is that the petitions succeed. Rule is made absolute in each of these petitions. The University authorities including the Director of the L. I. T. Institute are directed to admit each of these petitioners to the degree course beginning from the curricular year 1980-81, if necessary, by creating additional seats for the petitioners. Parties to bear their own costs in these petitions.

Rule made absolute.

AIR 1982 BOMBAY 191**SHARAD MANOHAR, J.**

Shankar Ganpat Sarphare and another,
Appellants v. Maruti Haibat Sarphare
and others, Respondents.

Second Appeal No. 211 of 1975, D/-
22-6-1981.

(A) Khoti Settlement Act (1 of 1880),
Section 9 — Transfer of property by oc-
cupancy tenant without consent of Khot
— No plea that transferor was occu-
pancy tenant taken and no evidence also
in that regard. Held, Section 9 did not
apply. (Para 13)

(B) Khoti Settlement Act (1 of 1880),
Sections 9 and 6 — Transfer of property
by occupancy tenant without Khot's con-
sent — Effect.

Section 6 of Khoti Settlement Act un-
equivocally provides that if an occupancy
right which is not transferable otherwise
than by inheritance, has been so trans-
ferred, the actual holder of the land shall
be deemed to be the tenant thereof, and
if he, or his father, or other person from
whom he inherits, has occupied or culti-
vated the land continuously from any
particular time provided by that section,
he shall have a right of occupancy there-
in. The words employed by Section 6
are 'actual holder' and the moment the
occupancy-tenant transfers the land with
possession, the transferee is the actual
landlord and not the transferor. If the
transfer is without consent of Khot, the
only consequence would be that the
transferee would become ordinary tenant.
The further legal consequence would be
though an occupancy tenant could not
have been removed by the Khot, the
Khot would be at liberty to remove the
ordinary tenant. AIR 1938 Bom 284 Rel.
on. (Para 13)

Held, on facts, that the courts below
had failed to consider whether the
transferee acquired such occupancy right.
(Para 13)

(C) T. P. Act (4 of 1882), Section 52
— Suit for possession of suit properties
on the basis of ownership — Ratification
deed purporting to perfect title of plain-
tiff brought into effect during pendency
of litigation — Defendants not proving
their title by adverse possession — Held,
Section 52 did not apply and document
was not hit by doctrine of lis pendens.
(Para 15)

Cases Referred: Chronological Paras

AIR 1938 Bom 284: 40 Bom LR 390 13
(1905) 7 Bom LR 941 13

K. J. Abhyankar, for Appellants; C.
A. Phadkar, for Respondents.

JUDGMENT:— This Second Appeal
has got to be allowed on the narrowest
possible ground that the decrees passed
by the trial Court and confirmed by the
lower Appellate Court have been passed
without reference to the relevant legal
provisions.

2. The facts of the case are as fol-
lows:—

It is unnecessary to set out the num-
bers of the suit lands. The suit lands
are eight in number. Land Serial Nos. 1
to 6 and 8 form one parcel of land and
land Serial No. 7 forms the second parcel
of the land. For the sake of convenience,
I will refer the said lands as the lands
of first parcel and the lands of second
parcel. So far as the lands of the first
parcel are concerned, there is no dispute
that initially, that is to say, in and be-
fore the year 1922, those lands belonged
to one Godabai. It is the contention of
the present respondents, who were the
original defendants Nos. 1 to 8, that
Godabai gave those lands to them for
vahivat and they had been in vahivat of
the same since that year. On 12-1-1928
Godabai executed a gift-deed in respect
of the said lands of the first parcel in
favour of one Laxman.

Godabai's daughter's name was Aubai
and Laxman was the husband of said
Aubai, that is to say, the son-in-law of
Godabai. Contention of defendants Nos. 1
to 8 is that the said gift-deed is hit by
the provisions of the Khoti Settlement
Act, 1880. The crux of the question is as
to whether this contention has any sub-
stance at all.

3. To continue the chronology of
events, Godabai died some time in the
year 1936. At about the same time, the
father of the plaintiff, who is the appel-
lant before me, came to reside in the
village in which the lands are situate. I
am stating this position because there is
no dispute about these facts.

Laxman died some time before 1958.
On 2-1-1948 Aubai executed the sale-
deed, Ex. 75, in favour of the plaintiff in
respect of the suit lands, parcel No. 1.
The sale-deed purported to have been
executed by her as the guardian of her
sons. It is, however, common ground in
these proceedings:

(a) that she had another step son, that is to say, the son of Laxman from another wife,

(b) that all her sons, including the step son, were major on the date of the sale-deed; and

(c) that the sale-deed did not purport to have been executed by her on behalf of herself as also on behalf of the step son in favour of the plaintiff and defendant No. 9.

It would be inarguable that if the sale-deed, Ex. 75, stood all by itself, it could convey no title whatsoever to the vendees, that is to say, to the plaintiff and defendant No. 9 and the present suit filed by the plaintiff would be devoid of any substance or basis in title. However, as will be presently pointed out, on 25th June, 1971 a document styled as a release-deed was executed by all these sons of Aubai including her step son as well as by herself releasing all their right, title and interest in the suit land parcel No. 1. One of the main questions arising in this appeal is the legal effect of this document. Contention raised by Mr. Abhyankar is that this really amounts to a deed of ratification. I have to examine the correctness of this contention.

4. To revert back to the chronology of events, I may refer to the transaction relating to the suit lands parcel No. 2. The plaintiff contended that he and defendant No. 9 had purchased the said land Parcel No. 2 from one Savitribai, who, according to the plaintiff, was the owner of the lands on that date. The sale-deed is at Ex. 76. The validity of this sale-deed is also challenged by the defendants on the ground that the same is hit by the provisions of the Khoti Settlement Act. I shall have to examine the correctness of the defendants' contention in this behalf.

The plaintiff contends that after the sale-deed he and defendant No. 9 in whose favour both the sale-deeds were executed by the vendors remained in possession of the suit lands. His grievance is that on 5-7-1966 Defendants Nos. 1 to 8, who are respondents Nos. 1 to 8 before me, obstructed the possession of the plaintiff and defendant No. 9 in respect of all the suit lands and hence the present suit, out of which the present appeal arises, was filed by the plaintiff against the defendants for a declaration that

the suit properties were of the ownership of himself and defendant No. 9 and also for injunction restraining defendants Nos. 1 to 8 from interfering with their possession of the suit lands.

5. Defendants Nos. 2 to 8 are the sons of defendant No. 1. It may be mentioned that defendants Nos. 2 to 8 remained absent and were, hence, proceeded ex parte. But that fact is really of no consequence because the suit has been defended by defendant No. 1 quite stoutly. His contentions by way of defences were as follows:—

His first contention was that even before the year 1922 Godabai had given the suit lands, parcel No. 1, to defendant No. 1 for his exclusive vahivat. He contended that he was in adverse possession of the the said lands parcel No. 1 till the year 1950 and that he had become owner of the same by adverse possession after the death of Godabai. Secondly he contended that the two sale-deeds executed by the vendors in question in favour of plaintiff No. 1 and defendant No. 9 were void, bad and illegal having regard to the provisions of the Khoti Settlement Act. As a matter of fact it was also contended that even the gift-deed executed by Godabai in the year 1928 had been executed in contravention of the provisions of the said Khoti Settlement Act, in that the consent of the Khot in question was not taken by Godabai for the purpose of gift-deed. The title of plaintiff and defendant No. 9 relating to the land parcel No. 1 was also challenged by the defendants on the ground that the sale-deed purporting to have been executed by Aubai as guardian of her sons, when the sons had already become major on that date was void and of no legal consequence. However, it may be stated that it was the defendants' further contention that the plaintiff and defendant No. 9 on the one hand were defendants Nos. 1 to 8 on the other were jointly cultivating all the suit lands. It will be thus clear that the contesting defendants have not pleaded their adverse possession against the plaintiff and defendant No. 9 as such. No doubt they have contended that defendant No. 1 had been in adverse possession of the suit lands from the year 1922 and that he had become owner of the same by adverse possession after the death of Godabai; but adverse possession against the plaintiff and defendant No. 9 as

such was not claimed by defendants Nos. 1 to 8, and as a matter of fact it was specifically stated in the written statement itself that from the year 1950 plaintiff and defendant No. 9 on the one hand and defendant Nos. 1 to 8 on the other had been in joint possession of all the lands ever till the date of the suit.

6. On these pleadings issues were framed and parties went to trial.

After examining the evidence, the learned trial Judge held that plaintiff and defendant No. 9 had not proved their exclusive title to the suit lands nor had they proved their possession of the same. Likewise the plaintiff's contention that defendants Nos. 1 to 8 had taken forcible possession of 20 Gunthas out of the suit land S. No. 8 was negatived by the learned Judge. The learned Judge seems to have taken the view that the plaintiff had only a joint title to the suit lands along with defendants Nos. 1 to 8. In para 17 of his judgment he observed that the plaintiff could not be given any relief in the suit and expressed an opinion that it would be better if the plaintiff filed a suit for partition. The learned Judge further observed as follows:

"If defendant No. 1 had cared to place on record the relevant documents from the Survey Deptt. for the period prior to 1956 there would not have been such a mess of the evidence."

He further observed that the defendants do not deserve any sympathy. Though, therefore, he dismissed the suit of the plaintiff holding that the suit for possession on exclusive title was not maintainable, he refused to pass any order of costs in favour of the contesting defendants. The said decree of the trial Court is dated 24-11-1969.

7. The plaintiff filed an appeal to the District Court. The judgment of the District Court is not produced before me but it is common ground, and this fact is evident from the judgment of the trial Court itself, that the decree passed by the trial Court was set aside by the appellate Judge and the entire suit was remanded to the trial Court for disposal according to law.

8. It is after this order of remand that the above mentioned 'release-deed' Ex. 146 dated 25-6-1971, was executed by all the major sons of Godabai includ-

ing her step son as also by herself stating that Aubai had executed the sale-deed, Ex. 76 on behalf of herself as well as of her sons including her step son, that, inadvertently, the fact that she had executed the sale-deed on her own behalf as well as on behalf of the step son was not mentioned in the sale-deed and that, hence, they were executing the document releasing all their right, title and interest in the suit lands with effect from the date of the sale-deed Ex. 76, itself. As will be presently pointed out, it is Mr. Abhyankar's contention that this document which is styled as a release deed can be really construed as a ratification-deed and the same has the effect of validating the sale-deed, Ex. 75, with retrospective effect. I have to examine the correctness of this contention as well.

9. After the suit was so remanded to the trial Court this document, viz. release-deed Ex. 146, was produced by the plaintiff before the Court in evidence and it was relied upon by the plaintiff as a document completing his title. The learned Judge however, took the view that Godabai herself had no title to the suit lands in view of the fact that the gift-deed executed by Godabai in favour of Laxman was hit by the provisions of S. 9 of the Khoti Settlement Act. The learned Judge seems to have taken the view that Aubai could claim her title only through her husband Laxman, who in his turn claimed title on the basis of the gift-deed, Ex. 66. The learned Judge seems to have taken the view that since the gift-deed itself was hit by S. 9 of the Khoti Settlement Act neither Laxman nor his wife Aubai could claim right, title and interest in the suit lands, parcel No. 1, which were the subject matter of the said gift-deed. When the release-deed Ex. 146, was relied upon by the plaintiff as completing his title the learned Judge observed that it was not necessary to consider the effect of the said document in view of the fact that neither Aubai nor any of her sons had any title to execute Ex. 75, in favour of the plaintiff and defendant No. 9.

It may be mentioned here that issue No. 5 raised by the learned Judge, after remand related to the plea of adverse possession of defendants Nos. 1 to 8. The issue ran as follows:

"Whether defendant No. 1 has proved that he had become owner of the suit lands or the share proved by the Plaintiff and defendant No. 9 to be of their ownership by adverse possession?"

This issue was, however, not pressed before the learned Judge on behalf of the contesting defendants. In this connection the learned Judge observed in para 11 of judgment as follows:

"This issue has not been pressed by the Advocate for the defendants. This issue was framed in Appeal No. 3 of 1970, by the District Court and hence it was considered. Shri Padhye submitted that defendants were claiming adverse possession as against Godabai and Aubai and therefore this issue need not be considered. Hence this issue does not survive."

The learned Judge also appears to have taken the view that not only the sale-deed Ex. 75 executed by Aubai in favour of the plaintiff and defendant No. 9 was hit by S. 9 of the Khoti Settlement Act but even the sale-deed Ex. 76 executed by Savitribai in their favour was hit by the self-same provisions. Taking this view of the matter, the learned Judge held that the plaintiff and defendant No. 9 had failed to prove their title to the suit lands and hence the suit filed by the plaintiff was dismissed by the trial Judge with no order as to costs.

10. In appeal the view taken by the learned Assistant Judge is of a somewhat bewildering character. The learned Judge seems to have negatived the plea of the contesting defendants relating to the effect of the Khoti Settlement Act on the basis of the amendment effected to the Khoti Settlement Act by Bombay Act No. 29 of 1939 as well as by subsequent amending Acts, Bombay Act No. 27 of 1942 as well as Bombay Act No. 26 of 1946. The learned Judge seems to have taken the view that S. 9 of the Khoti Settlement Act as it stood in the year 1928 no doubt rendered the gift-deed Ex. 66 bad in law because the gift was not executed by Godabai in favour of Laxman with the consent of the Khot. The learned Judge, however, took the view that this requirement of the consent of the Khot was done away with by the subsequent amending Act of the year 1939. According to the learned Judge the amendment related back to the date when the original Khoti Settlement Act came into force in the year

1880. In other words, according to the learned Judge, the Khot's consent which was obviated in the year 1939 must be deemed to have been so obviated at all times including in the year 1928 when the gift-deed Ex. 66 was executed by Godabai in favour of Laxman. According to the learned Judge, therefore, the gift-deed must be deemed to have been validated by virtue of the said amending Act with retrospective effect.

11. However, the learned Judge was of the view that the sale-deed, Ex. 75, which was executed by Aubai not on her own behalf but as a guardian of her sons who were already major on the date of the sale-deed, was of no legal consequence. The release-deed, Ex. 146, was relied upon on behalf of the appellants and it was contended that whatever the defect in the original sale-deed Ex. 75, may be, the same must be deemed to have been removed or corrected by virtue of the said release-deed Ex. 146. The plaintiff's contention in this behalf was, however, negatived by the learned Judge holding that the document, Ex. 146, could not have any retrospective effect. Somewhat interesting observations were made by the learned Judge in this connection as follows:

"A belated attempt after remand is made to get a release-deed at Ex. 146 and it is sought to be made out on the basis of the release-deed at Ex. 146 that the original document became valid right from the beginning. I, however do not see any foundation for any such proposition. It is not retrospective legislation whereby a subsequent document would validate the first void document. Therefore, it must be said that when the first document was executed there was no authority in the mother, the sons already having attained majority, to execute the sale-deed on their behalf. Therefore, this sale-deed must be held to be void. Any attempt to make the sale-deed valid as long after as in 1971 after remand vide Ex. 146 is of little avail. At best the document styled release-deed at Ex. 146 would mean that on 25th June, 1971 for the first time the sons ratified the action of their mother. It cannot, however, relate back to the original transaction, It would mean that in year 1971 these sons transferred the land which is not going to help the case of the plaintiff in any manner. They have to prove their title

as well as the possession ab initio. Therefore, it would appear that the title-deed Ex. 75 is not going to advance the case of the plaintiff in any manner." With this reasoning the learned Judge negated the plaintiff's plea based upon the said document, Ex. 146.

It may be mentioned here that the learned Judge has made observations in his judgment to the effect that the plaintiff and defendant No. 9 had failed to prove their possession of the suit lands. The learned Judge's finding, however, in this behalf is somewhat intriguing in view of the fact that the plaintiff's joint possession of the suit land was not only admitted but in fact asserted by the contesting defendants themselves. The learned Judge seems to have taken the view that the plaintiff was in Bombay at all the relevant times and hence he could not be in possession of the suit land.

Moreover, I do not find from his judgment that he has applied his mind to the right of the plaintiff relating to the land parcel No. 2. So far as the sale-deed Ex. 76 conveying the said land was concerned, the title based upon the sale-deed could not be found fault with by the learned Judge. The trial Court had no doubt found that the sale-deed Ex. 76 was bad because, it was, according to the trial Judge, hit by the provision of Section 9 of the Khoti Settlement Act, but the contention relating to the said bar of the Khoti Settlement Act. was specifically negated by the learned Judge. So far as the said sale-deed, Ex. 76, was concerned it was negated because it was executed by Savitribai on behalf of the major sons. No doubt the contesting defendants had contended in their written statement that Savitribai had no title to the said land. But even this question has not been considered by the learned Judge at all. It appears that, according to the learned Judge, his decision relating to the validity of the sale-deed, Ex. 76, would have equal application to the validity of sale-deed Ex. 76, and it is with such reasoning that the learned Judge thought that the plaintiff had failed to prove his title to the suit lands, parcels Nos. 1 and 2. The appeal filed by the plaintiff was, therefore, dismissed by the learned Judge with costs.

12. In this Second Appeal the question that arises for decision may be formulated as follows:—

The first question is as to what is the effect of the provisions of Section 9 of the Khoti Settlement Act. The second question is as to whether the sale-deeds, Exs. 75 and 76, are bad on account of any other reason. I may state here that if the legal position in this behalf is found against the plaintiff-appellant, nothing could be said in his favour and the appeal shall have to be dismissed. But the opposite position is equally true. If it is found that the view taken by the Courts below relating to the plaintiff's title is correct, it would follow, in the context of the facts and pleadings in the instant case, that the plaintiff's suit shall have to be decreed. I will refer to this legal position after I have discussed the legal position relating to the validity of the sale-deeds, Exs. 75 and 76.

13. As regards the challenge to the plaintiff's title based upon the provisions of the Khoti Settlement Act is concerned, to my mind, the view taken by both the Courts below is so patently erroneous that it smacks of lack of application of mind by the learned Judge to the provisions of the relevant statute with which the Court was concerned, the learned trial Judge seems to have taken the view that Section 9 of the Khoti Settlement Act stands all by itself. Section 9 of the said Act no doubt provides that the occupancy-tenants' right shall be heritable, but shall not be otherwise transferable without the consent of the Khot, except in certain given circumstances. I may state here that the said given circumstances do not obtain in the present case at all and it can be taken for granted that according to Section 9 Godabai, if she was an occupancy-tenant, could not have transferred occupancy tenancy, as such of the suit lands parcel No. 1 to her son-in-law, if she had not taken the Khot's consent. But the points in the instant case, which points are missed by both the Courts below by miles, are that in the first place the defendants have not come forth to the Court with the plea that Godabai was an occupancy-tenant. The first para of Section 9 of the said Act is as follows:

"9. The rights of Khots, dharekaris and quasi dharekaris shall be heritable and transferable."

Not a word has been whispered by any of the contesting defendants either in the written statement or even in the evi-

dence that Godabai was an occupancy-tenant and not a Dharekari or quasi-dharekari. I do not mean to state at all that it is proved by the plaintiff that Godabai was a Dharekari or a quasi-dharekari. The point is that there is no pleading either one way or the other on that question as regards the status of Godabai. Nobody contends that she was or was not a Dharekari or an Occupancy-tenant. In that view of the matter, in first place the prohibitive effect of Section 9 of the said Act does not come into play at all.

Even assuming, however, that Godabai was an occupancy-tenant, what is the effect of transfer made by her? Has the transfer become void and illegal. A casual perusal of Section 6 of the said Act is enough to dispel the view taken by the Courts below in this behalf. The said Section 6 unequivocally provides that if an occupancy right which is not transferable otherwise than by inheritance, has been so transferred, the actual holder of the land shall be deemed to be the tenant thereof, and if he, or his father, or other person from whom he inherits, has occupied or cultivated the land continuously from any particular time provided by that section, he shall have a right of occupancy therein.

The learned Judge has, therefore, to see whether the transferee viz. Laxman, had continued to occupy the suit lands parcel No. 1 continuously from the year 1928 or not. It does not appear from anything in the judgment, of either Courts that they were alive to this legal position. Both the Courts have proceeded upon the basis that if there is any embargo upon the transfer, the transfer becomes illegal. What the Courts lost sight of is that if a consequence is provided in connection with the embargo, no other consequence can be inferred. In the first instance, the only consequence would be that Laxman would become an ordinary tenant. The further legal consequence would be though an occupancy-tenant could not have been removed by the Khot, the khot would be at liberty to remove an ordinary tenant. This means that the khot could have filed a suit against Laxman for recovery of the said land parcel No. 1 and to such a suit Laxman probably would have no defence. But the result is not that Laxman's title to the suit lands even as ordinary tenant was non est.

Mr. Phadkar contended that the person who became an ordinary tenant upon the transfer was not transferee but the transferor. To my mind the contention is wholly devoid of any basis. The words employed by Section 6 are 'actual holder' and the moment the occupancy-tenant transfers the land with possession, the transferee is the actual landlord and not transferor. Moreover the entire tenor of the section militates against any such construction as is suggested by him. In this connection Mr. Abhyankar relied upon a judgment of a Division Bench of this Court in *Ramkrishna v. Bapurao*, 40 Bom LR 390 : (AIR 1938 Bom 284). The following observation made by the District Judge, which has been approved by this Court is enough to reinforce the above view:

"The khot could not forfeit the occupancy right and resume the land, because Section 10 did not provide any penalty for the transfer. This position was exhaustively reviewed by Batty, J. in *Yesa v. Sakhamam* ((1905) 7 Bom LR 941). The result of the review was briefly this. The transferee became an annual tenant of the khot, the transferor continued to be a holder of the occupancy right, the khot could not call in the land and evict the transferor in occupation until the occupancy right determined, and after such determination the khot could evict the transferee by putting an end to his annual tenancy after giving him a notice to quit, under Sec. 84 of the Land Revenue Code."

In this view of the matter, it is futile to contend that the gift-deed executed by Godabai in favour of Laxman was invalid.

14. However, the question does not rest there. Admittedly the legal position was changed by virtue of the amending Act of the year 1939 and the requirement of khot's consent was wholly obviated thereafter. As a matter of fact, relying upon this amendment the learned Assistant Judge has held that the provisions of Section 9 of the said Act do not operate as a bar to the gift-deed. It is not necessary for me to consider the correctness of the reasoning of the learned Judge in that behalf. If it is correct, no fault could be found with Aubai's title at all. But I assume that the reasoning is not correct. The fact, however, remains that if the gift-deed, Ex. 66, was not valid on account of any

embargo contained in Section 9 of the said Act, the result would be that the document Ex. 66 would be of no legal consequence. It would be a document just non est. If that was the position, the title of Godabai would continue. Admittedly Aubai was the daughter of Godabai and upon the death of Godabai, Aubai would be her heir. If this is the position, then she was perfectly at liberty to execute the sale-deed Ex. 75 in favour of the plaintiff and defendant No. 9.

Mr. Phadkar, however, contended that it was not open for me to take this view because there has been no pleading on this point. Contention is that the plaintiff had not claimed the title of Aubai by inheritance, and hence, it is not open for me to hold her sale-deed to be valid on the ground that she got the title by inheritance from her mother. To my mind this contention is without any substance. If the plaintiff had not pleaded that Aubai was the heir of Godabai, likewise he has not pleaded any other manner in which Aubai got title to the suit land. The fact that Godabai gifted the lands to Laxman, that Laxman died leaving behind his widow and sons as his heir are all facts which have come in evidence. All that the plaintiff has stated in the plaint is that Aubai executed a sale-deed. It is no doubt found that she had executed a sale-deed not on her own behalf but on behalf of her sons. I have to examine the effect of this position. But from that it cannot be said that want of pleading is an impediment in the way of the plaintiff. Moreover what is required to be pleaded, as per our system of precedural jurisprudence is the fact, not law. To my mind by virtue of what position of law the plaintiff got the title need not have been pleaded. The facts in this behalf are wholly undisputed. In this view of the matter, it cannot be held that Aubai had no title to execute the sale-deed, Ex. 75, in favour of plaintiff and defendant No. 9.

15. What remains to be considered is the effect of release-deed, Ex. 146. The trial Court has found it unnecessary to apply its mind to the same, because, according to it, the provisions of the said Act rendered the sale-deed Ex. 75 invalid. The learned Assistant Judge has taken the view that the document, Ex. 146 could not have retrospective effect. His

view is that the document is not legislation. According to him, only a legislation can have retrospective effect and not document. The reasoning no doubt is somewhat humorous, but devoid of legal substance. I fail to see why a document cannot be given a retrospective effect. Mr. Phadkar contended that this document was invalid because it was, in his words, a tailored document. He did not expound this contention. To my question, whether there was any law against tailoring a document his only answer was he did not use the word in literary sense meaning thereby that I understood it in a literary sense. But beyond advancing this cryptic argument, 'take it or leave it' was his attitude. Whatever that may be, I would like to say a few words regarding the legal position in this behalf. The document, Ex. 146, is no doubt executed during the pendency of the litigation. I take it that the document either constituted a document of transfer by itself or it may constitute a deed of ratification, as contended by Mr. Abhyankar. To my mind either way, there is nothing objectionable about this document. If the document was to be regarded as a transfer or a document of fresh transfer, it would be bad only if it was hit by the doctrine of lis pendens. Such a plea is not raised. In this connection it is to be noted that if it was a defence plea in the present case that before or during the pendency of the litigation the defendants had perfected their title to the said lands by adverse possession or otherwise, it could perhaps be argued that the document which was brought into effect during the pendency of the litigation after the title had already passed to defendants Nos. 1 to 8 was hit by the doctrine of lis pendens. But it is not the case of the contesting defendants that they were ever in adverse possession against defendant No. 9 and the plaintiff as such. In fact it has been asserted in the written statement, and with added vigour before me by Mr. Phadkar, that the contesting defendants never wished and did not wish to plead adverse possession against the plaintiff and defendant No. 9 and they have specifically admitted their 1/2 possession of the suit lands. They pleaded adverse possession against Godabai and Aubai; but that plea also was not pressed and was specifically given up. If this is the position it can

never lie in their mouth to say that they had perfected their title by adverse possession so far as the suit lands are concerned. By no stretch of imagination the provisions of S. 52 of the T. P. Act can be said to apply and if those provisions do not apply, it is difficult to see on what ground the document, Ex. 146, even if it is taken as a fresh transfer, can be found bad.

But to my mind the document can, in reality, be construed as a ratification deed. The executants in respect of the said document, Ex. 146, have stated in unison that the sale-deed, Ex. 75, was in fact executed by Aubai on their behalf. They have stated that certain technical objections had been raised in regard to the validity of the sale-deed on account of the fact that they had become major on the date of the sale-deed. It is clear that the document, though styled as release-deed, has been executed by them with the sole purpose of owning whatever had been done by Aubai by the sale-deed. The document states that the previous sale-deed was executed by Aubai on behalf of them all. She was acting as the agent of all. If she had no previous authority from them for doing so, all of them could come forth subsequently and own the transaction to be their own, meaning thereby—ratify the same. In these circumstances it is difficult to see why the said document cannot be construed as a deed of ratification. The technical defects that were found by the plaintiff in their way were sought to be removed by another way. In this view of the matter to my mind the objection found by the learned Assistant Judge to the effect of this document Ex. 146 is devoid of any substance.

This is the position relating to suit lands parcel No. 1.

16. So far as the suit land, parcel No. 2, is concerned, the judgment of the learned Judge is even more vulnerable. He has not even applied his mind to the question as to whether the sale-deed, Ex. 76, suffers from the same defect as Ex. 75 or not. It is nobody's case that Savitribai executed the sale-deed on behalf of her major sons. Only defect alleged in that behalf is that Savitribai had no title to the suit land. To my mind the learned Judge has failed to apply his mind to this aspect of the case entirely and hence it is necessary for me to examine the question myself and once I

start embarking upon the enquiry in that behalf, I find that there is no justification whatsoever for the view that the title of Savitribai was not proved. There is no dispute that Savitribai had executed the sale-deed. The sale-deed is a registered document. The plaintiff has examined Krishnaji Keshav Prabhu-Desai, who was the Khot. He has stated that Sakharam Bhavade, husband of Savitribai, had entered into an agreement with the plaintiff in connection with the suit land parcel No. 2. The said agreement is produced at Ex. 136 in these proceedings. The fact that Krishnaji was himself the Khot is not at all disputed. This is clear from the cross-examination of the witness. The significant fact is that the Khot has himself scribed the agreement, Ex. 136, by which the suit land parcel No. 2 was to be sold by Sakharam to the plaintiff and defendant No. 9. The said witness has also attested the agreement. It is, therefore, futile to contend that Sakharam had no title to the suit land. When the Khot in whom the title vested had himself scribed the document in question, it is futile to contend that Sakharam's title was not recognised by the Khot. If this is the position, Savitribai who was the widow of Sakharam must be held to be having title to the suit land parcel No. 2 after the death of Sakharam. The sale-deed, Ex. 76, executed by her in favour of the plaintiff and defendant No. 9 becomes, therefore, unassailable. It is thus clear that so far as the title to the suit land, parcel No. 2, is concerned the plaintiff and defendant No. 9 have proved the same to the hilt.

17. The only question that remains is as to why the plaintiff should be nonsuited, if he has proved his title. If a person proves his title and files a suit for possession on title, the only conceivable defence to the suit on merits is that title was subsequently extinguished by some supervening event such as the adverse possession of the defendants. In the instant case, a plea for adverse possession was raised by way of issue No. 5, but the plea has not been pressed into service and it is contended before me specifically by Mr. Phadkar that he did not want to set up a plea of adverse possession against the plaintiff and defendant No. 9 in this litigation. As a matter of fact it is the contention of the contesting defendants themselves that their possession of the suit lands is joint

with the plaintiff and defendant No. 9. A plea of adverse possession is, therefore, wholly misconceived. No other supervening event extinguishing the plaintiff's title is relied upon.

The plea is contained in issue No. 5 which has been framed on the basis of the written statement. But it is explained by stating that adverse possession was claimed against Godabai and not against the plaintiff. But even that plea has been given up. If this is the position, then it is difficult to see how the plaintiff's suit for possession based on title could be dismissed. To my mind, in the context of the facts and pleadings, the conclusion arrived at by the learned Judge is wholly unsustainable.

18. It was sought to be contended before me that the contesting defendants have led evidence to show that they were in possession of the suit lands till the year 1950. I may state here that I am not at all satisfied even about this factual position. But I propose to express no opinion in that behalf for the simple reason that the position in that behalf is of no legal consequence. Once it is found that defendants Nos. 1 to 8 have not pressed into service their contention regarding acquisition of title by adverse possession, the entire question relating to their possession becomes wholly academic. The plaintiff and defendant No. 9 have proved their title to the suit land and defendants Nos. 1 to 8 have established none. The result must follow that the plaintiff and defendant No. 9 are entitled to the possession of the suit lands from defendants Nos. 1 to 8.

19. The appeal is, therefore, allowed, the decrees passed by both the Courts below are set aside and the plaintiff's suit for declaration of title of himself and defendant No. 9 and for injunction in respect of the suit lands mentioned in the plaint and for possession of the rest of the land is hereby decreed. The plaintiff shall be entitled to costs of this litigation in all the Courts.

By consent of the parties, status quo to continue for a period of (one) month from today.

Enquiry as regards future mesne profits according to the provisions of law.

Appeal allowed.

AIR 1982 BOMBAY 199

V. S. DESHPANDE, C. J. AND

Smt. SUJATA V. MANOHAR, J.

Maharashtra State Co-operative Land Development Bank Ltd. and another, Petitioners v. State of Maharashtra and others, Respondents.

Writ Petn. No. 881 of 1980, D/- 10-4-1981.

(A) Maharashtra Co-operative Societies Act, 1960 (24 of 1961), S. 69A (3) and (4) — Fund established by State Level Caderisation Committee and not by Apex Society — Demand for contribution from notified society is not sustainable.

The obligation under S. 69A (4), if any, of any notified society is to contribute annually to the 'Fund' established by the Apex Society and not to any Fund. The Apex Society not having established any such Fund till this date, the petitioner notified Society was under no legal obligation to pay or make any contribution to any such Fund. The demand thus being ill-founded is illegal and ineffective and unenforceable against the petitioner. (Para 9)

(B) Maharashtra Co-operative Societies Act, 1960 (24 of 1961), S. 69A (4) — Notice to petitioner notified Society demanding contribution to fund — Benefit to petitioner society from cadre and fund found to be too indirect, remote and far-fetched — Demand notice must be quashed. AIR 1980 SC 1008 and AIR 1971 SC 1182, Rel. on — Held, further, that demand notice was also liable to be quashed on ground that fixation of quantum of contribution was arbitrary and irrational. (Paras 18, 22, 25)

Cases Referred: Chronological Paras
AIR 1980 SC 1008 16, 19, 20, 22, 25
AIR 1971 SC 1182 21

Dr. B. R. Naik with Y. R. Naik, for Petitioners; C. J. Sawant, Addl. Govt. Pleader with D. P. Hegde Asst. Govt. Pleader, for Respondents, Nos. 1 to 3.

DESHPANDE, C. J. :— Of the two petitioners in this writ petition, No. 1 is the Maharashtra State Co-operative Land Development Bank Ltd. (hereinafter referred to as 'the Society') while No. 2 is its Member. Under demand notice dated 12-2-1980 and 3-3-1980 by Respondents Nos. 3 and 2 respectively, the Society is called upon to pay a to-

AZ/AZ/A303/82/JHS/SNV-H

tal sum of Rs. 10 lacs towards its contribution for the years 1977-78 and 1978-79 for "the Co-operative State Cadre Employment Fund" (hereinafter referred to as the Fund) under sub-s. (4) of S. 69A of the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as 'the Act'). The Society is notified by Respondent No. 1 State Government by a notification dated 6-3-1979, as one of the Societies, which, in its opinion, derives benefit directly or indirectly from the services of the Co-operative State Cadre of Secretaries, constituted under sub-s. (1) of S. 69A (hereinafter referred to as 'the Cadre'). Under R. 53A of the Maharashtra Co-operative Societies Rules, 1961 (hereinafter referred to as 'the Rules') as amended by the First Amendment of 1979, the liability of the society is determined to be Rs. 5 lacs per year in terms of sub-s. (4) of S. 69A. The demand notice cannot be ignored by the society without exposing it to the levy of attachment of the amount by the Registrar under sub-s. (5) of S. 69A of the Act. Both the petitioners challenge the validity of this demand in this petition under Art. 226 of the Constitution.

2. We do not think it necessary to go into the questions of the vires of S. 69A of the Act and Rr. 53A and 53B of the Rules raised by Dr. Naik, learned Advocate for the petitioners, namely (1) whether S. 69A is violative of Articles 14 and 19 of the Constitution and (2) whether Rr. 53A and 53B are ultra vires of the rule making power of the State Government. In our opinion, other three points raised by Dr. Naik are sufficient to quash the impugned demand notices. The first contention of Dr. Naik is that no liability to contribute towards the Fund arises u/s. 69A (4), inasmuch as, no Fund as such 'Co-operative State Cadre Employment Fund' has been in fact established by any Apex Bank as contemplated u/s. 69A (3), till this day. His second contention is that the contribution cannot be claimed by way of tax for want of legislative competence and it cannot be levied as fee, which levy is conditional on benefit to the payer and the Society does not get any benefit whatsoever from the 'Fund' or the 'Cadre' for the maintenance of which the Fund is raised. His third contention is that fixation of the liability at Rs. 5 lakhs is arbitrary, irrational and without any basis whatsoever and therefore legally ineffective.

3. It will be convenient to refer to certain indisputable relevant factors. S. 69A of the Act contemplates constitution of a Cadre of Secretaries for the efficient administration of certain resources and other prescribed Societies specified in S. 69A (1) under the hypothesis that improvement in their working would in turn help implementing the projects in the co-operative sector through other societies at higher level. It seeks to provide, for its recruitment and operation, by certain notified Central Societies and, maintenance from the Fund to be contributed by the said resource societies and certain other notified societies who would derive benefit therefrom. This S. 69A was introduced in the Act on 19-2-1976 by Maharashtra Amendment Act 36 of 1975 while sub-s. (4) thereof as it now stands was introduced therein on 27-12-79 by Maharashtra Amendment Act 30 of 1978. The scheme was introduced even earlier and was sought to be implemented by persuading the societies concerned to amend their bye-laws for its enforcement. Supervisory Unions at taluka level were established for this purpose who would recruit personnel for the secretarial work of the societies. A State Caderisation Fund was established earlier, under the Government Resolution dated 2-8-1974 and managed and operated by a State Level Committee, with a view to improve the tone of the working of the primary co-operative societies of certain categories. A current account in the Maharashtra State Co-operative Bank Ltd. was opened on 14-1-1975 under the name of "The State Level Caderisation Fund" by a Resolution of the said Committee dated 7-11-1974. The committee was to collect contributions from the Co-operative Institutions and Administrative Funds for its working.

4. Sec. 69A and Rr. 53A and 53B were introduced to accord statutory recognition to this scheme enforced already earlier under the Government Resolution dated 2-8-1974. Sub-s. (1) of S. 69A specifies certain categories of primary societies and provides for the establishment of the Cadre, and recruitment thereof by the notified Central Societies. Sub-s. (2) authorises the Central Society to depute such recruited personnel to the societies specified in sub-s. (1) and the said societies are required to take them over. Their emoluments however are

liable to be paid from the Fund. Sub-sec. (3) provides for the establishment of the 'Fund' by an Apex Bank to be so notified, to be utilised for the maintenance of the Cadre. Sub-s. (4) enables the State Government to notify the societies which in its opinion are benefited by the Cadre directly or indirectly, and charge them with a statutory liability to make contribution at the rates to be fixed by the State Government by reference to factors enumerated therein. Sub-s. (5) provides for the sanction for the enforcement of such dues.

5. By notification dated 6-3-1979, certain societies including the petitioner No. 1 were declared to be beneficiaries of the Fund u/s. 69A (4) of the Act. R. 53A was inserted on 16-7-1979 while R. 53B was inserted on 3-9-1979 by amending the 1961 Rules under the Act. Under R. 53A, the rates of contributions were fixed by reference to the categories of the societies benefited, while R. 53B indicated the mode of payment of such contributions by the societies so declared to be liable. Sub-r. (1) of R. 53B of the Rules requires the Apex Society, so notified u/s. 69A (3) of the Act, to open an account in the name of the 'Co-operative State Cadre Employment Fund' established by it in the Maharashtra State Co-operative Bank, Bombay and also in every District Central Co-operative Bank excluding the Bombay District Central Co-operative Bank. The other clauses of R. 53B provide for channelizing of the contributions of the notified societies into the said Fund.

6. Now the first contention of Dr. Naik is that liability to make contribution by any notified society u/s. 69A (4) does not arise as the Fund itself is not established. No material is placed by the respondents to show if such 'Fund' is established at all. Entire reliance was placed at the hearing on the affidavit of one Bhatwadekar filed in this writ petition and Writ Petition No. 181 of 1980. Bhatwadekar is an Officer of the Maharashtra State Co-operative Bank Ltd. The affidavit does show that the Maharashtra State Co-operative Bank Ltd. is notified as an Apex society by the State Government for this purpose u/s. 69A (3) of the Act on 17-5-1979. The State Level Caderisation Committee at its meeting held on 13-11-1979 passed a resolution to change the name of the account open-

ed by them on 14-1-1979 in this very Maharashtra State Co-operative Bank Ltd., from 'State Caderisation Fund' to 'Co-operative State Cadre Employment Fund'. The name of the account has accordingly been changed by the Bank in pursuance of the said resolution. The Maharashtra State Co-operative Bank Ltd. now possesses dual capacity of being a Banker and also supposed opener of the account as an Apex Society. This is liable to add to the complexity of the question. The Bank appears to have conveyed its reluctance to operate as an Apex Society. By a resolution dated 27-2-1980 the Government has now put an end to the State level Caderisation Committee. We were informed at the Bar that this work now has been entrusted to a Co-operative Society viz. Maharashtra State Level Caderisation Co-operative Society Ltd. specially registered for that purpose on 1-1-1981.

7. Shri C. J. Sawant, the learned Additional Government Pleader relies only on these facts to show that the Fund contemplated u/s. 69A (3) has been established by the Government and it gives rise to the liability of the petitioner-Society and other notified societies to make contribution. Now sub-s. (3) of S. 69A requires the Apex society to 'establish' a Fund, while R. 53B (1) requires such an Apex society to open an account in the name of the Fund. The facts deposed to by the Bhatwadekar do not refer to the Apex society having done anything, after its being so notified on 17-5-1979, for establishing the Fund or opening of any account of the Fund. There is no other material before us to indicate as to in what manner the said Apex Society can be said to have established this Fund and opened the accounts for its purpose and what acts it has performed in this behalf after 17-5-1979.

8. That the Fund was actually established in this connection long back under the Government Resolution dated 2-8-1974 is no answer to the point raised. The Apex Society was obviously not in the picture when actually the Fund was established and an account was opened. A mere change of the name of the account from the 'State Caderisation Fund' to 'Co-operative State Cadre Employment Fund' by itself does not vest the said Fund in the Apex Society nor does it divest the Caderisation Committee thereof. The Apex Bank does not get

any control over the said Fund. The change of the name of the account by itself does not constitute the change in the ownership of the said money lying in the said account of the Bank or furnish an authority to the Apex Society to withdraw money from the said account or the Fund, which still vests in the State Level Caderisation Committee. The Committee has opened the account. It alone can claim to operate it even after the change in its name. What will be the position and what will happen to the authority of the said State Level Caderisation Committee after the formation of the Maharashtra State Co-operative Caderisation Society Ltd. with effect from 1-1-1981 is altogether a different point not relevant for the purpose of this case. These facts may at the most go to show that a Fund i.e. "the Co-operative State Cadre Employment Fund" has been established by the State Level Caderisation Committee. That is a different thing from holding that the Apex Society notified u/s. 69A (3) has established the said Fund.

9. The obligation under sub-s. (4) of S. 69A, if any, of any notified society is to contribute annually to the said 'Fund' and not to any Fund. Dr. Naik and other learned Advocates appearing for the several petitioners in this group of cases appear to us to be right in contending that the Apex Society not having established any such Fund till this date, respondents Nos. 3 and 2 were not competent to call upon the petitioners to make any contribution towards any such non-existing Fund as the petitioners were under no legal obligation to pay or make any contribution to any such Fund. The demand thus being ill-founded is illegal and ineffective and unenforceable against the petitioners on this ground itself.

10. The second contention as to the absence of any benefit of the Fund to the Society raised by Dr. Naik also appears to be well founded. S. 69A (4) casts statutory obligation on the notified societies to contribute to the Fund. Such impost can be justified either as a tax or a fee. No authority can claim any legal sanction under the Constitution to levy any impost without legislative competence and compliance with basic norms. Shri C. J. Sawant, the learned Additional Government Pleader, appearing for the State did not seek to defend this levy as a tax. According to him,

the levy is in the nature of a fee. The legislature no doubt is competent to levy any amount by way of a fee to reimburse the administration of the costs required to meet special services to any class of citizens. It is well settled that legislature can authorize any Government agency to charge fees for certain special services to individuals or class of individuals. The question is, if the society can derive or derives any service or benefit at all in lieu of such contributions.

11. It is true that the State Government has notified the petitioner-society as one of the societies which derives benefit from the State Cadre, directly or indirectly, for the maintenance of which contributions are claimed. The petitioners challenge the correctness of this opinion. The opinion formed by the Government unilaterally by itself cannot be conclusive of the petitioners deriving any such benefit, when the petitioners deny the receipt of any direct or indirect benefit from the Cadre. Dr. Naik emphasised two words — 'directly or indirectly' — in the notification and urged that the use of these words displays in-application of mind and uncertainty if the contemplated benefit is direct or indirect. There is much substance in this contention. All the learned Advocates urged that indirect benefit cannot furnish basis for any levy of fees. It is not necessary to decide in this case if indirect benefit can ever justify the levy of the fees and if proof of direct benefit is indispensable for this purpose. Even if it is assumed that indirect benefit also can justify the levy, it is still necessary to know what such indirect benefit is and what correlation between the contributors and the services claimed to have been rendered in fact exists. Without the existence of such correlation, the levy is liable to be struck down as being legally ineffective.

12. Now under sub-s. (3) of S. 69A, the Fund is to be "utilised for meeting the expenses on the salaries, allowances and other emoluments to be paid to the persons appointed to the Co-operative State Cadre and the other expenditure relating to the Cadre." The correlation must be shown between the services rendered by the Cadre for the maintenance of which the Fund is earmarked, and the payer the petitioner-Society by reference to its business activities. Sub-s. (1) of S. 69A contemplates constitu-

tion of the Co-operative State Cadre of Secretaries for administering (1) primary agricultural credit societies, (2) multipurpose co-operative societies and (3) service co-operative. The benefit of this Cadre is intended also to be extended to some other classes of societies provided the same are so prescribed'. The Cadre is contemplated to be operated and managed by the 'Central Societies' to be so notified by the State Government as detailed in sub-s. (2) of S. 69A.

13. Admittedly the petitioner-Society is not one of the three societies specified in S. 69A (1) nor the petitioner-Society herein is shown to have been so 'prescribed by any notification' for whose administration and management the 'Cadre' is established. Admittedly no person is deputed or even contemplated to be deputed from the rank of the Cadre to the societies notified u/s. 69A (4) including the petitioner-Society. If this be the factual position, the petitioners cannot be said to be the beneficiary of the Cadre and consequently of the Fund and the opinion formed by the Government to that effect cannot but be held, at any rate *prima facie*, to be ill founded.

14. Shri C. J. Sawant drew our attention firstly to S. 111 of the Act, enumerating the purpose for which the society i.e. the Petitioner-Bank is established. He also drew our attention to certain passages from the affidavit of Koranne, an Officer in the Agriculture and Co-operation Department, filed by the State in defence of the levy of contribution as fees, to show how the Fund is intended to maintain the Cadre and how services of the Secretaries deputed from the Cadre to the society specified in S. 69A (1) result in the efficient working of the said societies and how improvement in their working ultimately improves the financial prospects of the societies notified u/s. 69A (4) and thereby benefit them. The deponent makes a distinction between long term loans advanced by the petitioner-society to the agriculturists for "land improvement and production purposes" such as "sinking of wells, installation of oil engines and electric motors, purchase of agricultural implements, lift irrigation schemes and so on" and the short terms loans or production loans advanced to them by the primary credit co-operative societies for carrying on the seasonal opera-

tions in the lands. According to the deponent, the agriculturists can, exploit to the maximum and derive full advantage and benefit of the assets created from out of the loan granted by the petitioner-Society, only, if they are assured of adequate and timely supply of 'production credit' for seasonal agricultural operations like purchase of seeds, fertilizers, pesticides, weeding etc. by the primary credit co-operative societies at village level for the working of whom the Cadre is established. Thus, the Cadre is alleged to be beneficial to the primary credit co-operative societies and the credit advanced by them to the agriculturists is shown to be beneficial to the petitioner-society by making loans advanced by them more productive and ensuring repayment of loans. According to the deponent, "All this results in ensuring that the agriculturists are assured of adequate and timely supply of production credit, without which not only the seasonal agricultural operations would suffer, but the repayment of their instalment of long term loan granted by the petitioner could also be jeopardised."

15. To sum up the case of the State, the efficient management of such primary credit co-operative societies by the Cadre Secretaries enables the agriculturists to get short term loans and consequently better yields from the land and to exploit the long term loans for improvement of the land and its production capacity and their paying capacity ensuring the refund of the instalments of the petitioner-society. This is how the petitioner-society is claimed to have been indirectly benefited from the Cadre for the maintenance of which the petitioner-society is required to contribute in terms of sub-s. (4) of S. 69A.

16. In support of his contention that even such indirect benefits can justify the levy of fees Shri C. J. Sawant drew our attention to the judgment of the Supreme Court in *Kewal Krishan Puri v. State of Punjab* reported in AIR 1980 SC 1008 and the other cases referred to therein. Dr. Naik, Shri M. V. Paranjape, Shri Rana, Shri A. V. Savant and Shri Sali appearing for the petitioners in these groups of cases also relied on the very same judgment in support of their contention that such remote, indirect, benefit relied on in this case can never furnish legal basis for any such fees.

17. In our opinion, the contention of Shri C. J. Sawant is misconceived and farfetched. Firstly, the Cadre personnel is also intended to serve three other categories of societies in the multipurpose and service co-operative and other 'prescribed societies'. No attempt is made to show how large chunk of the Fund spent for their Secretaries can benefit any of the class of notified societies. There is no data to suggest that majority of such personnel is deputed to primary credit societies only. Secondly, though it is true that members of the primary credit co-operative societies and the petitioner-society are agriculturists, there is no basis for assumption that all or any members-debtors of the petitioner-society are necessarily the members of primary credit co-operative societies specified in sub-s. (1) of S. 69A, who alone are the real and direct beneficiaries of this Cadre. Reliance by Shri C. J. Sawant on the averment in cl. (c) of para 3 of Koranne's affidavit saying that, "a substantial majority of them — (agriculturist debtors of the petitioner-society) — are also members of the village primary credit societies and hence are receiving benefit of 'short term credit' from these societies" is not of much assistance as the factual basis thereof is denied in the counter-affidavit of the petitioner-society. Even if it is assumed that majority of the debtors of the petitioner-society are in fact the members of the primary credit societies and as such loan holders therefrom, it does not follow therefrom, (a) that all of them secure short term loans from the primary society or, (b) that the said loans actually go to improve the productivity of the land owned by them and (c) that as a result of the improvement in the productivity of land, their capacity to pay the loan instalments is actually improved and (d) that but for such loan assistance from the primary resource society the debtors of the petitioner-society could not have paid the instalments in time. The loans are advanced by the petitioner-society to the agriculturists on the security of the lands, and the dues of the societies, such as the petitioners, get priority in terms of the Ss. 48A and 120 of the Act. Their claims stand on par with Government dues for priority. Thirdly, and more importantly, incorporated societies have independent identity from their members. The supposed benefit to the mem-

bers cannot be said to be the benefit to the society.

18. To sum up, the Fund is intended to feed the personnel of the Cadre. The Cadre is intended not only for the secretarial work of the primary resource Societies but also for other two categories of the society, payment to whom from the Fund does not at all benefit the Society. Secondly the Cadre may cause benefit to the primary credit societies and not to its share-holders directly. Even if the said members are held to have been benefited indirectly by the Cadre, there is no basis for holding that very same members are members of the petitioner-society. Even if it is assumed that they are such members and consequently the debtors of the petitioner-society are actually benefited indirectly by secretarial services of the primary credit co-operative society, that can never be evidence of the petitioner-society being even indirectly benefited thereby. More importantly, the alleged benefit of improvement in the paying capacity is a nothing but a myth as loans of the petitioner-society are secured and treated statutorily on par with crown dues for priority. The benefit, apart from being too indirect, is too remote and far-fetched and cannot furnish basis for levying any fees and make the petitioner-society liable to contributions. On the basis of the material placed before us, no other conclusion is possible.

19. The question that fell for consideration in Kewal Krishan's case (AIR 1980 SC 1008) (supra) was whether raising of market fee under the provisions of the Punjab Agricultural Produce Markets Act, 1961 as applicable to the State of Punjab and Haryana was justified in the facts and circumstances arising therein. The Judges proceeded on the basis that what was sought to be exacted from the dealers was not tax but was fee. A fee, according to the learned Judges, is defined to be a charge for a special service rendered to individuals by some governmental agency. Raising of the fees was found by the Supreme Court to have unwarranted and no correlation was found to exist between additional services sought to be rendered in lieu of the enhanced fees and the payer of fees by reference to the transaction of sales in dispute. On exhaustive examination of the case law

the learned Judges of the Supreme Court indicated in para 23 at p. 1023 of the report, tests to determine when the fees could be legal and when the same would not. Cl. (3) emphasises how special benefits claimed to have been conferred on the payer of tax must have "a direct, close and reasonable correlation between the licensees and the transactions". Cl. (5) is illustrative of how remote and indirect benefit to the traders can in no sense be a special benefit to them.

20. In our opinion, the following passage from para 46 of the judgment (Kefal Krishan's case) AIR 1980 SC 1008 is illustrative of how the contention raised by Shri C. J. Sawant before us is thoroughly untenable:

".....Similarly, as pointed out in the Mining Act and the factory cases charge of fee from the mine owners in the area or the factory owners in the factory for the purpose of developing and protecting the mines and the factories is a service to the owners. If one were to push the example of a factory beyond the limit of the conception of fee, one could say that the fee charged from the factory owners can be utilised for pushing and augmenting the output of the raw-materials required in the manufacturing process in the factory, it is also a benefit to the factory. Is it reasonably possible to travel as wide as that?"

The learned Judges answered the question in the negative.

21. We do not think it necessary to refer to other cases relied upon by Dr. Naik and other learned Advocates appearing for the petitioners, excepting to the judgment of the Supreme Court in the Indian Mica and Micanite Industries Ltd. v. State of Bihar reported in AIR 1971 SC 1182. The rule framed by the Board of Revenue under the Bihar and Orissa Excise Act, 1915 required every consumer of denatured spirit to obtain a licence for possessing denatured spirit on paying certain amount of fee for such licence. Legality of the fees was challenged in the Supreme Court. The Supreme Court held that, before any levy can be upheld as a fee, a reasonable correlation between the contributions and the services rendered by the Cadre must be proved. In other words, the levy must be proved to be a quid pro quo for the services rendered. The expected correlation is one of a gene-

ral character and not as of arithmetical exactitude. Services of the Government in the matter of supervising and controlling such intoxicating liquors and supplying the raw materials like moleses and coal to the distilleries at cheap rates for manufacturing the alcohol were relied on to justify the licence fee. The Supreme Court upheld the claim of the petitioners and held that no such correlation existed to justify the validity of the fees.

22. In the facts and circumstances of the case the claim made by the Government stand on a still weaker basis. In terms of sub-s. (3) of Section 69A the Fund to which the contribution is required to be made is intended to be utilised for meeting the expenses on the salaries, allowances and other emoluments of the personnel of the Cadre which is not expected to render any services whatsoever to the petitioner-society. Even if any benefit can be held to have been received by the petitioner society in the manner suggested and discussed earlier, the connection between such contributions and the services rendered by the Cadre through the resource societies to the petitioners is too remote to admit of a finding of the existence of the correlation, which is so essential to justify the validity of the claim according to the ratio of the Supreme Court in Kewal Krishan's case (AIR 1980 SC 1008).

23. Third contention of Dr. Naik is that, the quantum of liability is arbitrary and without any rational basis. R. 53A seeks to fix the quantum of contribution payable by the petitioner-society towards the Fund at Sr. No. 3. The petitioner-society's contribution is quantified at Rs. 5 lacs per year. The rule itself does not indicate the basis or the method by which the figure of Rs. 5 lacs is arrived at. The way the amount is worked out and fixed on the face of it smacks of an arbitrary, irrational and unreasonable approach. It is not possible to know why the amount is fixed at Rs. 5 lacs, not Rs. 10 lacs or Rs. 2 lacs. It was open for the State Government to explain and indicate the basis elaborately. The cl. (d) of para 3 of Koranne's affidavit indicates that the amount of Rs. 5 lacs is "insignificant considering the fact that during both 1977-78 and 1978-79 the petitioner-society has made a net profit of over Rs. 2 crores each year." In the absence

of any explanation for making this profit as the basis for this quantum of Rs. 5 lacs and indication of the nexus between the two, the bald statement cannot be accepted to justify the same. There is no indication as to what would happen if there were losses.

24. Shri C. J. Sawant drew our attention to Koranne's affidavit filed in Writ Petition No. 181 of 1980 and the enclosed statement (Ex. 1) therewith. Exhibit 1 does indicate what the total annual expenditure on the caderisation of Secretaries has been from 1977-78 to 1982-83 and how it is sought to be met by collecting contributions from the societies notified to be so beneficiaries thereof. The statement also further indicates as to what amounts are expected, at the rates fixed in the notification dt. 16-7-1979, from each one of the categories of the societies detailed in R. 53A itself. The contribution is levied by reference to the turnover or sale proceeds. Lump sum is levied only for two societies including the petitioner-society. The total expenses seem to have been sought to be apportioned between various categories. There is no explanation for the different basis, rates in different cases, no indication how the quantum of benefit is related to the levy imposed. The lump sum receivable under the said notification from the Maharashtra State Co-operative Bank Ltd. and the Maharashtra State Co-operative Land Development Bank Ltd. (Petitioner society) amounts to Rs. 20 lacs and Rs. 5 lacs per year respectively. According to Shri C. J. Sawant, the amount of contribution due is fixed by the Government in the light of the estimate of its expenses. The costs incurred have been distributed between different categories of societies by reference to turnover etc. without indication of any bars. It is only in respect of two societies that a lump sum amount has been fixed.

25. Section 69 (4) requires the State Government to take into account, (1) the expenditure referred to in sub-sec. (3) viz. total emoluments payable to the personnel of the Cadre; (2) the services likely to be rendered, and (3) the financial condition of the societies or other bodies concerned. There is no explanation how all these factors were actually taken into account. It is a moot point whether the capacity to pay towards fees can be a relevant consideration for

fixing the quantum thereof. Certain observations in the judgment of the Supreme Court in Kewal Krishan's case (AIR 1980 SC 1008) do create a doubt in the relevancy of the capacity to pay. Even if this aspect of the matter is ignored, neither the affidavit in this case nor the affidavit in writ petition No. 181 of 1980 nor the material placed before us indicates in what manner the services likely to be rendered by the Cadre to the petitioner-society were measured or taken into account and which financial condition of the petitioner-society was taken into account for the contemplated apportionment of the expenditure amongst several categories of societies. The contention of Dr. Naik, therefore, that the fixation of the quantum of contribution towards the fund is arbitrary, irrational and unreasonable, in our opinion, deserves to be accepted. The petition deserves to be allowed and the demand notice is liable to be quashed.

26. We accordingly allow the petition, make the rule absolute and quash the impugned notice of demand made by the respondents.

27. The petitioners will get their costs from the respondents.

28. The amount deposited by the Petitioner-society on 23-4-1980 pursuant to the directions of this Court dt. 11-4-1980 be refunded to the petitioner-society.

29. Shri C. J. Sawant orally applies for leave to appeal to the Supreme Court.

P. C. Leave refused.

Operation of the Order stayed for four weeks,

Petition allowed.

AIR 1982 BOMBAY 206

KANADE, J.

Kagal Education Society Ltd., Petitioner v. Shrimant Ajitsinhrao Yeshwantrao Ghatge and others, Respondents.

Special Civil Appln. No. 1412 of 1977, D/- 12-12-1980.

(A) Bombay Tenancy and Agricultural Lands Act (67 of 1948), Secs. 43 and 32 — Tenant in possession of land on Tillers' day — He becomes deemed purchaser on that day u/s. 32 and Sec. 43

BZ/BZ/A398/82/HR/RSK

immediately comes into play — Tenant cannot be said to become purchaser only on payment of entire price and obtaining certificate thereafter u/s. 32-M.

Section 32 of the Tenancy Act, introduced a legal fiction that if the tenant on the land is in possession on April 1, 1957, he will be deemed to be the purchaser or the ownership of the land would stand transferred in favour of the tenant on the tillers' day, free of all encumbrances subsisting thereof on the said day. Sec. 43 comes into play the moment a tenant has become purchaser of the land u/s. 32 or 32F, i. e., it comes into play on tillers' day or on postponed date of purchase of the land u/s. 32F, where the tenant had exercised his right of purchase, as provided u/s. 32F. The view that the tenant becomes a purchaser only on payment of the entire purchase price and obtaining certificate thereafter u/s. 32M is an error apparent on the face of the record. The very legal fiction introduced u/s. 32 will be defeated if it is held that a tenant becomes purchaser on payment of the entire price and obtaining certificate thereafter u/s. 32-M of the Act. If the Legislature had intended to make the tenant absolute owner only on the payment of entire purchase price and obtaining certificate u/s. 32M, then the language of Sec. 43 would have been quite different, the words as found in Sec. 32M would have been inserted. (Paras 10, 12, 13)

(B) Bombay Tenancy and Agricultural Lands Act (67 of 1948), Secs. 32, 32G, 32M, 32P, 43 and 84C — Tenant purchasing land u/s. 32, and, before paying entire price, transferring it in violation of Sec. 43 — Transfer declared invalid u/s. 84C — In circumstances, held, land would vest in Government u/s. 84C (3) and landlord though entitled to balance price, could not claim restoration of possession since tenants purchase was not declared ineffective either u/s. 32G or u/s. 32M.

The tenant, being in possession of the land on tillers' day, became deemed purchaser of the land u/s. 32. After payment of only five instalments, he gifted away the land and thus the land was transferred by the deemed purchaser. The Tahsildar found that the transfer by the tenant purchaser was in contravention of Sec. 43, and, therefore, the said transfer was declared invalid in terms of Sec. 84C.

Held, since the entire price was not paid by the tenant and the transfer by him had been declared ineffective u/s. 43, the land automatically vested in the Government u/s. 84C (3). The landlords could not claim restoration of possession u/s. 32P since the purchase in favour of the tenant was not declared ineffective either u/s. 32G or u/s. 32M. However, the landlords could recover the balance of the purchase price in view of Section 84C (3). (Para 15)

S. M. Mhamane, for Petitioner; N. D. Hombalkar, for Nos. (1 to 4) and R. V. Naik for, Y. R. Naik (for No. 5) for, Respondents W. N. Yande Addl. Govt. Pleader for the State.

ORDER:— A short question involved in this Special Civil Application filed by the petitioner under Art. 227 of the Constitution of India is as to whether the provisions of Sec. 43 r/w. Sec. 84C or Sec. 32 of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as the "Bombay Tenancy Act") would apply to the facts of the present case.

2. Undisputed facts of this case are that the land R. S. No. 95/1 admeasuring 13 acres 33 gunthas situated at village Kagal, District Kolhapur was owned by respondents Nos. 1 to 4 and the same was in possession of one Gopal Krishna Jadhav as a tenant. In the proceeding started u/s. 32G of the B. T. A. L. Act, Gopal Krishna Jadhav was declared as deemed purchaser and the price of the land was fixed at Rs. 2000/-. It was directed that the said amount should be deposited by the tenant in 20 instalments. It appears that the tenant paid only five instalments and ceased to make any further deposits thereafter.

3. The said tenant Gopal Krishna Jadhav since deceased transferred the land in favour of respondent No. 5 under a registered gift-deed, dt. Nov. 29, 1965. It is, therefore, respondents Nos. 1 to 4 — original owners, who filed Tenancy Case No. 80 of 1968 in the Court of the Tahsildar, Kagal, challenging the validity of the said transfer of the land under the gift-deed. The learned Tahsildar, Kagal started inquiry on the basis of the application made by respondents Nos. 1 to 4 and on consideration of the evidence on record held that the transfer effected by the deceased tenant Gopal Krishna Jadhav was in contravention of the provisions of Sec. 43 of the Bombay

Tenancy Act and therefore the said transaction was declared invalid in terms of Sec. 84C of the said Act. The learned Tahsildar by the judgment and order dt. April, 29, 1969 declared that the transfer of the suit land by gift-deed was invalid and the suit land should be vested in the State Government. He further directed that the disposal of the suit land should be made in accordance with the provisions of sub-sec. (4) of Sec. 84-C of the Tenancy Act. From the record of this case, it appears that appeal was filed by the widow of the deceased Gopal Krishna Jadhav, but the said appeal was dismissed. The transferee-respondent No. 5 did not file any appeal. Similarly, the original owners respondents Nos. 1 to 4 also did not file any appeal against the said order. However, respondent Nos. 1 to 4 made a representation to the District Collector, Kolhapur that the land in dispute should be transferred to them as they are agriculturists. By a letter, dt. Feb. 14, 1976, the District Collector's office informed respondents Nos. 1 to 4 that their application is disposed of and filed and they expressed their regret that the land cannot be restored to the original owners. The original owners respondents Nos. 1 to 4 feeling aggrieved by the decision of the District Collector submitted Revision Application to the Maharashtra Revenue Tribunal being No. MRT. KP. 95/76. The said representation made by the original owners was treated as an appeal by the learned Member of the Tribunal without expressing any opinion as to whether the said representation was in the nature of an appeal or otherwise and proceeded with the revision application. Respondents Nos. 1 to 4 in the said revision application inter alia contended that the tenant who was deemed purchaser had not paid the entire purchase price of the land and therefore the sale in favour of the tenant must be declared ineffective and the land must be restored to them under the provisions of Sec. 32P of the Tenancy Act. The landlord's contention seems to have been accepted by the learned Member of the Tribunal. It is observed in the judgment of the Maharashtra Revenue Tribunal that:

"Now, it is not disputed before me that the proceedings started u/s. 32-G had not been finally concluded. In that the entire price was not recovered with the result that certificate u/s. 32-M re-

mained to be granted. Therefore the suit land cannot be said to have been purchased by the tenant within the meaning of Sec. 43 of the Tenancy Act."

It is further observed that:

"It is again not disputed that the proceedings u/s. 84-C were started on an assumption that the suit land was purchased by the tenant but as we have seen, this was not the case and therefore there was no warrant for taking proceeding u/s. 84-C. In that view of the matter, I hold that the proceedings u/s. 84-C were incompetent and the orders whatever might have come to be passed in that regard are a nullity."

4. In the subsequent para of the judgment the learned Member of the Maharashtra Revenue Tribunal further observed that:

"Evidently, the revision application, sought an entirely different redress when they complained against the transfer effected by the tenant. The purport of their complaint obviously was that either the price should be recovered and paid to them failing which action to dispose of the land in accordance with the provisions of Sec. 32-P should be taken. Unfortunately this aspect of the matter was lost sight of. I am therefore constrained to remit the matter to the trial Court for taking suitable action in terms of Sec. 32-K to start with and dispose of the matter according to law."

While making the said observations, the Tribunal was pleased to allow revision application and remitted the case to the trial Court for fresh disposal according to law in the light of the observations made in the judgment with reference to the provisions of Secs. 32K, 32M and 32P of the Act. This order of remand is challenged by the petitioner in this Special Civil Application under Art. 227 of the Constn.

5. It is necessary to mention here that the petitioner is a society by name "Kagal Education Society Ltd." at Kagal to whom the disputed land is allotted, while disposing the same under the provisions of S. 84-C of the Bombay Tenancy Act. The petitioner has constructed some structures on the said land and the society is in actual possession thereof. It is, therefore, the petitioner has challenged the order of remand by the learned Member of the Maharashtra Revenue Tribunal.

6. A short question involved in this Special Civil Application is as to whether the provisions of Sec. 43 of the Bombay Tenancy Act would apply to the admitted facts of this case and consequently the provisions of Sec. 84-C would be attracted for disposal of the land. Sec. 43 lays down as under:—

"43. (1) No land purchased by a tenant under Secs. 32, 32F, 32-I, 32-O, 33-C or 43-ID or sold to any person under section 32P or 64 shall be transferred by sale, gift, exchange, mortgage, lease or assignment or partitioned without the previous sanction of the Collector. Such sanction shall be given by the Collector in such circumstances, and subject to such conditions, as may be prescribed by the State Government:—

Provided that, no such sanction shall be necessary where the land is to be mortgaged in favour of Government or a society registered or deemed to be registered under the Bombay Co-operative Societies Act, 1925, for raising a loan for effecting any improvement of such land.

(2) Any transfer or partition of land in contravention of sub-sec. (1) shall be invalid."

The said section would attract a case where a tenant has purchased the land under the said provisions mentioned in the section. In the instant case, it is not in dispute that Gopal Krishna Jadhav was in actual possession of the disputed land on the Tillers' day i. e. on April 1, 1957 and he became deemed purchaser of the said land on the Tillers' day free of all encumbrances subsisting thereof under the provisions of Sec. 32 of the Tenancy Act. Sec. 32 of the Tenancy Act introduced a legal fiction that if the tenant on the land is in possession on April 1, 1957, he will be deemed to be the purchaser or the ownership of the land would stand transferred in favour of the tenant on the Tillers' day, free of all encumbrances subsisting thereof on the said day. Legally it means effacement of rights of the landlord creating a right of ownership in favour of the tenant. Subsequent provisions of the Tenancy Act such as Sec. 32-G empower the authorities to make an inquiry after due notice to both the landlord and tenant and person interested. Under sub-sec. (3) of Sec. 32-G where any tenant fails to appear or makes a statement

that he is not willing to purchase the land, the Tribunal shall by an order in writing declare that such tenant is not willing to purchase the land and that the purchase is ineffective. If the purchase is declared ineffective as provided by Sec. 32-G (3), the authority under the Act is to start the proceeding u/s. 32-P of the Tenancy Act and dispose of the land as provided therein.

7. The provisions of Sec. 32-K of the Tenancy Act further provide that on the determination of the purchase price payable u/s. 32-H, the tenant-purchaser has to deposit the said price in lump sum or such annual instalments not exceeding twelve with simple interest at the rate of $4\frac{1}{2}$ per cent per annum on or before such dates as may be fixed by the Tribunal and if a tenant-purchaser is unable to deposit with the Tribunal the entire amount of the purchase price in accordance with the order of the Tribunal then certain concessions are provided. S. 32-K (3) provides that if a tenant-purchaser fails to pay the entire amount of the purchase price within the period fixed under the provisions of this section or is in arrears of four instalments where the number of instalments fixed is four or more, and all the instalments in any other case, the amount of the purchase price remaining unpaid and the amount of interest thereon at the rate of $4\frac{1}{2}$ per cent per annum, if any, shall be recoverable by the Tribunal as an arrear of land revenue.

8. Lastly, the provisions of Sec. 32-M of the Tenancy Act provides that the Tribunal shall issue a certificate on depositing the purchase price in lump sum or the last instalment of such price to the tenant in respect of the land and such certificate shall be conclusive evidence of purchase. In any event, if a tenant-purchaser fails to pay the purchase price then under sub-sec. (3) of Sec. 32-K of the Tenancy Act, the Tribunal may declare the purchase to be ineffective and the land shall be disposed of by the Tribunal as provided u/s. 32-P of the Act and the amount, if any, deposited by the tenant-purchaser towards the purchase price of the land, shall be refunded to him.

9. The scheme under the Tenancy Act to make the tenant purchaser of the land has been stated in the provisions of Secs. 32 to 32R. The question in this

case is as to whether the tenant becomes the purchaser on the Tillers' day or he becomes the purchaser when he deposits the entire purchase price of the land or when he obtains certificate u/s. 32-M of the Tenancy Act.

10. Mr. N. D. Hombalkar, the learned Counsel appearing on behalf of Respondents Nos. 1 to 4 contended that unless the entire purchase price is paid by the tenant-purchaser, he cannot be said to have become the purchaser of the land and therefore the provisions of Sec. 43 of the Tenancy Act would not apply. The submission of Mr. Hombalkar cannot be accepted in view of the clear intent of Sec. 43 of the Tenancy Act. Sec. 43 in terms lays down that no land purchased by a tenant u/s. 32 shall be transferred by sale, gift, exchange, mortgage, lease or assignment or partitioned without the previous sanction of the Collector. If the Legislature had intended to make the tenant absolute owner only on the payment of entire purchase price and obtaining certificate u/s. 32-M, then the language of Sec. 43 would have been quite different, the words as found in Sec. 32M would have been inserted. As stated above, a legal fiction has been introduced u/s. 32 itself that a tenant in possession of the land becomes deemed purchaser of that land with all the rights of owner of the land and further provided that the price of such land so determined under the Act be recovered as land revenue.

11. Section 43 prohibits a transfer of such a land of which the tenant has become purchaser u/s. 32. The purpose and intention of the Legislature as disclosed by Sec. 32 is to transfer the ownership of the land to the tenant on the 'Tillers' day and that he should personally cultivate the land and benefit himself by the produce from the said land. Therefore, a restriction has been imposed not to transfer the said land and if such land is transferred and the provisions of Sec. 43 are contravened, then all his rights are defeated and the land is to be taken back from him and the same is to be disposed of in accordance with the provisions of S. 84-C of the Act.

12. What the learned Member of the Maharashtra Revenue Tribunal has held is that the tenant does not become a purchaser till he deposits the entire purchase price. That observation is obvious-

ly an error apparent on the face of record having regard to the contents of the provisions of Sec. 32 of the Act. The very legal fiction introduced u/s. 32 will be defeated if it is held that a tenant becomes purchaser on payment of the entire price and obtaining certificate thereafter u/s. 32-M of the Act.

13. Section 43 of the Tenancy Act shall come into play only in a case where a tenant becomes purchaser of the land u/ss. 32, 32-F. It means after April 1, 1957 i.e. on the 'Tillers' day' or on postponed date of purchase of the land u/s. 32-F, where the tenant had exercised his right of purchase, as provided u/s. 32-F.

14. In the instant case, the deceased Gopal Krishna Jadhav became deemed purchaser on April 1, 1957 and on Nov. 29, 1965 after the payment of only five instalments, he gifted away the land in favour of one Maruti Rama Mali and thus the land was transferred by the deemed purchaser. The said transfer was informed by the landlords themselves to the learned Tahsildar, Kagal, who started inquiry u/s. 43 r. w. Sec. 84-C of the Tenancy Act. It is found by the Tahsildar that the said transfer was invalid and final order was passed that the transfer of the said land was invalid and the land should be vested in the Government and the same should be disposed of by the authorities concerned to the petitioner as provided u/s. 84-C of the Act.

15. In the facts and circumstances of the case I am unable to appreciate as to what purpose the order of remand was passed by the learned Member of the Maharashtra Revenue Tribunal. It is an admitted fact that the purchase of the tenant was not declared ineffective either u/s. 32G or u/s. 32M of the Tenancy Act. If the purchase is not declared ineffective, the provisions of Sec. 32P would not be attracted and the landlord will not be a person entitled to claim restoration of possession of the land. As a matter of fact and law, Respondents Nos. 1 to 4 are only entitled to claim the purchase price because all the rights in respect of the land in dispute are defeated or transferred in favour of the tenant. They cannot claim any right whatsoever in respect of the land except the price thereof. If the entire price is not paid by the tenant and the transfer has been declared ineffective u/s. 43, the land

vests in the Government under sub-s. (3) of Sec. 84-C of the Act and under sub-sec. (4) of S. 84-C, the Mamlatdar shall grant the land on new and impartible tenure and on payment of occupancy price equal to the reasonable price determined under sub-sec. (3) of Sec. 84-C in the prescribed manner so mentioned in the order of priority. Sub-sec. (3) of Sec. 84-C also provides that the land shall be deemed to vest in the State Government free from all encumbrances lawfully subsisting on the date of such vesting, and it shall be disposed of in the manner provided in sub-sec. (4) of S. 84C; the encumbrances shall be paid out of the occupancy price in the manner provided by S. 32Q for the payment of encumbrances out of the purchase price of the sale of land but the right of the holder of such encumbrances to proceed against the person liable for the enforcement of his right in any other manner, shall not be affected. Having regard to the provisions of sub-sec. (3) of S. 84C, it is clear that the right of these landlords are safeguarded and they can recover their encumbrances in the manner provided by sub-sec. (3) of S. 84-C. The landlords have only a right to recover the balance of purchase price and they could not claim any right to restoration of possession of the land because the purchase in favour of the tenant u/s. 32 was never made ineffective u/s. 32G or S. 32M of the Tenancy Act. The view taken by the learned Member of the Maharashtra Revenue Tribunal does not appear to be consistent with the scheme of the Tenancy Act. There was no question of recovery of remaining instalments from the tenant, because he lost all his rights due to illegal transfer of the land in favour of one Maruti Rama Mali.

16. Mr. S. M. Mhamane, the learned Counsel appearing on behalf of the petitioner, submitted that the purchase price has been fixed and the petitioner has deposited the purchase price. Out of the said purchase price, the Mamlatdar is supposed to pay to the original owners respondents Nos. 1 to 4 as provided under sub-sec. (3) of S. 84-C of the Tenancy Act. The landlords cannot claim in the facts and circumstances of the case, any right except the right to recover the balance of the purchase price. Thus, the learned Member of the Maharashtra Revenue Tribunal committed an error apparent on the face of re-

cord in remanding the matter to make fresh inquiry u/ss. 32K, 32M and S. 32P of the Tenancy Act. Therefore, the same order deserves to be quashed.

17. In the result, the order passed by the learned Member of the Maharashtra Revenue Tribunal, dated Mar. 31, 1977 in Tenancy Revision No. MRT. KP. 95/76 is set aside and that of the Tahsildar Kagal, dated April 29, 1969 is restored. Thus the rule is made absolute with costs, Respondents Nos. 1 to 4 to pay the costs of the petitioner.

Ordered accordingly.

AIR 1982 BOMBAY 211

CHANDURKAR AND KOTWAL, JJ.

Mallappa Guruppa Chaugule, Petitioner v. Padmanna Omannna Sajane and others, Respondents.

Special Civil Appln. No. 3138 of 1975, D/- 24-1-1980.

(A) **Bombay Prevention of Fragmentation and Consolidation of Holdings Act (62 of 1947), S. 15A — Preparing draft scheme for consolidation — Notice of enquiry not given to concerned landowner before preparation — Scheme is vitiated.**

A land belonging to a land owner will not be affected by the scheme unless he is personally given notice of the enquiry. This provision is obviously made with a view to safeguard the interest of the land owner so as to enable him to put before the Consolidation Officer all the necessary information in relation to his land and to know his point of view in respect of land which is likely to be allotted to him. It is difficult to imagine how a scheme concerning land belonging to the land owner to whom no notice has been given can really be said to be a scheme properly made in compliance with the statutory provisions of S. 15A at least in so far as it affects him. (Para 11)

(B) **Bombay Prevention of Fragmentation and Consolidation of Holdings Act (62 of 1947), Ss. 32 (1), 19 — Only one day's time granted by Consolidation Officer for communicating objections to draft scheme in violation of S. 19 — This error in procedure creates infirmity in consolidation scheme so as to justify its variation.** (Para 14)

AZ/AZ/A237/82/MBR

Cases Referred: Chronological Paras

(1972) Spl. Civil Appl. No. 1592 of 1971;
D/- 17-4-1972 (Bom), Devappa Palisa
Darure v. Gangubai Satabai Bhau
Darure 9

S. M. Mhamane, for Petitioner; Bhim-
rao N. Naik, (for No. 1) and A. G.
Sabnis, Asst. Govt. Pleader, (for Nos. 2
and 3), for Respondents.

CHANDURKAR, J.:— This petition filed by the original owner of survey No. 145 of village Shedshal, Taluka Shired, District Kolhapur, challenges the action taken by the Settlement Commissioner under S. 32 (1) of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter referred to as "the Act"), where by the original scheme for consolidation which had become final is now sought to be modified by the Settlement Commissioner.

2. In a scheme of consolidation in respect of the village of Mahuli, the petitioner was allotted land bearing revision survey No. 146/1-A and revision survey No. 146/1-B admeasuring 1 hectare 58 ares which constituted Gat No. 622. These fields were originally owned by respondent No. 1 before consolidation. Respondent No. 1 was allotted 1 hectare 56 ares out of revision survey No. 145 which was given Gat No. 23. According to the petitioner, this scheme of consolidation was arrived at on the basis of an agreement between the two parties and this arrangement was, therefore, included in the scheme. The petitioner alleged that a joint statement was made by the parties on 22nd Nov. 1973. The petitioner also claimed that he was put in possession of Gat No. 622 on 31st Mar. 1974.

3. Respondent No. 1 alleging that the petitioner was interfering with his possession of the two survey numbers which, according to the petitioner, were allotted to him under the consolidation scheme, had filed a civil suit for injunction restraining the petitioner from interfering with his possession. No interim injunction was, however, granted to respondent No. 1. He failed to get a relief of injunction even in appeal against the order refusing to grant the injunction. Respondent No. 1 then made an application on 28th May 1974 which is to be found in the record which has been made available to us by the learned Assistant Gov-

ernment Pleader. He has made a grievance in that application against the scheme by which his land was being given to the petitioner and he has stated that no notice was given to him at the time when this arrangement was arrived at. He also further stated that the quality of the land was not taken into account at the time of making the scheme relating to the exchange of the land. He has stated that if an enquiry was made from him about this, he would have given the necessary facts. He further stated that his own land was more fertile and though the area of the land sought to be exchanged between the two parties was the same, he would still be seriously prejudiced because he would lose the land of good quality. According to respondent No. 1, the petitioner was a leader in the village and he was also a panch appointed to help the Consolidation Officer and, therefore, he has managed to take such land for himself as he wanted. It is on this application that the Settlement Commissioner acted after making the necessary enquiry and he has in the exercise of his power under S. 32 (1) of the Act varied the scheme, the effect of this variation being that the land of respondent No. 1 would be restored to him. This variation of the scheme was directed to be published by the Settlement Commissioner on 7th Oct. 1975. The notice dated 7th Oct. 1975 was issued to the Talathi by the Consolidation Officer asking him to publish the variation in the scheme by putting it on the notice board and by beat of drum. One of the reliefs claimed in the present petition is that this notice should be quashed. The petitioner has also prayed that the Settlement Commissioner must be restrained from taking steps for variation of the scheme which was finalised on 19th Mar. 1975.

4. The main challenge to the action taken by the Settlement Commissioner on the application filed by respondent No. 1 is that this action is beyond the powers conferred by S. 32 (1) of the Act. It is contended that merely because respondent No. 1 got land which was less fertile as a result of the scheme and the petitioner was allotted land which is more fertile, the scheme could not be interfered with because such an error is not within the provisions of S. 32 (1) of the Act so as to give jurisdiction to

the Settlement Commissioner to exercise his power under that provision.

5. Before we deal with this contention, we may dispose of two other contentions which have been raised before us. One of the contentions raised is that when arriving at the decision to modify the scheme, the petitioner has not been heard and, therefore, the decision of the Settlement Commissioner to modify the scheme is in violation of the principles of natural justice.

6. Now, the only occasion on which under the law a person can raise an objection to the variation of the scheme is after the proposed amendment is published as contemplated by S. 32 (1) of the Act. S. 32 reads as follows:—

“(1) If after a scheme has come into force it appears to the Settlement Commissioner that the scheme is defective on account of an error (other than that referred to in S. 31A), irregularity or informality the Settlement Commissioner shall publish a draft of such variation in the prescribed manner. The draft variation shall state every amendment proposed to be made in the scheme.

(2) Within one month of the date of publication of the draft variation any person affected thereby may communicate in writing any objection to such variation to the Settlement Commissioner.

(3) After receiving the objections under sub-sec. (2) the Settlement Commissioner may, after making such enquiry as he may think fit, make the variation with or without modification or may not make any variation.

(3A) If the scheme is varied under sub-sec. (3), a notification stating that the scheme has been varied shall be published in the Official Gazette and the scheme so varied shall be published in the prescribed manner in the village or villages concerned.

(4) From the date of the notification stating that the scheme has been varied the variation shall take effect as if it were incorporated in the scheme.”

Under sub-sec. (1) it is provided that if it appears to the Settlement Commissioner after the scheme has come into force that the scheme is defective on account of an error other than the error referred to in S. 31A or irregularity or informality, he shall publish a draft of such variation in the prescribed manner

and the draft variation has to state every amendment proposed to be made in the scheme. S. 31A deals with the power to correct clerical and arithmetical mistakes in the scheme. The error referred to in S. 32 (1) must, therefore, be different in nature from the clerical or arithmetical mistake or error arising from any accidental slip or omission referred to in S. 31A. Then under Section 31 (2) objection can be raised within one month of the date of publication of the draft variation by any person affected by the proposed amendment. These objections are required to be considered by the Settlement Commissioner and there is power given to the Settlement Commissioner to make such enquiry as he thinks fit and then to decide whether he will make a variation with or without modification or whether he will not make any variation at all.

7. The notice dated 7th Oct. 1975 which is now impugned in this petition is the notice requiring the scheme to be published and inviting objections. The petitioner was, therefore, entitled to object to the proposed variation at that stage alone. However, he has come to this Court even before the expiry of the 30 days' period referred to in S. 32 (2), though the record shows that later on he has filed on 26th Oct. 1975 certain objections which admittedly have not been decided possibly because of the pendency of this petition. The grievance that action has been taken by the Settlement Commissioner without hearing him is, therefore, premature because no final decision as contemplated by Section 32 (3) of the Act has been taken.

8. In the petition an averment has been made that respondent No. 1 is associated with one Mr. Ratnappa Kumbhar who was then a Minister for Civil Supplies and that he had threatened the petitioner that he would use good offices of the Minister to secure possession of Gat No. 622. Apart from this averment we are not able to see any material on record which would justify the grievance that the power under S. 32 (1) was exercised as a result of any outside interference as alleged. Indeed, as will be clear later, the case of respondent No. 1 has throughout been that the petitioner was never officially delivered possession of Gat No. 622 and that respondent No. 1 was never dispossessed and in any case, respondent No. 1 claims

never to have taken possession of the substitute land allotted to him in lieu of Gat No. 622.

9. Coming to the main contention whether the Settlement Commissioner was justified in taking action under S. 32 (1) for variation of the scheme, though it was clear that he had not taken any final decision with regard to the proposed variation and really speaking respondent No. 1 was at liberty to canvass the matter before the Settlement Commissioner, since he has already raised objections, what has been urged before us on the authority of a decision of this Court in *Devappa Parisa Darure v. Gangubai Satabai Bhau Darure* (Special Civil Appln. No. 1592 of 1971 decided on 17th Apr. 1972) is that any difference in quality of the land allotted to different persons as a result of a scheme of consolidation did not furnish a ground for variation of the scheme under S. 32 (1) and, therefore, the entire proceedings must be quashed. The Division Bench of this Court has taken the view in the decision above referred to that mere difference in quality of land exchanged cannot be said to be an error or basis for treating the scheme as defective so as to permit the Settlement Commissioner to vary the scheme in exercise of his powers under S. 32 (1) of the Act. It cannot be disputed that having regard to the decision of the Division Bench, if the ground on which the scheme was being varied was that respondent No. 1 had been allotted land of inferior quality, the proceedings for variation of the scheme could not have been validly taken. What is, however, contended by respondent No. 1 both in his application made to the Settlement Commissioner on 28th May 1974 and in the return filed in this petition is that respondent No. 1 was given no notice as contemplated by S. 15A of the Act. It is also his contention that it was not correct that there was at any stage any agreement between the parties and, according to him, he was never in the picture at all when the draft scheme was made. According to the learned Counsel, the draft scheme itself is vitiated for non-compliance with the mandatory statutory requirements in S. 15A. Since the matter now goes to the root of jurisdiction of the authorities to frame the scheme, we are called upon to decide whether the original scheme itself is such that it was

validly brought into being and if it was not validly brought into being, it would be open to the Settlement Commissioner to undo the effect of such a scheme by variation thereof which would only mean that the status quo was being restored.

10. Having gone through the record, we are not satisfied in this case that the original scheme was made and published in compliance with the provisions of the Act. The averment made by the petitioner that the original scheme as a result of which land belonging to respondent No. 1 was allotted to the petitioner with the consent of respondent No. 1 is not only denied by respondent No. 1, but it is negatived by the documents in the original record. The original record relating to this consolidation in question shows that the Consolidation Officer has recorded statements of the villagers. On page 37 of the compilation of the statements among the names of the persons making the statements, at serial No. 4 is the name of respondent No. 1 and at serial No. 3 is the name of the petitioner. These statements state that these persons and the three other persons whose names are recorded therein agree to the formation of the Gat specified in that statement and further agree that these Gats were formed after taking into account the area, land revenue and the production capacity and the quality of the land. It contains a statement that these Gats have thus been made by them and that they are not disadvantageous to anybody and there is no grievance about the fixation of the Gats. The averment made in the petition is that respondent No. 1 is a party to this agreement. The original record, however, shows that while three of the five persons have signed this, respondent No. 1 has not signed. Now, the case of respondent No. 1 is that he was not given notice as required by S. 15A of the Act and that all the proceedings have been taken behind his back.

11. Now, S. 15A of the Act which deals with the procedure for preparation of a scheme and principles to be followed in its preparation reads as follows:—

“(1) The Consolidation Officer shall, after giving due notice to the land owners concerned and the village committee, visit each of the concerned vil-

lages, and shall, in consultation with the village committee, proceed to prepare a scheme for the consolidation of holdings which shall include such statements, records and maps as may be prescribed.

(2) In preparing the scheme, the Consolidation Officer shall have regard to the procedure which the State Government may from time to time prescribe in regard to the number of blocks in which the village lands are to be grouped, the manner of allotting new plots to each owner, the recommendations of the village committee and such other matters as may be prescribed."

A bare reading of the provisions of S. 15A will show that the Consolidation Officer must visit each of the concerned villages and he has to proceed to prepare a scheme in consultation with the village committee for the consolidation of holdings. S. 15A further requires that the Consolidation Officer must give due notice to the land owners concerned and the village committee. S. 15A is no doubt a procedural provision, but it casts an obligation on the Consolidation Officer statutorily to give sufficient notice to the land owners before he visits the village. The visit to the village is intended for the Consolidation Officer to personally collect the necessary data. It is implicit in the provisions of S. 15A that before any scheme is made, the villagers have to be heard. A villager is entitled to put his point of view before the Consolidation Officer as to how his field or land should be dealt with and whether it should be included in the one Gat or the other and further whether any land which is intended to be allotted to him compares favourably with the land which is owned by him and which may as a result of a scheme of consolidation be allotted to some other person. The very basis of the scheme, therefore, is to be prepared by the Consolidation Officer after recording the views of the land owner concerned. It is clear from the provisions of S. 15A that the legislature contemplated that a land belonging to a land owner will not be affected by the scheme unless he is personally given notice of the enquiry. This provision is obviously made with a view to safeguard the interest of the land owner so as to enable him to put before the Consolidation Officer all the necessary information in relation to his land and

to know his point of view in respect of land which is likely to be allotted to him. It is difficult to imagine how a scheme concerning land belonging to the land owner to whom no notice has been given can really be said to be a scheme properly made in compliance with the statutory provisions of S. 15A at least in so far as it affects him. The pre-conditions, therefore, for preparing a draft scheme is individual notice to the land owner and if such notice has not been given, the scheme so far as he is concerned cannot be said to have been made in compliance with the provisions of law. There is nothing on the record to show that any such personal notice was given to respondent No. 1.

12. It also appears to us on perusal of the record that the publication of the draft scheme has not been made according to law. S. 19 of the Act provides that when a scheme of consolidation is ready for publication, the Consolidation Officer shall publish a draft thereof in the prescribed manner in the village or villages concerned and any person likely to be affected by such a scheme may within 30 days of the date of such publication communicate in writing to the Consolidation Officer any objections relating to the draft scheme.

13. An argument was advanced on behalf of the petitioner by Mr. Mhamane that respondent No. 1 has failed to take advantage of this provision and since he has not objected to the draft scheme, his grievance that there is any error in the draft scheme should be rejected.

14. Now, when we go through of this publication, it presents a rather an unusual look. A notice under Rule 14 Form I in the printed form is on record. That notice is dated 1st Feb. 1974. That notice states that the draft scheme is published at the Chawdi on 2nd Feb. 1974 and any person who has any objection to that scheme should submit it on or before 3rd Feb. 1974. S. 19 statutorily provides for a period of 30 days before the scheme is finalised. The original notice shows that the date 3-3-1974 has been altered to 3-2-1974. When we went through the rest of the record, we found that there were two other true copies of this notice certified to be true signed by the Assistant Consolidation Officer, Shirol, where it has expressly been stated that the date for receipt of objec-

tion is 3-2-74. These true copies are also on the printed forms where blanks have been filled up. Now, if this is the state of the record, the only inference that we can draw is that assuming that the scheme was published on 2nd Feb. only one day's time has been granted by the Consolidation Officer for the necessary objections. This is itself in utter violation of the statutory provisions of Section 19. The record, therefore, discloses serious lapses on the part of the Consolidation Officer, which have clearly affected the rights of respondent No. 1. It is not necessary for us to go into the contentions raised by Mr. Naik appearing on behalf of respondent No. 1 that the petitioner was himself a member of the village committee appointed to assist the Consolidation Officer and he has, therefore, so manipulated consolidation that the land of good quality belonging to respondent No. 1 was allotted to himself. The errors in the procedure which we have pointed out above were, in our view, sufficient to create a serious infirmity in the consolidation scheme so far as at least respondent No. 1 was concerned. If in these circumstances the Settlement Commissioner has thought it fit to exercise his powers under Section 32 (1), it is hardly possible to argue that the exercise of the powers is without jurisdiction.

15. In the view which we have taken, we must dismiss the petition. The petition is, therefore, dismissed with costs. Rule discharged.

Petition dismissed.

AIR 1982 BOMBAY 216

DHARMADHIKARI AND

BHONSALE, JJ.

Hindurao Balwant Patil and another, Petitioners v. Krishnarao Parshuram Patil and others, Respondents.

Writ Petns. Nos. 1791 and 1574 of 1981, D/- 7-7-1981.

Maharashtra Co-operative Societies Act, 1960. (24 of 1961), S. 73G (2) — Removal of Chairman or Vice-Chairman by vote of no confidence — In absence of rule or bye-law Managing Committee has no such inherent or implied power — Such power cannot also be claimed under S. 16 of General Clauses Act — Absence of such power cannot be said

to be violative of Art. 19 (1) (c) of the Constitution, (General Clauses Act (1897), S. 16; Constitution of India, Art. 19 (1) (c).)

Section 73 in specific terms lays down the powers and functions which could be exercised by the members of the board of directors. Apart from the powers and the duties conferred or imposed by the Act, rules and the bye-laws as a member of board of directors, a member has no further right or power. Board of directors is itself a creation of statute. An election held to the said board and the right conferred upon the members to elect office bearers is also a creation of the same statute. The statute has created a right and has also imposed restrictions. The Act, rules and the bye-laws do not confer any right upon the members of the Board of Directors to remove the Chairman and the Vice-Chairman by passing a mere vote of no confidence. Therefore it will not be proper to confer such a wider power upon the board of directors by taking recourse to the doctrine of implied or inherent power.

A right to contest the election and the right to move for setting aside an election or right to recall the person already elected are not common law rights. These rights must be conferred by the statute and therefore can be enforced only in accordance with and subject to the conditions laid down therein by the statute concerned. The right guaranteed by Art. 19 (1) (c) is a fundamental right common to all citizens. It is a right which can be enjoyed by all and everybody. This has no reference to the right conferred or created by a particular statute. (Para 10)

The Co-operative Societies Act has been enacted having regard to the directive principles of the State policy as enshrined in the Constitution of India. Co-operative movement is a socio-economic and moral movement. To say the least it is a part of the scheme of decentralisation and deconcentration of power. Collective power intoxication cannot be equated with co-operation. In the very nature of the said movement it must not be only self-regulated but the constraints and restraints are inherent in the movement itself. The rights conferred or created by the statute are coupled with duty. Fixity of tenure helps proper administration and management of the society. Co-operative move-

ment cannot be permitted to be polluted or choked by internal or individual strike nor it can be permitted to be polluted by party politics. Whenever the legislature thought that a person is not fit to continue as a member of the board, specific provisions are made for his removal. A person is elected as Chairman or Vice-Chairman for a particular term. His office is controlled by the provisions of the Act. It is not an office at will and therefore, to such an office S. 16 of the General Clauses Act cannot apply. AIR 1957 Raj 134 Rel. on. (Para 9)

By importing the doctrine of implied and inherent power or right to recall, the members of the board cannot be permitted to do indirectly what they are not permitted to do directly under any of the provisions of the Act, rules or the bye-laws. Power to recall is not inherent in the electorate. Therefore, in the absence of such a power it was not open to the members of the Board of Directors to remove the Chairman or the Vice-Chairman by passing a mere resolution of vote of no confidence. ILR (1975) Andh Pra 242 Overruling AIR 1972 Andh Pra 349. Rel. on. (Para 18)

Cases Referred: Chronological Paras

AIR 1979 Madh Pra 173	12
AIR 1979 Mad 241	12
AIR 1978 Kant 148 (FB)	12
AIR 1977 SC 2257: 1977 Lab IC	1843
	4, 11
AIR 1976 Andh Pra 340 (FB)	12
ILR (1975) Andh Pra 242	14
(1973) 14 Gui LR 786	3
AIR 1972 Andh Pra 349	14
AIR 1971 SC 966	4, 12
AIR 1971 SC 1737	12
AIR 1968 Delhi 30 (FB)	9
1960 Nag LJ 99: 62 Bom 450	3, 9
AIR 1957 Raj 134	3, 9
(1951) 2 All ER 101: (1951) 2 KB 393:	
(1951) 1 TLR 1105, Manton v. Brighton Corporation	4, 11

In W. P. No. 1791 of 1981, Y. R. Naik, for Petitioners; Caveat and V. P. filed by P. M. Pradhan, for Respondents Nos. 1, 3, 5 and 6 to 10.

In W. P. No. 1574 of 1981, M. V. Paranjape with P. M. Pradhan, for Petitioners; S. G. Deshmukh Asst. Govt. Pleader (for No. 1), Dr. B. R. Naik with Y. R. Naik. (for No. 2) for Respondents.

DHARMADHIKARI, J.:—As in both these petitions, common questions of law and fact are involved, they were heard together and are being

disposed of by this common judgment. Shree Dudhganga Vedganga Sahakari Sakhar Karkhana Limited (hereinafter referred to as the Society) is a registered co-operative society registered under the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as the Act). In the year 1973 the said society was declared as the specified society under Sec. 73G of the Act. On 5-11-1976 the bye-laws of the society were amended.

2. In April 1979 the present board of directors was elected and petitioners Nos. 1 and 2 in writ petition No. 1791 of 1981, i.e. Hindurao and Shankarrao, were elected as Chairman and Vice-Chairman respectively. These elections were held as per the procedure prescribed under Chapter XIA of the Act. On 19th of May 1981 a notice was issued by the Managing Director of the Society to convene a meeting of the Board of Directors on 27th of May 1981 for passing a vote of no confidence against the Chairman and the Vice-Chairman. It appears from the record that on 21st of May 1981 petitioner Shankarrao filed a dispute under Sec. 91 of the Act with the Regional Deputy Director of Sugar, Kolhapur, challenging the notice dated 19-5-1981 issued for convening the meeting for passing a vote of no confidence. In the said dispute the authority concerned did not pass any interim orders. Hence on 27th May 1981 a resolution expressing a vote of no confidence was passed by the majority of the members of the board against the Chairman as well as the Vice-Chairman. On 28th May 1981 the petitioners moved the Regional Deputy Director of Sugar for interim relief. But the said application was rejected and, therefore, the dispute itself was withdrawn as it had become infructuous. Thereafter a notice was issued by the Managing Director of the Society for convening a meeting on 6th of June 1981. Petitioner No. 2 Shankarrao filed a second dispute with the Regional Director of Sugar, Pune obviously under Sec. 91 of the Act praying inter alia for an order of prohibition restraining the Board of Directors from electing a new Chairman and Vice-Chairman. The said dispute was referred to the Co-operative Court No. 2 by the Director of Sugar vide order dated 3rd of June 1981. On 4th June 1981 an ad interim injunction was granted by Co-operative Court and it further directed that a notice should be issued

to the opponents who had filed caveat returnable on 5th June 1981. Thereafter the case was adjourned for 6th June 1981. In the meantime petitioner Shankarrao approached the Co-operative Appellate Court and obtained an ex parte injunction restraining the respondents from holding the meeting. In view of this appellate order, earlier order passed by the Co-operative Court refusing the injunction was kept in suspension. Thereafter the respondents filed a writ petition before this Court bearing writ petition No. 1574 of 1981 and obtained an ex parte stay order on 8th June 1981. On 12 June 1981 petitioner Shankarrao applied for vacating the interim relief. On the statement made by the learned Counsel for the other side that the elections of the Chairman and the Vice-Chairman will not be held, till 16th June, the matter was adjourned. Ultimately when the matter came up before us on 17th June 1981 we admitted the petition and issued rule returnable on 3-7-1981. During the course of the hearing at the admission stage itself both the parties have put in writing the question of law, which is involved in this petition, namely:—

"Whether in the absence of any provision in the Act, rules or the bye-laws of the Society, managing committee can pass a resolution of no confidence against the Chairman and Vice-Chairman before expiry of their term?"

3. The parties also agreed that during the pendency of this petition fresh elections will not be held. Therefore, the only question which requires consideration in these writ petitions is to find out whether in the absence of any provision in the Act, rules or the bye-laws of the Co-operative Society, the managing committee can pass a resolution of no confidence against the Chairman or Vice-Chairman. This is the only question which is argued before us. It is not disputed before us that so far as the present Society is concerned, there is no provision even in the bye-laws which confers a right upon the members of the Managing Committee to pass a no confidence motion against the Chairman and the Vice-Chairman. Dr. Naik, learned Counsel appearing for the Chairman and the Vice-Chairman has contended before us that the Managing Committee is to be elected under Sec. 73G of the Act and under

sub-sec. (2) of the said section, the members of the managing committee have a right to hold the office for a period of five years from the date on which the first meeting is held. The term of the Chairman and the Vice-Chairman is co-extensive with the term of the members of the committee. Since in this case the elections to the managing committee were held in the year 1976 in the absence of any provision to the contrary, the petitioners viz, the Chairman and the Vice-Chairman of the Society have a right to continue in office till expiry of the said term of five years. According to Dr. Naik the bye-laws of the society provide for constitution of the managing committee, including as to how the election of the Chairman and the Vice-Chairman is to be held. Though in the model bye-laws framed by the Co-operative department, a provision is made for passing a vote of no confidence against the Chairman and the Vice-Chairman under bye-law No. 34 (d), the said bye-law was not approved by the Registrar, of the Co-operative Societies so far as the present society is concerned. Therefore, apart from the fact that there is no provision in the bye-laws or the Act or the rules to enable the members of the board to pass a resolution of no confidence against the Chairman or Vice-Chairman, in fact so far as the present society is concerned, though the society initially had framed such a bye-law and had submitted it to the Registrar under Sec. 13 of the Act, the said amendment was not approved by the Registrar. The order passed by the Registrar rejecting the said part of the bye-law is final as the said order was not challenged by any member of the society. Shri Naik further contended that in view of the provisions of Sec. 73 of the Act, the bye-laws framed by the society in this behalf have the force of law or in any case are binding upon its members. Therefore, the said bye-laws are also binding upon the respondents. As in the bye-laws no provision is made for passing a resolution of no confidence against the Chairman and the Vice-Chairman the resolution passed on 27th May 1981 is illegal and ultra vires of the powers of the members of the Board and therefore cannot result in removal of the Chairman or the Vice-Chairman. As the said resolution passed in the meeting D/- 27th May 1981 is ab initio void there is no vacancy so far as the

offices of the Chairman and the Vice-Chairman are concerned, which could be filled in by holding fresh election. In support of his contention, Shri Naik has relied upon the decisions of various High Courts in *Lambha Mandali v. Dist. Registrar, Co-op. Societies* (1973) 14 Guj LR 786; *Kanta Devi v. State of Rajasthan* AIR 1957 Raj 134, *Jahangir Bhikaji v. Corporation of City of Nagpur*, 1960 Nag LJ 99. In substance it is the contention of Shri Naik that in the absence of such a specific provision the members of the Board of Directors have no inherent or implied power to remove the Chairman and the Vice-Chairman by passing a resolution of vote of no confidence.

4. On the other hand, it is contended by Shri Paranjape, learned Counsel appearing for contesting respondents that every citizen has a right to form an association with all the components of this right and the said right with its components is guaranteed by Art. 19 (1) (c) of the Constitution of India, of course subject to permissible limits. As a necessary consequence of this, after formation of association a citizen has a further right to assemble peaceably under Article 19 (1) (b). After assembling a citizen has a further right to discuss, to express his opinion and pass a resolution which will be collective expression of the opinion or the decision of the members present and participating in the discussion. These members can exercise these rights for practising any profession or for carrying on any occupation, trade or business. Right to form an association does not end with mere formation of association. But as a necessary implication of this right citizens have a further right to manage affairs of the association. According to Shri Paranjape all these rights flow from biological evolution of human species as gregarious animal. Man is a social animal and a social being and, therefore apart from the provisions of the Constitution he has a natural right to assemble and to form an association. Shri Paranjape further contended that any provision made in the enactment for the purposes of regulating any of these rights will have to be construed in the background of this natural right and so construed both the sub-sections of S. 73G as well as bye-law 34 (d) merely lays down outer limit, known as a term of office, which will have to be construed to mean, that the elected body

will not continue in office beyond the period of five years and it will not be necessary to hold election or to make appointments earlier. According to Shri Paranjape the term prescribed only prescribes an outer limit and does not control the fundamental right of a citizen guaranteed by Art. 19 (1) (a), (b), (c) and (g) of the Constitution. Shri Paranjape also contended that if the said provisions are not read or construed as contended by him, the restriction incorporated in the said provision will be violative of the members' fundamental right and is not saved by any of the clauses of Art. 19. He also contended that all these provisions will have to be construed in the light of the subject matter of the legislation and the object sought to be achieved. Shri Paranjape has also contended that the members of the Board who have power to elect Chairman and the Vice-Chairman have also an implied and inherent power to remove them by passing a resolution of vote of no confidence, because in the very nature of things if these office bearers are to function properly, they must enjoy confidence of the members of the board. The moment they lose this confidence, they must vacate the office. He has also contended that the members of the Board had an implied right to pass such a resolution because they have a right to elect the office bearers. Thus, the board is appointing authority of the Chairman and the Vice-Chairman and they have an inherent right to remove them on the basis of the principle incorporated in Sec. 16 of the General Clauses Act. In support of his contentions Shri Paranjape has placed reliance upon the decision of the Supreme Court in *M/s. Heckett Engineering Co. v. Their Workmen*, AIR 1977 SC 2257; *Manton v. Brighton Corporation*, (1957) 2 All ER 101 and *Damayanti v. Union of India*, AIR 1971 SC 966.

5. Shri Sawant, learned Additional Government Pleader appearing for the State has supported the contention of Shri Naik viz, that in absence of any provision conferring a power to pass a vote of no confidence, the board of Directors had no power to pass such a resolution and, therefore, the impugned resolution is illegal and void.

6. For properly appreciating the controversy raised before us, it will be worthwhile if a reference is made to some of the relevant provisions of the

Act. From the preamble of the Act it is quite clear that with a view to providing for orderly development of the co-operative movement in the State in accordance with the relevant directive principles of the State policy enunciated in the Constitution of India the said Act was enacted by the State legislature. This Act provides for registration of the Society by making a necessary provision in Chapter II, Sec. 6 of the Act provides for conditions of registration. An application for registration is contemplated by Sec. 8 and then Sec. 9 confers a power upon the Registrar to register the Society together with its bye-laws. Sec. 13 deals with the amendment of the bye-laws. Chapter III deals with the members and their rights and liabilities. Sec. 23 lays down that no society without sufficient cause can refuse admission to a member who is otherwise duly qualified therefor. A right of appeal is also conferred upon an aggrieved person if such an admission is refused and the order of the Registrar in appeal is made final. Sec. 36 deals with incorporation of the society and then in Chapter VII provisions are made for the management of the Societies. Sec. 72 lays down that subject to the provisions of the Act and the Rules, final authority of every society shall vest in the general body of the members. Then comes Sec. 73 which reads as under:—

"73. The management of every society shall vest in a committee, constituted in accordance with the Act, the rules and the bye-laws, which shall exercise such powers and perform such duties as may be conferred or imposed respectively by this Act, the rules and the bye-laws."

Thus it is clear that Supreme Body is the General Body and managing committee can exercise only those powers which are conferred upon it by law.

7. Sec. 73G makes a provision for conduct of elections to the committees, and of officers of specified societies, and the term of office of members of such committees. The said section reads as under:

"73G. (1) The election of the members of the committees and the officers by the committees, of the societies of the categories mentioned below shall be subject to the provisions of Chapter XIA and shall be conducted in the manner laid down by or under that Chapter:—

(i) Such Apex Co-operative Institutions which the State Government may by general or special order published in the Official Gazette, from time to time, specify in this behalf, regard being had to the financial position and share capital of such institution;

(ii) all District Central Co-operative Banks;

(iii) all Primary Land Development Banks;

(iv) (a) all District Co-operative sale and purchase organisations;

(b) all Taluka Co-operative sale and purchase organisations;

(v) all co-operative spinning Mills;

(vii) any other societies or class of societies which the State Government may by general or special order published in the Official Gazette, from time to time, specify in this behalf, regard being had to the financial position and share capital of such institutions.

(2) When the election of all the members of the committee of any such society is held at the same time, the members elected to the committee at such general election shall hold office for a period of five years from the date on which the first meeting is held and shall continue in office until immediately before the first meeting of members of new committee.

(3) Notwithstanding anything in the bye-laws of any such society, only the committee of management shall be elected by a general body of members of the society; and all other committees authorised by or under the bye-laws may be constituted only by electing or appointing of persons from among the persons who are members of the committee of management and all such committees shall be sub-committees of the committee of management and shall be subordinate to it."

8. The bye-laws of the Society provide for the procedure for the election of the Chairman and the Vice-Chairman. Therefore, it is quite clear that the Act is a regulatory piece of legislation which deals with the rights, obligations and duties of the members of the Registered society. In this case we are not concerned with the rights of the members of the Society as such, but we are only concerned with the rights of a member of the Board of Directors. The members of the board of directors are

elected as per the procedure prescribed by Chap. XIA of the Act which was inserted by Maharashtra Act No. XXVII of 1971. The elections are held under the control of the Collector. The Committee referred to in Chap. XIA of the Act is the same as that of the Board of Directors. Therefore, if the relevant provisions of the Act as well as the bye-laws are read with Sec. 73 of the Act, it is quite clear that the Board of Directors is to be constituted in accordance with the Act, Rules and the bye-laws and the said Board of Directors can exercise such powers and perform such duties as may be conferred or imposed respectively by the Act, Rules or the bye-laws. Bye-law 34 of the present society lays down that the Board of Directors will be entitled to elect Chairman and the Vice-Chairman from amongst themselves in the first meeting of the Board. Bye-law 34 (c) also makes a provision for passing of a resolution of vote of no confidence against the Board of Directors by the general body. As already observed the provision made in the model bye-law regarding passing a vote of no confidence against the Chairman and the Vice-Chairman is not incorporated in the bye-laws of the Society. It is neither disputed nor can it be disputed that these bye-laws are binding on the members of the Society. Sec. 73G (2) lays down that the members elected on the committee viz. the board of directors shall hold office for a period of five years. According to Shri Paranjape the persons who have right to elect the Chairman and the Vice-Chairman have got inherent or implied power to remove them in case of loss of confidence. In this context he has also placed reliance on the provisions of the General Clauses Act. From the bare reading of the provisions of the General Clauses Act, it is quite clear that Sec. 16 of the Act cannot apply to an elective office. Various provisions of the Act do not prohibit a citizen from exercising his right guaranteed under Art. 19 (1) (c) of the Constitution, nor it prohibits a citizen from assembling or participating in the discussion. Law merely prescribes conditions which must be observed if he wants to become a member of the Society or the board of Directors. Right to stand as a candidate or contest election is not a common law right. It is a special right created by the statute and can only be exercised on the

condition and in the manner laid down or prescribed by the enactment concerned. The Chapter dealing with the fundamental right has no bearing on such a right which is a creation of statute itself. The petitioner has no fundamental right to elect Chairman or Vice-Chairman. That right is a creation of the Act itself. If the right itself is created by the statute, then obviously it is subject to the conditions as laid down by the statute. It is no doubt true that many a time term of the office is prescribed by the statute so as to provide for the outer limit. But at the same time the term of office is also prescribed to give a security of tenure to enable the office bearers to carry on the management of the society effectively and efficiently, in the interest of the society as a whole. If no term is prescribed and the tenure is permitted to be controlled by the whims of the members, then management of the society will become difficult if not impossible. This does not mean that a licence is granted to the office bearers to act in any way they like. Apart from the right to resign from the post, Sec. 78 confers a power coupled with duty, upon the Registrar to remove the committee or its members, if in the opinion of the Registrar the committee of the society or any member of such committee persistently makes a default or is negligent in the performance of his duty or commits any act, which is prejudicial to the interest of the society or disobeys the direction, etc. Section 144-E and R. 58 of the Rules provide for the disqualification for being elected or for being a member of the committee of any specified society. Section 144G also deals with disqualification for failure to lodge accounts of election expenses. This is not the end of the matter. Even bye-law 37 of the bye-laws of the Society provides for the disqualifications for continuing as member of the Board of Directors. A provision is also made by bye-law 34 (c) for passing a vote of no confidence against the whole of the Board of Directors by the general body. Therefore, the legislature in its wisdom has made various provisions for the removal of the members of the Board. Thus, the term of office prescribed by Sec. 73G is not wholly unqualified or unconditional. The legislature has not chosen to make any provision for passing a vote of no confidence against the

Chairman and the Vice-Chairman either in the Act or in the Rules. Such a provision could have been made by the society by framing necessary bye-laws. But in the present case such a provision is not made or to be precise, though suggested the said proposal was turned down by the Registrar by a specific order. Even the provision made in this behalf in the model bye-laws if read as a whole, it is quite clear that the right conferred by the said model bye-law is also conditional one. It prescribes for special majority for passing such a resolution. It also lays down time limit within which such a resolution is to be moved as well as the period of notice for such a meeting.

9. As observed by the Full Bench of the Delhi High Court in *Suraj Prakash v. State of Punjab*, AIR 1968 Delhi 30 (at p. 41):

"Being presumably conscious of the subtle corrupting effect of power, the Legislature has fixed this time limit of three years with a desire to insulate the democratic set-up from power intoxication. History all over the world shows that, again and again, men put in power for temporary periods seek, for some new reasons to retain it. Craving for power is an appetite which grows most with what it feeds upon. It is for this very reason that democracy has in its practical wisdom sought to make its own tenure of power temporary and to hedge its exercise with limitations and restrictions. These elements seem to constitute the essential prerequisites of a true democratic set up. The limitation placed on the life of the members of a municipal Committee seems to be inspired by this democratic instinctive foresight on the part of the legislature."

It cannot be forgotten that the Co-operative Societies Act has been enacted having regard to the directive principles of the State policy as enshrined in the Constitution of India. Co-operative movement is a socio-economic and moral movement. To say the least it is a part of the scheme of decentralisation and deconcentration of power. Collective power intoxication cannot be equated with co-operation. In the very nature of the said movement it must not be only self-regulated but the constraints and restraints are inherent in the movement itself. The rights conferred or created by the statute are coupled with duty. Fixity of tenure helps proper administration

and management of the society. Co-operative movement cannot be permitted to be polluted or choked by internal or individual strike nor it can be permitted to be polluted by party politics. Co-operative capitalism despotism is not co-operation. On the other hand co-operation is a substitute for self interest of an individual or a group of individuals for the benefit of whole community. Therefore, if the society itself while framing and adopting its own code of conduct in the form of bye-laws, which are to be duly approved by the Registrar, has not made any provision for removal of the Chairman and Vice-Chairman by passing a vote of no confidence, it cannot be said that the step taken by the Society or Registrar in that behalf is not a regulatory one nor is in the interest of the society or the general public. The so-called mandate theory cannot be pushed to ridiculous extremes to convert co-operative movement into an arena or akhada of power politics. Whenever the legislature thought that a person is not fit to continue as a member of the board, specific provisions are made for his removal. A person is elected as Chairman or Vice-Chairman for a particular term. His office is controlled by the provisions of the Act. It is not an office at will and therefore, to such an office Section 16 of the General Clauses Act cannot apply. It is not necessary to deal with this aspect of the matter in detail in view of the decision of this Court in *Jehangir Bhikaji v. Corporation of City of Nagpur*, 1960 Nag LJ 99. A similar view seems to have been taken by the Rajasthan High Court in *Kanta Devi v. State of Rajasthan*, AIR 1957 Raj 134.

10. So far as the contentions raised by Shri Paranjape based on the provisions of Art. 19 (1) (c) of the Constitution are concerned, it is not possible for us to accept any of these contentions. In substance it is contended by Shri Paranjape that a person who has a right to form an association and to elect the office-bearers has a component right to remove them in case of loss of confidence. As already observed, the right to contest the election and the right to move for setting aside an election or right to recall the person already elected are not common law rights. These rights must be conferred by the statute and therefore can be enforced only in accordance with and subject to the con-

ditions laid down therein by the statute concerned. The right guaranteed by Art. 19 (1) (c) is a fundamental right common to all citizens. It is a right which can be enjoyed by all and everybody. This has no reference to the right conferred or created by a particular statute. As already observed S. 73 in specific terms lays down the powers and functions which could be exercised by the members of the board of directors. Apart from the powers and the duties conferred or imposed by the Act, rules and the bye-laws on a member of the board of directors, a member has no further right or power. Board of directors is itself a creation of statute. An election held to the said board and the right conferred upon the member to elect office bearers is also a creation of the same statute. The statute has created a right and has also imposed restrictions. The Act, rules and the bye-laws do not confer any right upon the members of the Board of Directors to remove the Chairman and the Vice-Chairman by passing a mere vote of no confidence. Therefore it will not be proper to confer such a wider power upon the board of directors by taking recourse to the doctrine of implied or inherent power.

11. It is no doubt true that in *Manton v. Brighton Corporation*, (1951) 2 All Eng. R. 101 it is held that the term prescribed is an outer limit. But it cannot be forgotten that Sec. 73G not only lays down the term of office but also lays down the time from which it commences as well as its outer limit. Apart from the term of five years, it further lays down that the committee shall continue in office until the new incumbents are elected. The decision in *M/s. Heckett Engineering Co. v. Their Workmen*, AIR 1977 SC 2257 is of little assistance while dealing with the question raised before us, which relates to the elective office created and controlled by the enactment itself.

12. Another decision upon which reliance is placed by Shri Paranjape viz. *Damayanti Naranga v. Union of India*, AIR 1971 SC 966 is also distinguishable and cannot be applied to the facts and circumstances of the present case. In that case the Supreme Court was concerned with the question of involuntary composition of the association viz. foisting members upon an association. The said decision is subsequently distinguished and explain-

ed by the Supreme Court in *D. A. College, Jullunder v. State of Punjab*, AIR 1971 SC 1737. While distinguishing the said decision the Supreme Court has observed as under (at p. 1747):

"A reference has been made to recent case of *Smt. Damayanti Naranga v. Union of India* W. P. No. 91 of 1964, D/-23-2-1971: (AIR 1971 SC 966) that a compulsory affiliation by statute would interfere with the right of association. This argument in our view is untenable because in that case Parliament passed a law under entry 63 of List II of Sch. VII to the Constitution under which a Hindi Sammelan was to be constituted which was to consist of the first members of the Hindi Sammelan registered under the Societies Registration Act and all persons who become members thereof in accordance with the rules in that behalf. This statutory Sammelan was constituted as a body corporate the first members of which were to consist of persons who immediately before the appointed day were life members of the society, had been Presidents of the society or were awarded the Mangla Prasad Paritoshik by the Society. There were also other provisions by which the Hindi Sammelan Society, its constitution as well as its property was affected. In these circumstances it was held that the Act in so far as it interferes with the composition of the Society in constituting the sammelan violated the rights of the original members of the society to form an association guaranteed under Art. 19 (1) (c). No such thing was intended or effected by Sec. 5 of the Act. At any rate the D. A. V. college Trust and Management Society is not being interfered with by any attempt to form an association with the University. We can see no infringement of Art. 19 (1) (c)." In this context reference can usefully be made to the following decisions:

Kamareddy Suryanarayana v. District Co-operative Officer, AIR 1976 Andh Pra 340 (FB), *Peddanaickenpalayam Co-operative Agricultural Bank Ltd. v. Govt. of Tamil Nadu*, AIR 1979 Mad 241; *Brij Gopal Denga v. State of Madhya Pradesh*, AIR 1979 Madh Pra 173 and *H. Puttappa v. State of Karnataka*, AIR 1978 Kant 148 (FB).

13. The posts of Chairman and Vice Chairman are creation of the statute. It's election and power and duties are circumscribed or conditioned by the pro-

visions of the Act, rules and bye-laws. The bye-laws lay down a code of conduct or self-discipline adopted by the Society. Therefore, it cannot be said that only because the members themselves have chosen not to make any provisions for passing a vote of no confidence or have resolved by framing bye-laws that the Chairman and the Vice-Chairman shall continue in office for a specified term subject to the other provisions of the Act, rules or the bye-laws it cannot be said that the fundamental right guaranteed under Art. 19 (1) (c) is being violated in any way. The provisions of the Act, rules and the bye-laws are regulatory in nature and amount to reasonable restrictions in the interest of the society as well as general public.

14. The decision reported in *N. Venkatratnam Naidu v. District Collector, Nellore*, AIR 1972 Andh Pra 349 wherein it was held that there is an inherent right to pass a vote of no confidence, is overruled by the larger Bench of the same High Court in *N. Venkata Narayan v. District Deputy Collector*, ILR (1975) Andh Pra 242 and in our opinion rightly. Therefore it is not necessary to deal with the said decision in detail.

15. However, it was faintly argued by Shri Paranjape that the local authorities or Corporations created by the statutes stand on a different footing, whereas a co-operative society is a voluntary association and, therefore, the principle applicable to the said authorities is not applicable to a body like a co-operative society. In our opinion this contention is also not well founded. The Act contemplates registration of the society. Registration of the society is subject to fulfilment of certain conditions including framing of the bye-laws. After registration such a society is treated a body corporate under Sec. 36 of the Act. Therefore to some extent the society registered under the Act stands on a different footing than an unregistered or an ordinary organisation.

16. It was then contended by Shri Paranjape that if the managing committee is to function properly, the confidence in the Chairman and the Vice-Chairman is a must and the loss of confidence must result in their eviction from the office. In our opinion this is not the whole truth. Whimsical removal

of the office bearers at any time without rhyme or reason is bound to result in uncertainty and if the office bearers have to depend for their tenure solely on the whims of members of the board, then instead of managing the society and its affairs, they will have to spend their whole time in managing the members of the board only. This is hardly in the interest of co-operative movement and, therefore, if for regulating its own affairs by framing necessary bye-laws in its wisdom, the Registrar and the society thought it fit not to make such a provision, then it cannot be said that it is any way bad in law. It is a conscious act of the society as well as the Registrar and is not merely accidental slip or omission. In this context it cannot be forgotten that ultimately the final authority in the matter of management of the society vests in the general body of members and not in the board of directors. By the bye-law 34 (c) the power is conferred upon the general body to pass a vote of no confidence against the board of Directors. There are other provisions in the Act, Rules and the bye-laws dealing with disqualifications and the removal of the members, which are sufficient to protect the society from mismanagement etc.

17. Further an unhampered, unconditional and uncontrolled power to remove office bearers without any rhyme or reason is bound to affect the management and the homogeneity of the society. Therefore, in all modern legislations specific provisions are made for regulating this right to remove the office bearers by passing a vote of no confidence. Such a regulation of rights is also contemplated by the model bye-laws. The amendment to the bye-laws proposed by the society, which was not approved by the Registrar, also provided for a regulatory procedure, including a notice as well as special majority etc. The order passed by the Registrar refusing approval to the proposed amendment to the bye-law has become final and is binding on the respondents who are members of the Society. Now they cannot get over the said finality by importing the doctrine of implied or inherent power though it is open to them to move for the amendment of the bye-laws over again. In the absence of such an amendment they cannot claim any wider, unregulated and uncontrolled right in this behalf. In the absence

of any such power in the bye-laws by necessary implication, it will have to be held that the members of the Board are prohibited and debarred from exercising any such right or power.

18. In this context it cannot be forgotten that the Chairman or the Vice Chairman, though ejected by the members of the Board, become office bearers of the society as a whole after their election. They have a right to continue in office for five years which term is co-extensive with the term of the committee or the board of directors. The enactment itself provides for the removal of the members under certain circumstances only. When law has made specific provision in this behalf, it will not be open to adopt some other procedure to achieve the same object. By importing the doctrine of implied and inherent power or right to recall, the members of the board cannot be permitted to do indirectly what they are not permitted to do directly under any of the provisions of the Act, rules or the bye-laws. Power to recall is not inherent in the electorate. Therefore, in the absence of such a power it was not open to the members of the Board of Directors to remove the Chairman or the Vice Chairman by passing a mere resolution of vote of no confidence. In the result, therefore, the resolution of no confidence passed against the petitioners is set aside, it being ultra vires of the power of the members of the Board. As a necessary consequence of this, the Chairman and the Vice Chairman are entitled to continue in office for the unexpired period of their tenure, obviously subject to the other provisions of the Act, rules and the bye-laws.

19. However, before parting with this case, we might observe that this is a case wherein the meeting for passing the vote of no confidence was already held and the resolution is also passed by the majority of the members of the Board. Thus, the petitioners very well knew that they no longer enjoy the confidence of the Board. In these circumstances the petitioners should well consider whether they should resign from the posts. Moreso in view of the well established conventions of public life as well as of the co-operative movement which is based on mutual trust,

20. In the result, therefore, writ petition No. 1791 of 1981 will have to be allowed. Hence the Rule is made absolute in the said petition. As a necessary consequence of this writ petition No. 1574 of 1981 is liable to be dismissed. Hence the Rule is discharged in the said petition. However, in the circumstances of the case there will be no order as to costs in both these writ petitions.

Order accordingly.

AIR 1982 BOMBAY 225

MASODKAR AND BHARUCHA, JJ.

The State of Maharashtra, Appellant v. Ganpatrao Amritrao Deshpande (deceased by L. Rs.), Respondent.

First Appeal No. 567 of 1976, D/- 23-2-1982.

Land Acquisition Act (1 of 1894), Section 23 (1) — Determination of compensation in respect of land used for non-agricultural purposes and held on restricted tenure governed by Sec. 4 (2) of Bombay Pargana and Kulkarni Watans Abolition Act, 1950, and Govt. Resolution D/- 18-8-1953 — Compensation must only be determined by finding out what a willing purchaser will pay, knowing it to bear the restriction. AIR 1972 Guj 189 (Pt. A), Diss. from. Decision of Jahagirdar and Mody, JJ. in Appeal No. 747 of 1973, D/- 15-9-1981 (Bom) Not Followed in view of earlier decisions in Appeal No. 502 of 1969 D/- 2-9-1976 (Bom) by Kantawala, C. J. and Sawant J. AIR 1981 Bom 439 and AIR 1968 SC 1045. (Bombay Pargana and Kulkarni Watans Abolition Act (60 of 1950), Sec. 4 (2).)

Section 23 (1), firstly, of the Act requires that in determining the amount of compensation to be awarded for land that is acquired its market value at the date of publication of the notification under Sec. 4 shall be taken into consideration. The measure of that market value is what a willing purchaser might reasonably pay for the land. To assess market value resort must be had to well recognised principles of valuation which would be instances of sale of comparable lands situated in the vicinity and the opinions of experts. It is, therefore, not open to the authority determining compensation to reduce the market

CZ/CZ/B233/82/RSK

value of restricted land by some arbitrary proportion arrived at by itself to compensate for the restriction. Nor is it open to the authority determining compensation to fix first the market value of adjoining lands and assess the market value of the restricted land by reducing the market value of the adjoining lands by some arbitrary proportion arrived at by itself. Far less is it open to the authority assessing compensation to find, as the Special Land Acquisition Officer in the present case has done, the market value of the acquired land, to deduct 50% of it for the reason that the respondent had to pay a fine to the government equal to the difference between 50% of its market value and the 'nazarana' already paid because the land was being used for non-agricultural purposes, and to direct that that deducted half should be credited to the government. The function of the Special Land Acquisition Officer is to assess the compensation which, in his opinion, should be allowed for the land acquired it is not to collect 'nazaranas' and fines for the government. (Para 14)

It bears repetition that even for restricted land compensation must only be determined by finding out what a willing purchaser will pay for it, knowing it to bear the restriction. AIR 1972 Guj 189 Dissented from, Decision of Jahagirdar and Mody, JJ. in Appeal No. 747 of 1973, D/- 15-9-1981 (Bom) Not followed in view of earlier decisions in Appeal No. 502 of 1969, D/- 2-9-1976 (Bom) by Kantawala, C. J. and Sawant, J. AIR 1981 Bom 439 and AIR 1968 SC 1045.

(Para 15)

Cases Referred: Chronological Paras
 AIR 1981 Bom 439 11, 13
 (1981) Appeal No. 747 of 1973, D/- 15-9-1981 (Bom) 6, 9
 (1976) Appeal No. 502 of 1969, D/- 2-9-1976 (Bom) 10
 AIR 1972 Guj 189 6, 16
 AIR 1968 SC 1045 6, 7, 12, 13
 (1914) AC 1056:111 LT 952: 83 LJPC 370, Corrie v. MacDermott 6

Smt. C. D. Shenoy, for Appellant;
 M. A. Rane, for Respondent.

BHARUCHA, J.:— By a notification under Section 4 of the Land Acquisition Act (hereinafter called "the said Act") dated 30th November 1961 land admeasuring 6 acres and 68 gunthas and bearing Survey No. 850 of village Nasik

in Nasik district was notified for acquisition for the purposes of the Barhe Vibhag Jungale Kamgar Sahakari Sangh Society. In respect of the said acquisition an award was made on 5th June 1973 by the Special Land Acquisition Officer. The Special Land Acquisition Officer took into consideration various instances of sale in the neighbourhood and, after dividing the land into three belts, formed the opinion that the reasonable market value of these belts would be Rs. 500/- per gunta, Rs. 300/- per gunta and Rs. 200/- per guntha respectively. On the basis of this he concluded that the reasonable market value of the land at the relevant time was Rs. 11,000/- per acre. Under the heading 'Inam Land' in the award the Special Land Acquisition Officer noted that the land under acquisition was Inam land of class V which had been regranted in the name of the 'kabjedar (the respondent) who had paid an amount equal to twenty-six times the assessment of the land. Mutation entry No. 6886 dated 13th August 1965 pertaining to the regrant stood certified in the village records. The land was assessed at the rate of Rs. 7.50. Twenty-six times this amount came to Rs. 195/- out of which Rs. 150/- had been paid as regrant. The land had been regranted for agricultural purposes. The said paragraph went on to state "However, it is found that the land is being used for N. A. purposes since 1952-53, i. e., after abolition of the Inam category of the land. In these circumstances the land owner had to pay nazarana equal to the difference between 50% of the market value and the nazarana already paid. In this case the market value of the land comes to Rs. 72,675/- (Seventy-two thousand six hundred seventy-five only). 50% of this comes to Rs. 36,337.50 (Thirty-six thousand three hundred thirty-seven and paise fifty only). After deduction of the amount of nazarana already paid, i. e., Rs. 150/- (One hundred fifty only) the amount to go to Government as Government interest will be Rs. 36,337.50 (Minus 150/-) (36,187.50) (Thirty-six thousand one hundred eighty-seven and paise fifty only). This amount of Rs. 36,187.50 should be credited to Govt. to proper head of account. The holder should be asked to obtain necessary permission for N. A. use of the land." The award stated that there was

no question of apportionment, there being only one claimant. It also stated that "after deduction of the amount of Government share, the remaining amount should go to the claimant."

2. The respondent filed a reference for enhancement of the compensation awarded under Sec. 18 of the said Act, which was heard by the Joint Judge, Nasik. By his judgment and order dated 30th April 1976 the learned Joint Judge rejected the respondent's claim for enhancement of compensation but declared that he was entitled to the full value of the land. In Para 16 of the judgment the learned Joint Judge stated: "Next point arises for consideration is about the amount of Rs. 36,187.50P ordered to be credited as Government interest. In para 11 of the award it is stated that the land under acquisition was Inam land of Class V and the same is regranted in the name of Kabjedar. There is no dispute that the land has been regranted on old tenure basis to the claimant. It is not pointed out there was a restriction on alienation of the land. I am not shown any provision on behalf of the opponent by which the Government is entitled to the deduction of 50 per cent of the amount of the price of the land, because the land has been used for non-agricultural purposes and it has been regranted to the claimant after abolition of the Inams. In determining the compensation payable for any land under the Land Acquisition Act, the element of non-transferability of the land cannot enter into consideration. The publication of declaration under Sec. 6 as a result of removing all restrictions on the rights of the owner. By necessary implication, it withdraws Inam land from the purview of the grant and consequently lifts the embargo on its transferability. The Inam land stands on the same footing as any freehold land. In my view, therefore, the claimant is entitled to full value of the market price of the acquired land. He is entitled to claim Rs. 36,187.50P, deducted by the Government."

3. It is against the finding of the learned Joint Judge in para 16 of his judgment that this appeal is filed by the State of Maharashtra.

4. Mrs. Shenoy, the learned Assistant Government Pleader, appearing on behalf of the appellant submitted that

the Land Acquisition Officer was justified in concluding that the respondent had to pay the appellants 'nazarana' equal to the difference between 50% of the market value of the said land and the 'nazarana' already paid since the the land was being used for non-agricultural purposes and he was entitled to reduce the market value of the land ascertained by him to this extent, and award only the balance to the respondent. She relied in this behalf upon Sec. 4 of the Bombay Pargana and Kul-karni Watan Abolition Act, 1950, (now referred to as "the said Abolition Act") and upon a Government Resolution of the appellants dated 18th Aug. 1953. Sec. 4 (2) of the said Abolition Act is relevant and provides thus:—

"(2) The occupancy of the land regranted under sub-sec. (1) shall not be transferable or partible by metes and bounds without the previous sanction of the Collector and except on payment of such amount as the State Government may by general or special order determine."

Clause (2) of the said resolution provides that the amount of nazarana to be levied for converting the new tenure of watan lands regranted under the said Sec. 4 into ordinary rayatwari tenure should be equal to 50% of the market value of the land if it was or was intended to be used for a purpose other than agriculture and should be equal to 20 times the assessment if the land was or was intended to be used for agricultural purposes only; provided that if the agricultural use of the land was subsequently changed for a purpose other than agriculture the holder would become liable to pay under Sec. 65 of the Bombay Land Revenue Code a fine equal to the difference between 50% the market value and 20 times the assessable value of the land.

5. The reduction in the market value made by the Collector in the said award would appear to be based upon the said resolution on account of the fact that the land was being used for non-agricultural purposes.

6. Mrs. Shenoy placed reliance upon a judgment of the Supreme Court in *Special Land Acquisition and Rehabilitation Officer v. M. S. Seshagiri Rao*, AIR 1968 SC 1045, upon a judgment of a Division Bench of the Gujarat High

Court in Special Land Acquisition Officer v. Sushilaben Chhaganlal Thakkar AIR 1972 Guj 189, and upon an unreported judgment of a Division Bench of this Court in Appeal No. 747 of 1973 (decided on 15th September 1981 by Jahagirdar and Mody, JJ.). She also placed reliance upon a judgment of the Privy Council in Corrie v. MacDermott 1914 AC 1056; since that judgment pertains to the resumption of land granted by Government under a deed and to the compensation to be paid to the grantee thereon it does not assist us and we do not propose to consider it further.

7. In M. S. Seshagiri Rao's case lands were granted to the respondents by the Government of Mysore upon the condition that the grantees had to surrender the lands to Government without claiming any compensation in the event of the Government requiring the lands for any reason whatsoever. The lands were thereafter acquired under the said Act. The Supreme Court held that the Government was obliged to pay compensation for the acquisition of the lands under the provisions of the said Act, but in assessing the compensation payable to the grantees the existence of the condition which severely restricted their rights could not be ignored. The grantees were entitled to compensation for the lands of which the ownership was vested in them; the measure of that compensation was the market value of the land at the date of the notification and the measure of that market value was what a willing purchaser might pay for the land subject to the option vested in the Government.

8. In the case before the Gujarat High Court land was acquired under the said Act. There was a tenant upon the land who had become its deemed purchaser under Sec. 32 of the Bombay Tenancy and Agricultural Lands Act, 1948. With regard to the valuation of his interest the Land Acquisition Officer adopted this formula: He valued the land as if it were held on old tenure to which the restrictions engrafted by Sec. 43 (1) of the Tenancy Act were not applicable; thereafter he valued the interest of the tenant at 2/3rd of the valuation on the ground that, so far as the tenant was concerned, his land was held on the new tenure created by Sec. 43 (1) of the Tenancy Act which imposed restrictions with regard to sale, gift, ex-

change, mortgage, lease, assignment or partition without payment to the State Government of such amount as it may by general or special order determine. The validity of the formula was challenged before the Gujarat High Court. The court held that it would not be right to value the land at a discount merely by reason of the fact that there was a restriction on its alienation but that principle was of no avail when the court was confronted with a question regarding the valuation of land where its transferability depended on an obligation to pay a sum of money to the Government. The court, therefore, did not agree with the submission made by the tenant's counsel that the Land Acquisition Officer was not right in valuing the new tenure land held by the tenant at 2/3rd of the notional valuation of the old tenure land. The court said it would be contrary to principle to value property which is burdened with the obligation to pay a portion of the sale-price to the State at par with a property which did not carry any such obligation and that it was unable to see any principle in awarding to the owner such property a larger amount as compensation if acquired for a public purpose under the said Act than he would be otherwise entitled to if he sold in the open market.

9. In Appeal No. 747 of 1973 a Division Bench of this court (hereinafter referred to as "the later Division Bench") was concerned with land covered by the Maharashtra Revenue Patels (Abolition of Office) Act, 1962. The relevant section of that enactment is substantially similar to the provisions of Sec. 4 of the said Abolition Act read with the said resolution with which we are here concerned. The land was agricultural land but had been put to non-agricultural use for about six years by the State who had requisitioned it. In the award the claimants were given a price of Rs. 1.50 per sq. ft. but it was reduced by 50% in view of the provisions of the Maharashtra Revenue Patels (Abolition of Office) Act, 1962. In the claimant's reference under Sec. 18 the court arrived at the market price of Rs. 3.75 per sq. ft. but reduced it for the same reason to Rs. 1.80 per sq. ft. The claimants filed an appeal seeking enhancement. The later Division Bench came to the conclusion that the price of

the land, subject to considering the effect of the enactment, was Rs. 4/- per sq. ft. It went on to say that it was obvious that a purchaser would pay only Rs. 2/- per sq. ft. for the land, if it was being transferred subject to the liability of payment of premium to the State under the enactment, when the prevailing value in respect of neighbouring lands which were free from such restriction was Rs. 4/- per sq. ft. It was held that the market value of the land would have to be calculated at the rate of Rs. 2/- per sq. ft. It stated that what had to be valued was the interest in the land; the interest had to be valued subject to a restriction which was capable of being valued in terms of money, and when the monetary value of the restriction was deducted from the market price of surrounding lands which were free from the restriction, the ultimate figure arrived at would be the market price of the acquired land.

10. Mr. Rane on the other hand contended that the reasoning of the Special Land Acquisition Officer in the award was wrong and that the learned Joint Judge was right in not making any deduction and awarding the full market value to the respondent. He placed reliance upon a judgment of the Division Bench of this court (now referred to as "the earlier Division Bench") in Appeal No. 502 of 1969 (decided on 2nd September 1976 by Kantawala, C. J., and Sawant, J.). Para 6 of that judgment needs to be fully reproduced:—

"That takes us to the cross-appeal filed by the State Government. The questions involved in this cross-appeal by the State Government relate to apportionment of compensation and award of solatium. We will proceed on the assumption that one of the terms in the order of re-grant upon the abolition of Jahagirs was that in case the land was converted to N. A. purposes 50% of the price was to be paid to the Government. However, in the present case at no time prior to the making of the award the land was converted to N. A. use. In fact no application was made at any time by the claimant to the Collector or any other Revenue authorities for conversion of his land for N. A. purposes. The restriction or the obligation imposed under the order of re-grant can only be attracted if the claimant wants voluntarily to convert his land to N. A. pur-

poses. If Government by statutory exercise of powers wants to acquire a claimant's land for using it for non-agricultural purposes like construction of a filter house, it cannot be said that the terms of the re-grant would be attracted in such a case. Government after it becomes the owner of the property can use the property in such manner as it likes, but it could not be said that obligation has arisen in view of the terms of the order of regrant because at no time in respect of any portion of the acquired land was any application made by the claimant for its conversion to N. A. purposes. Thus the trial Court was right in setting aside the apportionment made by the Land Acquisition Officer in respect of the amount of compensation. In fact the claimant was entitled to the whole of the amount awarded as compensation by the Land Acquisition Officer."

11. Reliance was also placed by Mr. Rane upon a judgment delivered by one of us (Masodkar, J.) in *State of Maharashtra v. Govindrao Narayanrao Ghorpade*, AIR 1981 Bom 439. The land acquired was Inam land covered by the Bombay Merged Territories Miscellaneous Alienations Abolition Act, 1955. Under Sec. 7 (3) of that Act land was not transferable or partible without the previous sanction of the Collector and except on payment of such amount as the State Government by general or special order determined. The Land Acquisition Officer found that the claimant was not entitled to 1/3rd of the market value of the land and made an award accordingly. The claimant filed a reference and the court held that it was improper to deduct that portion of the market value. Against that order an appeal was preferred to this court. It was held that the first and primary consideration in determining compensation was what the market value of the acquired land, whether or not of unrestricted tenure, was. The court said, "If the market value can be fairly determined of such land there is hardly any scope to deduct any amount from that value so as to compensate the restrictions with regard to transferability. In terms of statutory injunction available in Sec. 23 (1) firstly of the Land Acquisition Act, the claimant is entitled to get the market value of the entire acquired land and nothing less than that."

12. The judgment of the Supreme Court in Seshagiri Rao's case (AIR 1968 SC 1045) cited by Mrs. Shenoy does not advance her case; quite the contrary. It was there held that the measure of the compensation which the grantee of restricted land must get is its market value and the measure of that market value is what a willing purchaser will pay for the land subject to the restriction. This, therefore, expressly enjoins upon the authority ascertaining the compensation payable for restricted land which is acquired to determine what a willing purchaser would pay for it and, necessarily, excludes the deduction of any amount from the market value. It contemplates the determination of the market value of restricted land in the manner in which the market value of land which is subject to no restrictions is ascertained.

13. It appears that before the later Division Bench the judgment in Seshagiri Rao's case (AIR 1968 SC 1045), the earlier Division Bench judgment and the judgment in Govindrao's case (AIR 1981 Bom 439) were not cited. In fact, it would appear from the judgment that no decisions were read to it. It had, therefore, no opportunity to read the decision of the earlier Division Bench that the restriction imposed under an order of regrant was attracted only if the claimant voluntarily converted the land to non-agricultural purposes and to appreciate that to the case before it this dictum applied because the claimant before them had not voluntarily converted his land to non-agricultural purposes but this had been done by the State after requisition. Not having before it the judgment in Seshagiri Rao's case it was also not afforded the opportunity to consider the dictum of the Supreme Court that, even in the case of restricted land, its market value had to be assessed for the purposes of determining compensation and that the measure of that market value was what a willing purchaser would pay for it.

14. Sec. 23 (1), firstly, of the Act requires that in determining the amount of compensation to be awarded for land that is acquired its market value at the date of publication of the notification under Sec. 4 shall be taken into consideration. To use the language of the Supreme Court the measure of that

market value is what a willing purchaser might reasonably pay for the land. To assess market value resort must be had to well recognised principles of valuation which, in the cases we are concerned with, would be instances of sale of comparable lands situated in the vicinity and the opinions of experts. It is, therefore, not open to the authority determining compensation to reduce the market value of restricted land by some arbitrary proportion arrived at by itself to compensate for the restriction. Nor is it open to the authority determining compensation to fix first the market value of adjoining lands and assess the market value of the restricted land by reducing the market value of the adjoining lands by some arbitrary proportion arrived at by itself. Far less is it open to the authority assessing compensation to find, as the Special Land Acquisition Officer in the case before us has done, the market value of the acquired land, to deduct 50% of it for the reason that the respondent had to pay a fine to the appellants equal to the difference between 50% of its market value and the nazarana already paid because the land was being used for non-agricultural purposes, and to direct that that deducted half should be credited to the appellants. The function of the Special Land Acquisition Officer is to assess the compensation which, in his opinion, should be allowed for the land acquired; it is not to collect 'nazaranas' and fines for the appellants.

15. It bears repetition that even for restricted land compensation must only be determined by finding out what a willing purchaser will pay for it, knowing it to bear the restriction.

16. It will be obvious from what we have said that we differ very respectfully from the view expressed by the Gujarat High Court in Special Land Acquisition Officer v. Sushilaben Chhaganlal Thakkar (AIR 1972 Guj 189).

17. There is no merit in the appeal. It is dismissed with costs.

Appeal dismissed.

AIR 1982 BOMBAY 231

MASODKAR, J.

Smt. Rajeshbai and others, Appellants v. Smt. Shantabai, Respondent.

First Appeal No. 633 of 1972, D/- 28-4-1981.

Hindu Marriage Act (25 of 1955), Sections 5 (i), 11 and 25 — Issue as to validity of marriage arising before Civil Court in suit or other proceeding — Can be decided by that Court — Provisions of Act no bar — So also court can in appropriate cases grant relief of maintenance to woman from estate of her deceased husband even on its finding that marriage was void. (Civil P. C (1908), S. 9).

The object of enacting the Hindu Marriage Act, 1955 is to amend and codify the law relating to marriages amongst the Hindus, though no doubt the provisions of that Act provide for the special remedies with regard to specific reliefs through marital courts. It does not follow from the provisions, like S. 11 that when the legality of marriage in any other proceeding is in issue, the same cannot be answered by reference to the provisions of the H. M. Act. On the other hand, as far as the conditions with regard to the Hindu marriages are concerned, S. 5 would be of universal application to all those persons who are subject to it; and with reference to those provisions the validity of any marriage, when in issue, in any collateral proceedings, can well be adjudicated upon. It is only when a special relief of the kind mentioned in S. 11 is being sought so as to annul the marriage solemnised after the commencement of the Act that the special remedial procedure will have to be followed. It will be too narrow a construction to hold that in every case whenever an issue of validity of marriage arises, having reference to the conditions of S. 5, the matter must be referred or the matter must arise only in the special jurisdiction under the H. M. Act. The declaratory parts and the remedial parts of the statute need not be intermixed. It is apparent that some of the provisions of the H. M. Act are definitive and declaratory. These could be applied as and when an occa-

sion arises to apply the same and in any proceedings, Ss. 5, 6 and 7 of the H. M. Act are definitive and declaratory in character and well apply to every marriage amongst the Hindus subject to the Act. Special remedial provisions available in Ss. 9 to 13 of the Act, permitting marital reliefs are not exhaustive nor compulsively universal so as to exclude powers of ordinary civil courts to find out legality of marital relations. When reliefs of the kind mentioned in Ss. 9 to 13 are sought, those provisions are exhaustive and compulsive and exclude the jurisdiction of other courts. Marriage, being a legal relation involving matters of status and title of persons, whenever the same is in issue the definitive provisions will have to be applied. (Para 16)

Section 11 of the H. M. Act itself is in two parts, the first being declaratory while the other remedial in character. It is not a general or universal remedy available to each and everyone related to either of the spouses. Remedial aspect enables either of the spouses to present a petition for declaration and get a decree of nullity with regard to the marriage solemnised in contravention of cls. (i), (iv) and (v) of S. 5. From this, it does not follow that in any other action, the legal validity of marriage cannot be set up. If such a construction is preferred, it would cut down the universal jurisdiction of civil courts to consider matters of civil status and title. If marriage involves matters of civil and legal status and consequent matters of personal and proprietary titles, jurisdiction available to courts cannot be deemed to be excluded. (Para 17)

The effect of the declaratory and definitive provisions in law is that legal results follow provided conditions thereof are satisfied. If the conditions laid down by cls. (i), (iv) and (v) of S. 5 are not satisfied, then, as the first part of S. 11 enacts, the marriage is void ipso jure. The injunctive rule that neither party should have a spouse living at the time of the marriage is enacted to prohibit polygamy and to institute measures of monogamy. Such injunctive character of law can always be set up in any legal proceedings when questions of status and title arise, whether during or after the lifetime of either of the spouses or both. (Para 18)

The competency of Court in such matters being so concluded, the result is inevitable, in that the marriage between Sadashiv (deceased) and Rajeshbai (appellant-defendant) while Sadashiv's first wife Shantabai (respondent-plaintiff) was living at the time of their marriage, is void ipso jure. No doubt, they united by going through the form of marriage as the evidence shows, but mere form does not make it a marriage in law. For the purpose of law, Rajeshbai cannot be treated as "wife" of Sadashiv during his lifetime, nor his "widow" after his death. Both by virtue of status and of law, upon the demise of Sadashiv, Shantabai alone would be "his widow" and as such would succeed to his properties and all interest therein under the provisions of the Hindu Succession Act. (Paras 19, 20)

This conclusion is enough to uphold the decree under appeal, but leave was granted during the course of the hearing of this appeal, which was adjourned from time to time for settlement, to raise the point that under the facts and circumstances of the present case, an absolute decree for possession of the properties left by Sadashiv without providing for the maintenance of Rajeshbai cannot, nor should in fairness, be passed. (Para 21)

About the term 'wife' or 'widow' in the context of Marriage, Succession or Maintenance enactments, the terms undoubtedly are of restrictive legal character. These are by themselves articulate, legal terms and those imply the relation that results from a recognised legal mode of marriage. (Para 26)

But there can be a class of persons who may be called "illegitimate wives or widows" who can be the subject of benefaction of law of maintenance, notwithstanding that eventually their legal status is annulled. Undoubtedly a female spouse united by marriage enters upon a status and is conferred with immediate as well as inchoate rights attached to such status by virtue of her marriage and that is because of the gift and conferment of law. When that status is shaken and found to have no sanction, it does not follow that even the inchoate rights of such person are totally eclipsed. As distinct from succession or inheritance, the right

of maintenance can be treated to be a separate one, the first two arising upon the natural or civil death of the husband, while the latter always available during the lifetime and even depending upon the contingent conditions after the death of the husband. Maintenance thus is a personal right. In its character it can be treated to be a secular right recognised by almost all the systems of personal laws in various degrees and under varying conditions. Though, therefore, for the purpose of the Succession Act and the Maintenance Act the terms "wife" and "widow" would have a restricted articulate legal meaning, that by itself would not be the position when the matter arises for the purpose of providing the measures of sustenance on considerations of justice and fair play involved and basic to all human and social relations. (Para 30)

Because of this, whenever issues of maintenance arise, they raise an intensely human problem. In the present case, Rajeshbai, appellant, was undoubtedly married with Sadashiv by the recognised form of marriage in the prime of her youth. She came to be united in person with Sadashiv and cohabited with him till his death. The other wife, Shantabai, was a consenting party to the union by marriage of Rajeshbai and Sadashiv. Upon the facts and circumstances, and particularly when Sadashiv has left the suit properties it cannot be said that she is not entitled to the claim for maintenance. (Para 31)

It is obvious that had the matter arisen during the lifetime of Sadashiv between Sadashiv and Rajeshbai and the matter would have been under S. 11 of the H. M. Act, Rajeshbai would have been entitled to rely on S. 25 of the H. M. Act so as to claim the relief of maintenance, AIR 1976 Bom 433 Foll. (Para 38)

There is no reason why there should be any change in the principle merely because the proceedings are after the death of Sadashiv. If S. 25 of the H. M. Act conferred a right that right could be worked out even in collateral proceedings if it be correct that the declaration of nullity of such a marriage could be rendered in such proceedings. Therefore, it will have to be found that Rajeshbai is entitled to rely on the principles of S. 25 of the H. M. Act

and to invoke the powers of the Court for making provision for just and fair maintenance. (Para 38)

Cases Referred: Chronological Paras

AIR 1976 Bom 433	29, 30, 38
1976 Mah LJ 82	40
AIR 1962 SC 527: 1963 All LJ 169	39
AIR 1954 Mad 1039	29
(1954) 3 WLR 265: (1954) 2 All ER 638:	
(1954) 2 QB 429, Shaw v. Shaw	32
(1941) 1 KB 706: (1941) 2 All ER 662:	
110 LJ KB 588, Inland Revenue	
Commrs. v. Gaunt.	28
AIR 1928 Oudh 155	27
AIR 1914 Lah 455: 15 Cri LJ 172	27

M. A. Rane for Appellants; K. J. Abhyankar, for Respondent.

JUDGMENT:— This appeal heard at some length raises, as is apparent, some intricate questions of law intermixed with problems of justice and fairness, of legality and of humanity, technical as well as of substance. The controversy centres round the human relations that became recognised by ties of marriage, its legal fallibility and consequential possibilities of avoidance of rights personal and of property. These problems arise this way.

2. Respondent Shantabai filed the present suit seeking reliefs of injunction against the defendants, the present appellants, restraining them from disturbing her possession and enjoyment of the properties and, alternatively, also seeking relief of possession of the properties which may not be found to be in her possession. She also prayed for the partition of C. S. No. 372 and possession of one-third share therein.

3. These reliefs were so claimed on the basis that the plaintiff, Shantabai, was the lawfully married wife of deceased Sadashiv and, upon his death, was entitled to inherit all his properties which are described and set out in the schedules attached to the plaint. It is not in dispute that Dagadu and Mahadu (original defendants Nos. 1 and 2), appellants Nos. 2 and 3, are the two brothers of Sadashiv, all being sons of Bayaji.

4. The common defence of these appellants was one of denial of the title of the plaintiff and an assertion to the effect that as per the caste custom applicable to Maratha community of which the parties were members, during the lifetime of Sadashiv, the plaintiff

was divorced by him and thereafter, Sadashiv had taken Rajeshbai, appellant No. 1, as his wife, who was till his death residing with him as his lawful wife. As the plaintiff was the divorced wife, she was not entitled to any share or any right of possession to the properties of Sadashiv. According to the defence, Rejeshbai was married according to the Hindu religious rites applicable to the community on Nov. 26, 1963 at Nasik and as she was the only lawfully married wife and as such the widow of Sadashiv, she would be entitled to succeed to all the interest of Sadashiv to the exclusion of the divorced wife.

5. The factum of the custom of divorce, as well as of the validity of the marriage of Rajeshbai in its turn were all denied by the plaintiff, the first wife of Sadashiv.

6. After trying the contentious questions between the parties, the trial Court found, upon evidence, that the custom was not established, that there was no divorce given by Sadashiv to Shantabai, that, therefore, though Rajeshbai went through the form of Hindu marriage, her marriage was void and as a result of this, it was the plaintiff who, as the legally married wife and after her husband's death being his widow, was entitled to succeed to the interest and all the properties of Sadashiv. The trial Court found that the properties were in possession of the defendants and, therefore, made a decree directing the defendants to deliver possession of the properties described at serial Nos. 1 to 4 in the schedule attached to the plaint and further made a decree with regard to the one-third share in the house bearing C. S. No. 372. That decree is under challenge in the present appeal.

7. During the course of the hearing of this appeal, Civil Application No. 1639 of 1981 was filed by the appellants' learned counsel raising alternate plea in defence as far as appellant No. 1 Rajeshbai is concerned and that is to the effect that in any case upon the finding that Rajeshbai having gone through the form of marriage and her marriage because of law being declared null and void and for no fault on her part, she would be entitled to the relief of maintenance against the admitted estate of her husband Sadashiv. That application was allowed as the same was not opposed.

8. Therefore, in the appeal there is an additional issue raised at the behest of the appellants as to whether upon the finding that the marriage between Sadashiv and Rajeshbai was void as the earlier marriage between Sadashiv and Shantabai was subsisting, Rajeshbai would or would not be entitled to the maintenance from and against the estate of Sadashiv.

9. All the contentious questions involved in the present appeal were argued with considerable concern by the learned Counsel having regard to all the principles applicable to the controversy.

10. As far as the evidence and the factual findings, are concerned, it does not admit of any doubt that the parties belong to Maratha Patil community that would form part of the residuary class amongst "the Marathas", the other two being the five families and the 96 families (see S. 630 of the Hindu Law by Mulla). Once this finding is supportable, the residuary class would be more or less governed by the principles of customs applicable as such to the Shudras. There is the preponderance of the evidence spoken to by the witnesses examined for the defendants to the effect that in the community to which the parties belong, there exists a long standing, well accepted and ever acted upon custom of divorce. The evidence of Dagadu (D. W. 1) is categorical on this aspect. His caste consciousness is exhibited as of other witnesses as he asserts that he himself and others are from Maratha Patil community and are governed by customs as such. He states that the community has an extant custom of divorce based on mutual consent to be worked out at Caste Panchayats. The cross-examination of Dagadu does not affect the truth of these assertions. He has attended the caste panchayats for divorce right from 1935. Tanaji (D. W. 2) is of 70 years of age. He is of the same community of Maratha. He too asserts that there is a custom of divorce. Waman (D. W. 3), similarly, states that there exists a custom of divorce in similar terms. Arjun (D. W. 4), who is aged 72 years, speaks of customary divorces in the community in similar terms. Pandit (D. W. 6) has divorced his own wife according to the caste

custom. Daulat (D. W. 7) is related to Rajeshbai and is aged about 50 years. He also speaks of the caste custom. Chindha Lala Bachhav (D. W. 8) too in the cross-examination speaks of the custom in the community to have divorce. No doubt, the modality of the divorce spoken to by the witnesses is not uniform, but there is no uncertainty about their evidence on the aspect of existence of custom involving divorces by consent through Caste Panchayats. The custom that is spoken to by all these persons is with regard to the divorce permitted and recognised in the community and they also speak about the instances of the divorces taken by the couples and acted upon and as such recognised in the community. As against this, there is no evidence to show that there does not exist any such custom. Therefore, it is apparent on the basis of the evidence that the findings recorded by the learned trial Judge that there is no custom is unsustainable. The evidence consistently shows that by mutual consent and by calling the panchas customary divorce is extant. Minor variations in the testimony of these witnesses on the aspects of actual working out the customary divorces do not affect the proof of the custom itself.

11. Now, once it is found that in the community to which Sadashiv, Shantabai and Rajeshbai belonged, there could be customary divorce, the more important question is whether actually before Rajeshbai was married with Sadashiv there was in fact a divorce between Sadashiv and Shantabai. The trial Court has given the negative finding on this aspect and the evidence goes to show that finding is well-merited. The evidence does not carry any conviction at all that Shantabai was duly divorced by Sadashiv according to the caste custom. On the other hand, Shantabai's evidence and the photographs produced during the trial, and particularly at Ex. 138, clearly go to show that Shantabai was in the family even after Rajeshbai was married with Sadashiv. The evidence of Shantabai on this aspect is preferable to the contrary evidence coming through the witnesses examined in support of the defence. According to Shantabai, as she was not getting the child, her mother-in-law suggested that Sadashiv should take a second wife and she (Shantabai) agreed to that

suggestion. She states that she never was divorced nor did she agree to put her thumb impression on a stamp paper which Sadashiv wanted her to give. She denies that any Caste Panchayat was held. She states that one notice was published by Sadashiv in "Gavkari" newspaper, but as soon as the notice came to her knowledge, she sent a reply through her lawyer, Mr. Kotnis, and also published the same in newspaper, asserting that there was no divorce. Sadashiv thereafter came and took her to his own house and they were all living together till he died. The photograph at Ex. 138 shows that she is sitting near the head of the dead body of Sadashiv and Rajeshbai is sitting behind her. According to her, Rajeshbai was just brought 2-3 years before his death and was not married at all. The undisputed and proved facts go to show that there is no writing that evidences any divorce. The evidence of the so-called panchas alleged to have been called for the purpose of giving divorce is far from satisfactory. As far as the documentary evidence shows, it is inconsistent with the fact of divorce. As soon as Sadashiv published the notice in the "Gavkari" newspaper, Shantabai denied the fact of divorce. Not only that, but thereafter at the time of the death of Sadashiv, she is very much seen sitting by the side of the head of the deceased Sadashiv. Her evidence on this aspect deserves to be accepted.

12. The evidence on record is indicative that though there is a caste custom under which the consenting parties can take a divorce, it does not go further to establish that actually Shantabai consented to or was actually divorced by Sadashiv. Her marriage with Sadashiv, being not in dispute, continued till he died.

13. The evidence of Rajeshbai goes to show that she was taken in marriage by Sadashiv and all the forms and the rituals necessary for the marriage were gone through. So is the evidence of Daulat who states that Rajeshbai is his sister's daughter. He speaks about the marriage that was performed in the temple of Kala Ram by the Brahmin priest. He speaks about the sacrament of Saptapadi and Homa. This evidence can hardly be doubted. In

fact, Rajeshbai is seen also in the photograph on which reliance is placed by the plaintiff herself. The plaintiff's assertion that she was brought without marriage does not appear to be true nor consistent. Thus, during the lifetime and before the death of Sadashiv, he had married by going through the form of Hindu Marriage with Rajeshbai and till his death, Rajeshbai was residing with him.

14. Under the provisions of the Hindu Marriage Act, which was applicable to the marriage of Rajeshbai, it is obvious that in view of the first subsisting marriage of Sadashiv with Shantabai, the marriage of Sadashiv with Rajeshbai would be void, being in breach of S. 5 (i) of that Act. Such marriage, S. 11 of the H. M. Act declares to be null and void.

15. Two questions were argued by the contesting Counsel in this appeal with regard to the application of Section 5 (i) of the H. M. Act read with S. 11 thereof so as to find out the entitlement of Shantabai to succeed and to possess the property of Sadashiv. It was contended that S. 11 is a remedial section and, therefore, in a suit of the present kind, no declaration can be entered against the marriage of Sadashiv with Rajeshbai, particularly when it is admittedly shown that the plaintiff must have been the consenting party to such a marriage. It is submitted that it is only in special proceedings under the H. M. Act and at the behest of the parties to the marriage that such an issue can arise and can be adjudicated upon. Because there was no annulment of the marriage under S. 11 of the Act, it is contended that Rajeshbai would continue to be "the widow" of Sadashiv and as such entitled to succeed and inherit his properties and she cannot be excluded from possession at the behest of a co-widow.

16. It is difficult to accept any of these propositions. The object of enacting the H. M. Act is to amend and codify the law relating to marriages amongst the Hindus, though no doubt the provisions of that Act provide for the special remedies with regard to specific reliefs through marital courts. It does not follow from the provisions, like S. 11, that when the legality of marriage in any other proceeding is in issue, the same cannot be answered by

reference to the provisions of the H. M. Act. On the other hand, as far as the conditions with regard to the Hindu Marriages are concerned, S. 5 would be of universal application to all those persons who are subject to it, and with reference to those provisions the validity of any marriage, when in issue, in any collateral proceedings, can well be adjudicated upon. It is only when a special relief of the kind mentioned in S. 11 is being sought so as to annul the marriage solemnised after the commencement of the Act that the special remedial procedure will have to be followed. It will be too narrow a construction to hold that in every case whenever an issue of validity of marriage arises, having reference to the conditions of S. 5, the matter must be referred or the matter must arise only in the special jurisdiction under the H. M. Act. The declaratory parts and the remedial parts of the statute need not be intermixed. It is apparent that some of the provisions of the H. M. Act are definitive and declaratory. These could be applied as and when an occasion arises to apply the same and in any proceedings. As far as the marriage is concerned, S. 5 enacts the conditions of the legal Hindu Marriage. S. 6 deals with guardianship in marriage matters and S. 7 deals with ceremonies necessary for performance of a Hindu marriage. All these three sections are definitive and declaratory in character and well apply to every marriage amongst the Hindus subject to the Act. Special remedial provisions available in Ss. 9 to 13 of the Act, permitting marital reliefs, are not exhaustive nor compulsively universal so as to exclude powers of ordinary civil courts to find out legality of marital relations. When reliefs of the kind mentioned in Ss. 9 to 13 are sought, those provisions are exhaustive and compulsive and exclude the jurisdiction of other courts. Marriage, being a legal relation involving matters of status and title of persons, whenever the same is in issue the definitive provisions will have to be applied.

17. It follows that it would be competent in any suit of such a kind to consider whether Rajeshbai was legally married or not with Sadashiv and for that purpose, it is not necessary that during the lifetime of Sadashiv any proceedings under S. 11 should have been re-

sorted to. It may be indicated that Section 11 of the H. M. Act itself is in two parts, the first being declaratory while the other remedial in character. It is not a general or universal remedy available to each and everyone related to either of the spouses. Remedial aspect enables either of the spouses to present a petition for declaration and get a decree of nullity with regard to the marriage solemnised in contravention of Cls. (i), (iv) and (v) of S. 5. From this, it does not follow that in any other action, the legal validity of marriage cannot be set up. If such a construction is preferred, it would cut down the universal jurisdiction of civil courts to consider matters of civil status and title. If marriage involves matters of civil and legal status and consequent matters of personal and proprietary titles, jurisdiction available to courts cannot be deemed to be excluded.

18. The effect of the declaratory and definitive provisions in law is that legal results follow provided conditions thereof are satisfied. In matters of marriage amongst Hindus, if the enacted conditions laid down by cls. (i), (iv) and (v) of S. 5 are not satisfied, then, as the first part of S. 11 enacts, the marriage is void ipso jure. Marriage, no doubt, is a voluntary union of one man with one woman to the exclusion of all others. Alien it is not to law, in public and social interest, to enact compulsive conditions for such a union. The three statutory conditions enacted by S. 5 are of that compulsive nature and unless satisfied do not confer legal validity upon such union of persons by marriage. Such union by marriage even though voluntary but in breach of these conditions is not marriage in the eye of law. It would be null and void from its inception. The injunctive rule that neither party should have a spouse living at the time of the marriage is enacted to prohibit polygamy and to institute measures of monogamy. Enquiry on this aspect cannot ensue on mere ethical notions but has to be strictly legal, that represents public and social interest. Such injunctive character of law can always be set up in any legal proceedings when questions of status and title arise, whether during or after the lifetime of either of the spouses or both. I do not find any impediment either because of any principle or policy

not to permit such issues being raised and adjudicated upon after the death of either or both of the spouses to such a marriage.

19. The competency of Court in such matters being so concluded, the result is inevitable, in that the marriage between Sadashiv and Rajeshbai while Sadashiv's first wife Shantabai was living at the time of their marriage, is void *ipso jure*. No doubt, they united by going through the form of marriage as the evidence shows, but mere form does not make it a marriage in law. For the purpose of law, Rajeshbai cannot be treated as "wife" of Sadashiv during his lifetime, nor his "widow" after his death. 'Wife' denotes a legal and juridical relation resulting from a valid and legal marriage, while "widow" a state after the death of the husband till such person remains unmarried. It is possible to state in the context of the law that the term 'wife' is connotative of the legal as well as the legitimate status. There may be cases where that status is not available to a woman because of injunctive process of law. Though such woman, therefore, might have undergone the formal process of marriage, her status would be that of illegitimate wife. For the purpose of distinction, she can be so termed as "illegitimate wife". Such wife is not conferred with status which is available to a legitimate wife nor has any entitlement as the lawful heir of her husband to take the property under the provisions of the Hindu Succession Act.

20. Both by virtue of status and of law, upon the demise of Sadashiv, Shantabai alone would be "his widow" and as such would succeed to his properties and all interest therein under the provisions of the H. S. Act.

21. This conclusion is enough to uphold the decree under appeal, but, as stated above, leave was granted during the course of the hearing of this appeal, which was adjourned from time to time for settlement, to raise the point that under the facts and circumstances of the present case, an absolute decree for possession of the properties left by Sadashiv without providing for the maintenance of Rajeshbai cannot, nor should in fairness, be passed. Rajeshbai has filed an affidavit seeking to assert that she should be given a place of residence in

4 gunthas of land and a sum of Rs. 300 per month be provided towards other amenities. At the hearing, Shantabai personally appeared along with her Counsel. She showed her willingness to deposit or pay to Rajeshbai a sum of Rs. 20,000/- in full and final settlement of her claim for maintenance against the estate of Sadashiv.

22. Before the orders in this regard are finally made, it is necessary once to advert briefly to the legal position in regard to women who become affected because of such legal declarations about their marriages otherwise solemnly gone through and are left without any succour or help. Indeed, laws' premises in this filed are not adequate nor clear. It may be that advisedly the results are left to the fair discretion of courts.

23. Now, fundamentally in the scheme of Hindu Law and even under the provisions of the codified H. M. Act, the marriage is not a mere matter of contract. Its breach or its failure one may or the other, either because of law or because of the act of the parties, would not, therefore, ordinarily give rise to the claims on the principles available and applicable upon breach of contract. A reference to the legislative history leading to codification of different branches of Hindu Law would show that apart from passing the H. M. Act, Parliament undertook the codification of the H. S. Act, 1956, the Hindu Minority and Guardianship Act, 1956 as well as the Hindu Adoptions and Maintenance Act, 1956. All these independent Acts deal with different subjects and the objectives of these will have to be gathered independently though as part of the same system of Hindu Law. Interpretative approach should of necessity be uniform. Words having reference to legal relations and titles cannot be treated to have different meanings.

24. The first question that arises for consideration is that a person of the type like Rajeshbai, who came to be united with Sadashiv by going through the form of marriage that was later found to be void *de jure*, could at all be considered as having entitlement to inherit or to succeed under any of the provisions of the H. S. Act. The provisions of that Act are made to effectuate legal relations. The order of succession and priorities therein open upon the death of a

Hindu male and are governed by special statutory rules. Consequences, where a Hindu dies and is survived by a female relative specified in Class I of the Schedule, are the part of enacting provisions. The word "widow" in that Class I or in any other part of such law, as is placed in juxtaposition of the other relatives, clearly intends to imply a spouse who was legally married and at the time of the death of her husband was having the same subsisting legal status. A female, whose marriage is void de jure and surviving the death of the husband would not be covered by the term "widow" either in Class I of the Schedule or anywhere such reference occurs. The term "widow", though not defined in express terms, clearly means and implies a female who was united in marriage recognised by law and who survives the husband without remarriage. Dilation by debate of this statutory sense of the word "widow" is neither possible nor permissible nor furthers the object of the Act.

25. Similar and identical phraseology is employed by the H. A. and M. Act and we have words "wife" and "widow" in several places in sections that make Chap. III dealing with the matters of maintenance. It must be observed that S. 21 is not exhaustive of categories of dependants needing measures of maintenance. That is statutory categorisation of dependants for the purpose of application of the Act and enforcement of rights thereunder. In that context cl. (iii) speaks of "his widow" as the dependent of the deceased and qualifies by saying so long as "she does not remarry". That word connotes legitimacy or lawful title to widowhood. That Act does not recognise a relation by marriage which is void de jure and such surviving female, upon the death of her spouse, would not be a relative that can be characterised as "a widow" for the purpose of S. 21 of the Hindu Adoptions and Maintenance Act, 1956 To be a dependant widow within the meaning of that section, a surviving female upon the death of the husband must be shown to have had lawful status of widowhood. Significant it is, that other entries in S. 21 show that illegitimate issues have been included in the categories of dependants. "Illegitimate wife" in the sense I have chosen to use this term to indicate the female who has been mar-

ried but whose marriage is found void cannot be conferred with the status of widowhood. Nor, she can be covered by any other entry in that section as "dependant widow" so as to confer entitlement to have rights of maintenance under the provisions of the Hindu Adoptions and Maintenance Act, 1956.

26. About the term 'wife' or 'widow' in the context of Marriage, Succession or Maintenance enactments, the terms undoubtedly are of restrictive legal character. These are by themselves articulate, legal terms and those imply the relation that results from a recognised legal mode of marriage.

27. No doubt, in the context of penal statute, a term like "wife" was treated to include a mistress, (see *Banwari Lal v. Emperor*, AIR 1914 Lah 455) while it was explained in the context of the Oudh Estates Act (1 of 1869), that the word used in S. 29 of that Act meant "a woman whose husband has died and who has not been married to any other man". (See *Abdul Halim v. Raja Saadat Ali*, AIR 1928 Oudh 155). There, the issue arose in a different context so as to what happens upon the re-marriage of a Mahomedan widow and what would be the legal effects of her entitlement to succeed to the property of the Mahomedan husband. While considering the provisions of S. 29, which used the phrase "widow," the Court observed that the word "widow" indicated a woman who is a widow, that is, whose husband has died and who has not married to any other man. It was further pointed out that the dictionary meaning of the word "widow" is a woman who has lost her husband by death and has not married again. The argument that the expression should also include a woman who was once a widow was repelled. The first case, in my view, does not render any assistance. In fact, being the matter of penal statute, I would hesitate to enlarge upon the scope of the words in such a statute. The second, however, indicates the accepted principle that the word "widow" has to be interpreted in the context of given law.

28. In *Inland Revenue Commrs. v. Gaunt*, (1941) 1 KB 706, the appeal Court was called upon to consider whether the word "wife" used in S. 38 of the English Finance Act of 1938 should extend to the case of a widow and in

the context of the provisions of law, the learned Scott L. J., whose view has received concurrence by other Lords, observed that it was wrong to limit the word "wife" as excluding "the widow" and in the context of the section the word "wife" should extend to the case of a widow. The learned Lords made it clear that in the context of law the word "wife" would include "a widow." This is all indicative as to how once legal status of "wife" is available, the same gets impressed in understanding the word "widow" both being matters of legal status.

29. Then, there are two decisions, one under the provisions of the Madras Hindu Bigamy Prevention and Divorce Act and the other under the provisions of the Hindu Marriage Act. In the case of Sivakami Ammal v. Bangaruswami Reddi, AIR 1954 Mad 1039, the Court found that the word "wife" in Sec. 5 (7) would mean a person who would have been the wife but for the decree of divorce or dissolution passed in the trial Court. In the case of Govindrao v. Anandibai, AIR 1976 Bom 433, the learned single Judge of this Court upheld the claim of a wife, whose marriage was declared null and void by making a decree of nullity, for the maintenance under Sec. 25 of the Hindu Marriage Act. There, the marriage was found void *de jure* and consequent decree followed under Sec. 11 of the Act. The learned Judge found that Sec. 25 of that Act not only provides for a remedy but also confers a right upon such "a wife" and refused to give literal meaning to the word "wife" or "husband" used by that section. In his view:—

"The words 'wife' and 'husband' used in sub-s. (1) of S. 25 of the Act would include within their scope a woman and a man professing the Hindu faith who have gone through a ceremony of marriage which would, in law, have conferred the status of a wife or husband on them but for the provisions of Sec. 11 read with Cls. (i), (iv) and (v) of Sec. 5 of the Act."

30. These decisions are authorities for the proposition that the term "wife" is a juridical term and so also the term "widow." In the context of the given law, the meaning thereof has to be gathered keeping the object of law in view. Primarily, therefore, it would not

be permissible to include in the term "wife" or "widow" that relation which is not recognised by law. However, it is implicit in the judgment of this Court in Govindrao's case (*supra*) that there can be class of persons who, as I propose to call, are "illegitimate wives or widows" who can be the subject of benefaction of law of maintenance, notwithstanding that eventually their legal status is annulled. Undoubtedly a female spouse united by marriage enters upon a status and is conferred with immediate as well as inchoate rights attached to such status by virtue of her marriage and that is because of the gift and conferment of law. When that status is shaken and found to have no sanction, it does not follow that even the inchoate rights of such person are totally eclipsed. As distinct from succession or inheritance, the right of maintenance can be treated to be a separate one, the first two arising upon the natural or civil death of the husband, while the latter always available during the lifetime and even depending upon the contingent conditions after the death of the husband. Maintenance thus is a personal right. In its character it can be treated to be a secular right recognised by almost all the systems of personal laws in various degrees and under varying conditions. Though, therefore, for the purpose of the Succession Act and the Maintenance Act the terms "wife and widow" would have a restricted articulate legal meaning, that by itself would not be the position when the matter arises for the purpose of providing the measures of sustenance on considerations of justice and fair play involved and basic to all human and social relations.

31. Because of this, whenever issues of maintenance arise, they raise an intensely human problem. In the present case, Rajeshbai, appellant No. 1, was undoubtedly married with Sadashiv by the recognised form of marriage in the prime of her youth. She came to be united in person with Sadashiv and cohabited with him till his death. There is clear evidence that the other wife, Shantabai, was a consenting party to the union by marriage of Rajeshbai and Sadashiv. It is equally true that consent does not cure the defect of law, nor can it operate as an estoppel against Shantabai. However, the question is

whether having found that Rajeshbai was an illegitimate wife, who had gone through the form of marriage which is found to be void *de jure*, is she, upon the facts and circumstances, and particularly when Sadashiv has left the suit properties, not entitled to the claim for maintenance? Is it conceivable that although had the matter been under Section 25 of the Hindu Marriage Act she would be entitled to such a maintenance, no such relief can be given by the Court whose aid is sought to recover the properties on the basis that the marriage of Rajeshbai is void *de jure*? Is the Court not possessed of powers to do justice to the parties placed in such situation acting upon the similar principles underlying the provisions of Sec. 25 of the Hindu Marriage Act? Is that such a person who has done everything and surrendered her prime of the youth to be at the mercy of the cold dictates of law and to remain ever unprovided and suffer the pangs of destitution?

32. In the Book by Derrett, "Introduction to Modern Hindu Law," on the analogy of contractual relationship, it is suggested in paras 671 and 672 that upon the failure of such a marriage an award of compensation or damage on the principle that there is a breach of implied warranty assured by the husband should be made and should be treated to be available to Court exercising jurisdiction with regard to marriages. Reading of these paras suggests that this view is mostly impressed by two factors, firstly, of the implied warranty involved in the act of a man who takes a woman as his wife by going through the form of a marriage, which eventually is adjudged as invalid and, secondly, by extension of principles of English Law enunciated by Lord Denning in *Shaw v. Shaw*, (1954) 3 WLR 265, to the effect that this implied involved warranty in the relation of husband and wife could be given effect to by awarding due damages to the wife upon failure of marriage. In that case, the learned Lord was dealing with the cause where the husband and wife lived for 14 years and where, after the death of the husband, it was found that their marriage was not legal because the husband's real wife was alive when the marriage took place. The Court put the matter on the implied term of warranty

undertaken by such a husband as binding on successor. Lord Denning observed:—

"The most important breach of all was at the moment of his death, because when he died she was not his widow as she thought she was That is the breach for which, in my judgment, damages can be recovered."

33. I am afraid that the principles of English Law which treat the marriage as a matter of contract can hardly have applicative force where the legal system regards it not as a contract but as a sacrament. Under Hindu system, right from its Shastric origin, legal marriage upon solemnisation results in the union of two spouses. In such union hardly there is any scope to read a warranty of the kind which could arise when juridically duality of persons is maintained. Historically as well as sociologically, institution of marriage is not on identical par amongst Hindus and other communities.

34. However, that, in my view, cannot be the end result of such cases where the finding is recorded by the competent Court that the marriage is void *de jure*. Firstly, the provisions of the Hindu Adoptions and Maintenance Act, 1956 are not the provisions which can be treated to be exhaustive of matters for awarding maintenance. To the extent the provisions are made there, the same would apply or be operative, but there would arise cases where the matter may arise under the general principles of law regarding the maintenance and the Court would be in a position to grant the same.

35. The measures for maintenance by themselves are secular and social in character. Those aim at avoiding immorality and destitution. Maintenance for juridical purposes has its own pragmatics having relation to the need and necessity to make provisions for securing reasonable bioeconomic as well as biocultural requirements for persons, such as shelter, food, garment and health. In the tenets of Hindu Shastric Law, two principles subserve this need to provide reliefs of maintenance and those emanated firstly from social ethics and secondly because of personal economics. The persons related to each other and dependant as such, could look for such relief by reason of law both on the moral and secular grounds. Subject

to conditions, it was a personal obligation and where there was estate, the rights in maintenance could be worked against the estate; nay, was a charge upon it. The moral or pious obligations mostly arose as personal liabilities, while those against property could be classed as economic or secular ones.

36. The principles of Hindu personal Law have developed in an evolutionary way out of concern for all those subject to it so as to make fair provision against the destitution. There is clear evidence to indicate that the law of maintenance stems out of the secular desire and so as to achieve the social objectives for making bare minimum provision to sustain the members of relatively smaller social groups. Organically and originally the law itself is irreligious. Its fountain spring is humanistic. In its operational field all through, it lays down the permissible categories under its benefaction, which are so entitled either because of the tenets supported by clear public policy or because of the need to subserve the social and individual morality measures for maintenance.

37. Further, it must be kept in view that the institution of property amongst the Hindus is a fine admixture of rights and duties, obligations and liabilities. In fact, it is an intermixture of corpus that is the object and the capacity that is the right or entitlement to it. A Hindu may possess the property and yet it would be limited by moral and civic obligations. One of such recognised obligations inscribed into the property of a Hindu was that of maintenance of dependants. There is no reason to hold that by codification of the laws, this basic concept for providing a sort of social security and having general insurance in favour of dependants has been completely taken away or abrogated by passing of the Hindu Adoptions and Maintenance Act, 1956. Necessity to provide even now may arise out of the premises of that Act and will have to be so worked out.

38. On parity of the principle that prevailed with this Court in *Govindrao v. Anandibai*, AIR 1976 Bom 433, it can be said that even after the Court rendered a decree of nullity under S. 11 of the Hindu Marriage Act, the wife re-

lated by such marriage was treated to be entitled under Sec. 25 of that Act to possess a right to have alimony and maintenance. Thus it is obvious that had the matter arisen during the lifetime of Sadashiv between Sadashiv and Rajeshbai and the matter would have been under S. 11, Rajeshbai would have been entitled to rely on Sec. 25 of the Hindu Marriage Act so as to claim the relief of maintenance. I do not think that only by reason of the fact that the proceedings are after the death of Sadashiv, there should be any change in the principle. If Sec. 25, as has been found by the above decision conferred a right that right could be worked out even in collateral proceedings if it be correct that the declaration of nullity of such a marriage could be rendered in such proceedings. Therefore, it will have to be found that Rajeshbai is entitled to rely on the principles of Sec. 25 of the Hindu Marriage Act and to invoke the powers of the Court for making provisions for just and fair maintenance.

39. Even apart from Sec. 25 of the Hindu Marriage Act, I would think that in such matter the Court possesses the inherent power to make such orders in matters of maintenance as may be necessary so as to meet the ends of justice. The principles underlying Sec. 151 of the Civil P. C. are no more in doubt. Where the need and the circumstances to do justice require, the power to act *ex debito justitiae* exists and can be invoked. That power as is observed by the Supreme Court in *Manoharlal v. Seth Hiralal*, AIR 1962 SC 527, is not conferred on the Court but is inherent in the Court "by virtue of its duty to do justice between the parties before it." The power will not be exercised when there is any express prohibition enacted by any statute nor would it be exercised when the operational field is covered by the terms of the statute or the terms of the Code. It would always be exercised undoubtedly and unfailingly to reach out a just and fair dispensation of justice to the parties before the Court.

40. When Laws' terms are inadequate and lead to loose ends in unfair tracts, the Court can rely on its inherent power to do justice. With changing complexity of human relations and times, everything cannot be provided

by enacted statutes and unfailing as well as just results can be left to be worked out by the Courts possessing such a power. This power has been exercised so as to grant maintenance pendente lite in partition suits. (See *Sushilabai v. Ramcharan*, 1976 Mah LJ 82). Along with this is the holding of the principles enunciated by this Court that under Sec. 25 of the Hindu Marriage Act, the wife whose marriage is void would be entitled as of right to the relief of permanent maintenance once the marriage is annulled by a decree of nullity under Sec. 11. There is no reason to deny similar relief on *pari materia* principle, though strictly the decree is not passed having reference to Sec. 11 of the Hindu Marriage Act. The right recognised by Sec. 25 of the Hindu Marriage Act can clearly be worked out in any civil proceeding subject to consideration of facts and circumstances so as to meet ends of justice by resort to the inherent powers conferred upon the Court by Sec. 151 of the Civil P. C. The statutory references do not indicate that there is any prohibition or any specific provision in this regard. On the other hand, the principle is statutorily recognised that upon a decree being passed for nullifying the marriage as void *de jure*, the Court is possessed with ample power to make orders as to alimony and maintenance. What could, therefore, be available in special proceedings cannot be said to be not available when the same issue is involved collaterally in competent civil proceedings. Strictly, the statutory entitlement of the Court may not apply but having the recognised right and necessity to enforce it, the Court can, in exercise of its inherent powers reach out justice by giving remedial and such salutary reliefs. Justice after all is another name of fairness. It cannot be blind to the facts in a given case and should reach out in its mercy those results which would be necessary to avoid ruinous consequences like economic or moral destitution. Ultimately, having based the relief on Sec. 151 of the C. P. C. with the aid of inherent powers and drawing upon the principles underlying Sec. 25 of the Hindu Marriage Act, it is implicit that before maintenance is granted, the need to grant such must exist as well as the grantee must fulfil the ordinary

conditions, like that of chastity, not being married to any other person and further of not being in a position to maintain herself.

41. Relying on the *pari materia* provisions of Sec. 25 of the Hindu Marriage Act and relying on the inherent powers of the Court to make orders so as to meet the ends of justice, I think, an appropriate order for maintenance in favour of Rajeshbai can be made, though it has to be concluded that in her appeal on other aspects, she cannot but fail.

42. Fairly, Shantabai has come out with an offer to pay Rs. 20,000/- exclusively in full and final settlement of claims for maintenance of Rajeshbai. As stated above, Rajeshbai wants a house to reside and an award of Rs. 300/- per month. The parties are the residents of Malegaon and appear to belong to a middle class agricultural family. The amount of Rs. 20,000/- which is given without any condition, would subserve the need for securing a reasonable accommodation and a reasonable return, which will be enough to provide other amenities.

43. Taking this view, the decree made by the trial Court, though confirmed, is made conditional, in that upon the deposit of Rs. 20,000/- to be paid in a lump sum in full and final settlement of claim for maintenance of Rajeshbai, the plaintiff would recover possession of the properties as are described in the decree made by the trial Court. It is made clear that it is only upon the deposit of Rs. 20,000/- and from that date onwards, if at all the plaintiff wishes to recover any mesne profits, that cause of action for that would arise in her favour. This clarification was necessitated because there had not been any decree nor any cross-objections filed, but the apprehension was expressed that the parties may litigate unnecessarily in that regard.

44. There will be no order as to costs throughout in view of the findings herein.

Ordered accordingly.

AIR 1982 BOMBAY 243**DESHPANDE, C. J. AND REGE, J.**

Rajendra Kumar Sabharwal, Appellant v. Smt. Lila K. Jagtiani and others, Respondents.

Appeal No. 358 of 1979, (In Misc. Petn. No. 1919 of 1979), D/- 16-2-1981.

Maharashtra Co-operative Societies Act (24 of 1961), Sec. 91 — Proceedings by disputant member for eviction of non-disputant occupier of flat — Society whether has cause of action against occupant of flat — Whether relationship of landlord and tenant exists between society and non-member occupant or between member and non-member occupant. (Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 28).

If it is found that the Society as a co-disputant is interested in taking possession of the flat from the non-disputant and see to it that it remains in possession of its own member, the disputant, then the dispute becomes not only between a member and the licensee but also between the Society and its member, on the one side, and the non-disputant member inducted in the flat by disputant member, on the other. These facts found are sufficient to meet the challenge of lack of jurisdiction under S. 91 of the Act. (Para 6)

If the by-laws contemplate that ordinarily the flat should be in possession of its member and if the Society is a party to the proceedings for eviction against such non-tenant for the sake of making the said flat available for the occupation of its member, the Society cannot be said to have no cause of action against the actual occupant of the flat.

(Para 7)

It is well-settled that the members of the Society in such cases are entitled to personal possession of the flats as such members of the Society, and they can claim to remain in possession only in accordance with the by-laws of the Society. Once the co-disputant Society is not claimed to be the landlord by the non-disputant, the question of his being a tenant of the said Society cannot arise. His claim to be a tenant even of disputant member cannot arise as long as the said tenancy is not shown to be with the permission of the Society.

(Para 10)

D. R. Dhanuka with I. S. Khemani. for Appellant; V. K. Punwani with K. N. Mirchandani and A. N. Mirchandani, for Respondents No. 1 and 2.

DESHPANDE C. J.:— The petitioner-appellant is the original non-disputant. A flat in a building belonging to disputant No. 2-Co-operative Society, was held as a member by disputant No. 1. The same was given on leave and licence basis on 1st Oct. 1962. A joint application was made to the Society by disputant No. 1 and the non-disputant for making the latter a nominal member of the Society. By-laws 66, 67 and 68 of the Society prevented a member from leasing out the flat or giving the same on leave and licence basis to any person who is not enrolled first as a nominal member and previous permission for such tenancy or leave and licence agreement is not taken from the Managing Committee of the Society. It is pursuant to these by-laws that the non-disputant appears to have been enrolled as a nominal member of the Society on the joint application of disputant No. 1 and the non-disputant. It is also not in dispute that the Managing Committee did pass a resolution according its permission to allow the disputant No. 1 to enter into a leave and licence agreement with the non-disputant.

2. The present proceedings were initiated by disputant No. 1 in the month of April 1969 against the non-disputant claiming his eviction from the flat and arrears of compensation unpaid till that date and future compensation till the date of vacating the said flat. In the written statement the non-disputant claimed to be a tenant of the said flat and denied his liability to vacate the same. He also contended that the tenancy was created with the permission of the said Society and he was enrolled as a nominal member of the said Society with that view.

3. By his order dated 22nd Aug. 1978 the learned Judge of the 1st Co-operative Court, Bombay, passed an award in favour of the disputants and directed the non-disputant to deliver possession of the said flat to the disputants and also pay arrears of compensation and future compensation till the date of vacating it. The claim also was decreed with costs.

4. Before the award was passed on 22nd Aug. 1978, disputant No. 2-Co-

operative Society, also was impleaded as a co-disputant and for that purpose the plaint raising a dispute was amended with the leave of the Court. An application to that effect was made on 29th Nov. 1973 and the order allowing the same was passed on 22nd Feb. 1974. It also appears that during the pendency of the dispute before the Co-operative Court, by-law 68 (a) was amended. In addition to becoming a nominal member it also became necessary for a licensee nominal member to pay a sum of Rs. 500/- by way of security deposit. According to Mr. Punwani, the learned Advocate appearing for respondents Nos. 1 and 2 the non-disputant was not called upon to pay the said amount of Rs. 500/-, but the 'B' share money was converted into cash and the non-disputant continued to be a nominal member because of his having paid Re. 1/- initially. It is unnecessary to go into this question as the decision thereon does not appear to us to be relevant to the point raised in this case.

5. Against the award of the Co-operative Court, the non-disputant preferred an appeal to the Maharashtra State Co-operative Appellate Court, Bombay. The said appeal was dismissed by the order dated 30th Aug. 1979. The validity of this judgment of the Appellate Court was challenged before a single Judge of this Court in a writ petition on the Original side of this Court. The same was dismissed summarily by the learned single Judge. Hence this appeal under clause 15 of the Letters Patent.

6. We are unable to see any force in this appeal. The contention of Mr. Dhanuka, the learned Advocate for the appellant, is that notwithstanding the amendment of the plaint during the pendency of the dispute before the Co-operative Court in the year 1973 and notwithstanding the impleading of the Co-operative Society as disputant No. 2, the Society has not indicated any interest in the proceedings initiated by disputant No. 1 against the non-disputant or in the possession of the flat for which the proceedings were initiated. Mr. Dhanuka, therefore, contends that the Society being in the circumstances merely an idle party, the dispute essentially remains between member-licensor and the licensee and is not cognizable by the authorities contemplated under Sec. 91

of the Maharashtra Co-operative Societies Act, 1960. Both the trial Court as well as the Appellate Court have held that the said Society became a co-disputant to ensure possession of the flat for its member as occupation by member alone is contemplated under the by-laws of the said Society. It is pertinent to note that the amended plaint indicated how the Society also was interested in evicting the non-disputant and ensure possession of the flat for the occupation by its member. Admittedly, the non-disputant-appellant did not even care to file a written statement and challenge the averments made in that regard. Both the Courts below have accepted the disputants' case to that effect. If it is found that the Society as a co-disputant is interested in taking possession of the flat from the non-disputant and see to it that it remains in possession of its own member, disputant No. 1, then the dispute becomes not only between a member and the licensee but also between the Society and its member, on the one side, and the non-disputant, who admittedly was inducted in the flat by disputant No. 1, on the other. These facts found are sufficient to meet the challenge of lack of jurisdiction under Sec. 91 of the above Act.

7. The contention of Mr. Dhanuka that the Society has no cause of action also is liable to be rejected on the same ground. If the by-laws contemplate that ordinarily the flat should be in possession of its member and if the Society is a party to the proceedings for eviction against such non-tenant for the sake of making the said flat available for the occupation of its member, the Society cannot be said to have no cause of action against the actual occupant of the flat. This contention is, therefore, devoid of any substance.

8. Mr. Dhanuka then contends that the non-disputant continued to occupy the said flat with the previous permission of the Society, and as long as breach of the by-laws is not alleged, the Society or the member cannot claim eviction of the non-disputant-appellant. The underlying assumption that no breach of the by-laws is alleged is based on the contention that the Society has accorded its sanction or permission for inducting the non-disputant as the licensee in the said flat. The assumption is ill-founded. Unfortunately, this point

does not seem to have argued before the fact finding Courts below at all, but the same was sought to be argued before us. There is, however, no dispute about the facts in the present case. There does exist a resolution of the Managing Committee of the Society according to its sanction to disputant No. 1 to enter into leave and licence agreement with the non-disputant. Mr. Dhanuka is right in contending that the said resolution does not contemplate fixing any period during which the leave and licence agreement was to remain effective. It is, however, not in dispute that the first leave and licence agreement was for eleven months. It is open to the fact finding Courts to construe the said resolution of the Managing Committee in the light of the contemporaneous leave and licence agreement and hold that permission was intended to be for the period during which that leave and licence agreement was to operate. Looked at from this point of view, the possession of the non-disputant must be deemed to have been without permission after the expiry of the first eleven months and consequently in breach of by-laws 66 and 67 of the Society the Society was entitled to the possession of the flat on this ground also.

9. It is true that this ground is not spelt out in so many words in the pleadings. Unfortunately, the non-disputant has not cared to file any written statement after the pleadings were amended on impleading the Society as a co-disputant. The case of the Society that it wants possession of the said flat for the occupation of its own member implies also the claim that the person actually in possession such as the non-disputant was remaining in possession in breach of the by-laws.

10. Mr. Dhanuka then strenuously argued that the fact-finding Courts have not applied the test laid down by the Supreme Court to determine the true relationship between the non-disputant-appellant and the disputants-respondents Nos. 1 and 2. We do not think it necessary to go into the larger question as to when the lease agreement can be said to have come into existence and when the agreement turned out to be one of mere leave and licence. Suffice it to note that admittedly the building belongs to a Co-operative Society as also

the flat in dispute therein. The non-disputant does not claim to be a tenant of the Society nor does he claim the Society as his landlord. It is well-settled that the members of the Society in such cases are entitled to personal possession of the flats as such members of the Society, and they can claim to remain in possession only in accordance with the by-laws of the Society. Once the co-disputant Society is not claimed to be the landlord by the non-disputant, the question of his being a tenant of the said Society cannot arise. His claim to be a tenant even of disputant No. 1 cannot arise as long as the said tenancy is not shown to be with the permission of the Society. We have already seen how even the leave and licence agreement lacked previous sanction of the Society subsequent to the expiry of the first leave and licence agreement.

11. There is thus no merit in this appeal and the same is dismissed with costs.

12. Mr. Dhanuka applies for leave to appeal to the Supreme Court. Leave refused.

Appeal dismissed.

AIR 1982 BOMBAY 245

SHARAD MANOHAR, J.

Sau. Kusum Bhimrao Patil and another, Petitioners v. Javahar Lalchand Katariya and another, Respondents.

Writ Petn. No. 201 of 1979, D/- 3-2-1980.

(A) Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947), S. 15 (1) Proviso and Notification issued thereunder — Assignment — Retirement of partner — Mere fact that partnership business vests in continuing partners does not mean that retiring partner has assigned business with stock-in-trade and goodwill thereof in favour of remaining partners. (Partnership Act (1932), S. 32). (Para 14)

(B) Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947), S. 13 (1) (e) — Suit for eviction — Decree for eviction can be passed not only against ex-tenant but also against persons who claim through him. (Para 17)

(C) Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947),

CZ/CZ/B113/82/MBR.

S. 13 (1) (e) — Expression “transferred in any other manner his interest therein” — Unpermitted transfer of possession by tenant in favour of stranger — It is a transfer within meaning of expression and tenant is deemed to have incurred liability of eviction irrespective of fact whether he is contractual tenant or statutory tenant. AIR 1965 SC 414 and AIR 1967 SC 1853, Rel. on. AIR 1979 SC 1745, Explained. (Paras 18, 20, 21, 22A)

(D) Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947), S. 15 (1) Proviso and Notification issued thereunder — Lease deed incorporating specific prohibition against assignment — Neither proviso nor Notification has overriding effect over contractual prohibition. AIR 1980 Bom 341, Foll. (Para 30)

Cases Referred: Chronological Paras
 AIR 1980 Bom 341 24, 31
 AIR 1979 SC 1745 22, 22A, 24, 25
 AIR 1973 SC 772 24
 AIR 1967 SC 1853 19
 AIR 1965 SC 414 19, 21, 22, 22A, 24

M. A. Rane, for Petitioners; K. J. Abhyankar, for Respondents.

ORDER:— The petitioners, in this case, claim to be the tenants in respect of the suit premises and have tried to make good their claim in a manner which has turned out to be rather quaint.

2. The facts giving rise to this petition are simple. The suit premises consist of a shop in House No. 255 at Bhavani Peth, Satara, admeasuring 20 ft. x 10 ft. For the sake of convenience the parties are referred to by me hereinafter as plaintiff or defendant No. 1 or 2 or 3 as the case may be, that is to say, with reference to their position in the trial Court.

3. Defendant No. 1 was the tenant in respect of the suit premises even before the year 1959. The house in which the suit premises are situate was purchased by the plaintiff on 25-6-1959. He purchased it for Rs. 25,000/-. It is contended that he spent a further sum of Rupees 45,000/- for the repairs of the same.

4. On 5-9-1966 the plaintiff executed a rent note in favour of defendant No. 1 Ramchandra Narayan Deshmukh. The exact period of the rent note is not known, but that fact is not even germane for the purposes of this petition. Admittedly defendant No. 1 was carrying on business in the suit premises.

5. On 4-6-1967, defendant No. 1 took defendants Nos. 2 and 3 in the partnership

and conducted his business in the said partnership. On 1-1-1969 plaintiff executed another rent note in favour of defendant No. 1. That was to be for a period of 11 months and the agreed rent was Rs. 50/- per month. The noteworthy thing is that there is a specific prohibition, prohibiting defendant No. 1 from subletting or assigning the suit premises to anyone else.

6. As mentioned above the rent note was only for a period of 11 months, meaning thereby that the period of contractual tenancy contemplated by the same expired at the end of 30th Nov. 1969. During the subsistence of the said tenancy, defendant No. 1 carried on business in partnership with defendants Nos. 2 and 3 in the suit premises and there is no dispute that even after the expiry of the said period continued to carry on the said business in partnership till 15-11-1970.

7. On 15-11-1970 a document was executed by the partners and the same has been loosely described as a deed of dissolution. On a careful examination of the document, however, it can be readily seen that the transaction envisaged by the said document was nothing but that of retirement of defendant No. 1 from the partnership. From that day defendant No. 1 took certain consideration (Rs. 1488) from defendants Nos. 2 and 3 and walked out of the partnership. What is mentioned in cl. (4) of the said document is rather significant. It is stated there as follows:—

“The premises in which our partnership business is going on belong to Shri Javahar Lalchand Katariya resident of Satara. The lease-deed in respect of the suit premises is in the name of Shri Deshmukh; but since the time Shri Deshmukh came in our partnership, the tenancy rights have come to the partners and the receipt in the name of Shri Deshmukh is in the name of Deshmukh as partner of the firm. Hence from the day of the retirement of Shri Deshmukh the said rent is to be paid to Shri Katariya by the remaining two partners and they are bound to obtain receipts. Shri Deshmukh should give co-operation in this behalf and he has to tell Shri Katariya to give rent receipts and to execute the lease-deed in the name of the partners.”

It is, therefore, crystal clear from this statement in the said document, which, incidentally, is styled as Karapatra, that the document by itself does not even pur-

port to transfer the tenancy rights of defendant No. 1 either incidentally or substantively in favour of defendants Nos. 2 and 3. Rather, the document assumes that the partnership comprising of the three partners, which came into being on 4-5-1967, ipso facto brought in its wake the transfer of the tenancy right in respect of the suit premises from defendant No. 1 to the partnership of defendants Nos. 1, 2 and 3. Evidently the document assumes the position of transfer as a fait accompli. There is not a suggestion in the said document that the document is instrumental to the transfer of the tenancy. The document only assumes an already existing transfer and only records the said fact. The document further expresses a pious hope that defendant No. 1 will give co-operation to defendants Nos. 2 and 3 so as to persuade the plaintiff to pass the rent receipt and execute a lease-deed in favour of the continuing partners.

8. It was in these circumstances that on 9-1-1971 the plaintiff terminated the tenancy of defendant No. 1 and called upon him to hand over possession of the said premises to the plaintiff by a notice of termination. Exh. 102. The plaintiff also called upon defendant No. 1 to pay all the arrears of rent which amounted to more than six months on the date of the notice.

9. It is not disputed that defendants Nos. 2 and 3 tried to send the money orders of the arrears of rent to the plaintiff before the expiry of one month from the receipt of the said notice, Ex. 102. But again it is common ground that they tried to send the amount of rent in their own right and not on behalf of defendant No. 1 as such. In other words it was their contention that they themselves were tenants in respect of the suit premises and that the plaintiff was duly bound to accept them as tenants and to receive the rent from them as such.

10. The plaintiff refused to accept the rent from defendants Nos. 2 and 3 contending that there was no jural relationship whatsoever between himself and defendants Nos. 2 and 3. Thereafter the suit out of which the present proceedings arise was filed by the plaintiff against all the defendants for recovery of possession of the suit premises.

11. The suit was based upon various grounds contemplated by the provisions of the Bombay Rents, Hotel and Lodging

House Rates (Control) Act 1947 (hereinafter 'the Bombay Rent Act'). However, we are concerned here only with four grounds, (i) unlawful subletting or assignment of the suit premises by defendant No. 1 to defendants Nos. 2 and 3; (ii) bona fide requirement of the landlord (iii) the non-user of the suit premises by defendant No. 1 for a period exceeding six months without any reasonable cause and (iv) default for a period exceeding six months in the matter of payment of rent. I have stated that these are the only relevant grounds because the trial Court decreed the plaintiff's suit on the above four grounds. The trial Court held (a) that the plaintiff required the suit premises bona fide and reasonably for his personal requirement as claimed by him; (b) that defendant No. 1 was liable for eviction from the suit premises on account of unlawful subletting of the suit premises by him in favour of defendants Nos. 2 and 3; (c) that defendant No. 1 had incurred liability for eviction on account of non-user of the suit premises by him for a period exceeding six months (d) and that defendant No. 1 had committed default in the matter of payment of rent for a period exceeding six months.

12. Defendants Nos. 2 and 3 filed an appeal to the District Court. The District Court held that the finding regarding unlawful subletting was not correct but had held that defendant No. 1 was guilty of unlawful assignment of the suit premises. Findings regarding plaintiff's bona fide requirement of the suit premises for his personal use as also regarding default committed by defendant No. 1 for a period exceeding six months were confirmed by the appellate Court. Hence the decree for eviction passed by the trial Court against the defendants was confirmed by the appellate Court. It is against this decree by the Courts below that the present Writ Petition had been filed by defendants Nos. 2 and 3.

13. Mr. Rane the learned Advocate appearing for the petitioners advanced three arguments in support of his contention that the decree passed by the Courts below was unsustainable. Firstly, he contended that there was a transfer of business by defendant No. 1 in favour of defendants Nos. 2 and 3, the present petitioners, as a going concern along with the transfer of the tenancy rights as envisaged by the notification issued by the Government under S. 15 of

the Rent Act, He, therefore, contended that there was a valid assignment of the tenancy rights in favour of the present petitioners. Secondly, he contended that the tenancy of the original defendant No. 1, even after the expiry of the period of lease of 11 months from 1-1-1969, was not a statutory tenancy but was contractual tenancy. Thirdly, he contended that though there was a prohibition in the said rent note dt. 1-1-1969 prohibiting defendant No. 1 from assigning his tenancy rights under the rent note to any other person without the consent of the landlord, still that prohibition was overridden by the proviso which permitted the assignments of the tenancy rights if the assignment took place together with the business as a going concern etc. Mr. Rane contended that the provisions of law had an overriding effect over the contractual obligations and stipulations.

14. To my mind each of the contentions of Mr. Rane must fail even if taken separately; but the entire petition is being capable of being disposed of with reference to Mr. Rane's first contention on the short point that in fact there was no transfer or assignment by defendant No. 1 of his tenancy rights in respect of the suit premises, whether contractual or statutory, in favour of defendants Nos. 2 and 3 whether by virtue of deed of dissolution, Ex. 159, dt. 15-11-1970 or otherwise. A glance at the said deed of dissolution would show that there is not even an intention to transfer the tenancy rights, whether incidentally or substantively by the retiring partner, defendant No. 1, in favour of the continuing partners, defendants Nos. 2 and 3. I have already extracted the relevant portion of the deed of dissolution and it shows that the deed of dissolution proceeded upon the assumption that the tenancy rights had already come to the two remaining partners. It is difficult to see on what basis the assumption is made. Further, there is not one word in the said deed of dissolution by which defendant No. 1 can be said to have intended to transfer those tenancy rights in favour of defendants Nos. 2 and 3. Even otherwise it is impossible to hold that there was any assignment by defendant No. 1 in favour of defendants Nos. 2 and 3 of the business as a going concern, the goodwill and the tenancy rights as incidental to the assignment by defendant No. 1 in favour of defendants Nos. 2 and 3. So far as the tenancy rights were concerned, it is nobody's

case that they ever belonged to the partnership as a whole. What defendant No. 1 has done by the deed of dissolution is that he has retired from the partnership. Retirement from the partnership by one partner may result in the fact that the business vests in the continuing partners exclusively and it does result in fact that the retiring partner ceases to have any right, title and interest in the business as such; but that does not mean that the retiring partner has 'assigned' the business with the stock-in-trade and goodwill thereof in favour of the remaining partners. The kind of deed executed by defendant No. 1 in favour of defendants Nos. 2 and 3 cannot be said to be a deed of assignment as contemplated by the notification issued by the Government under S. 15 of the Rent Act. Moreover, if the tenancy rights were to be transferred they could be so transferred only by a registered document. Admittedly no such registered document has been executed by defendant No. 1 in favour of defendants Nos. 2 and 3 for the purpose of alleged assignment. It is, therefore, impossible to hold that defendants Nos. 2 and 3 are lawful assignees in respect of the tenancy rights within the contemplation of S. 15 of the Rent Act. If there was any ambiguity about the fact that defendant No. 1 did not purport to transfer the tenancy rights in favour of defendants Nos. 2 and 3, the position is made clear by defendant No. 2 himself. In Para. 13 of her deposition she has stated in clear terms as follows:—

"We have not got transferred the leasehold interest of defendant No. 1 in our favour till to-day by separate deed." This aspect of the case is considered by the learned trial Judge in para. 11 of his judgment. There he has discussed the entire evidence led on behalf of the defendants.

15. From the discussion it will be seen that the contention of defendants was that there was an agreement by defendant No. 1 to assign or transfer the leasehold rights in favour of the partnership, but it was not so done till the dissolution of the partnership. The deed of dissolution proceeds on the assumption that defendants Nos. 2 and 3 were already tenants in respect of the suit premises, whereas defendant No. 2 has admitted in so many words that there was no separate deed executed by defendant No. 1 in favour of defendants Nos. 2 and 3 for the

purpose of such transfer. This is apart from the position that no such transfer could have been effected by a separate deed. If at all transfer of the tenancy is to be made by any tenant in favour of a stranger it could be done along with the assignment of the business as a going concern together with the stock-in-trade and good will etc. It, therefore, follows that so far as defendants Nos. 2 and 3 are concerned they have not a tittle of right, title and interest in the suit premises. It is equally clear that defendant No. 1 had ceased to have the possession of the suit premises. There was, therefore, no question of his being entitled to any protection under the Rent Act. If he was not entitled to any protection of the Rent Act, defendants Nos. 2 and 3 could be having no legal status whatsoever either under the provisions of the Rent Act or under the provisions of the general law. None of them was, therefore, entitled to any legitimate defence to a suit for possession by the landlord.

16. In reply to this position Mr. Rane faintly suggested two replies. Firstly, he contended that if there was no unlawful subletting or unlawful assignment in favour of defendants Nos. 2 and 3, no decree could be passed against defendant No. 1 for possession under S. 13 (1) (e) of the Rent Act. Secondly, he contended that in that event defendants Nos. 2 and 3, the present petitioners, were just trespassers. No decree, therefore, could be passed against them by the Court in these proceedings which were instituted under the provisions of the Rent Act.

17. I will firstly dispose of the second line of the argument of Mr. Rane. In this behalf, the contention of Mr. Rane is no longer *res integra*. As early as in the year 1953 the Supreme Court has held that where the decree is passed against a tenant under the provisions of the Rent Act the same can be executed against all the persons claiming through the tenant, including the unlawful sub-tenants or assignees. In the present case defendants Nos. 2 and 3 did not become lawful assignees. In any event they claimed through defendant No. 1. There is, therefore, absolutely no reason why decree could not be passed or executed against them. This position could be further clarified by taking an illustration. Supposing the plaintiff had not impleaded defendants Nos. 2 and 3 at all and had obtained a decree against defendant No. 1 alone. When he got a decree against de-

fedant No. 1, he would try to execute a decree against defendants Nos. 2 and 3, who would be in possession. They would raise obstruction and would contend that they were claiming either through defendant No. 1 or that they were rank trespassers. In both the cases the obstructionist would have no answer in law to the execution. The obstruction would have to be removed by the executing Court. Now, the position of the petitioner by joining defendants Nos. 2 and 3 in the suit could not be worse than what it would be if defendants Nos. 2 and 3 were not impleaded in the suit. I am mentioning this only as an illustration to show that it is perfectly within the jurisdiction of the Rent Court to pass a decree not only against an ex-tenant but also against persons, who claim through him.

18. As regards the first line of argument of Mr. Rane mentioned above, it is amenable to number of answers. The first simple answer is that even assuming that no decree could be passed against defendant No. 1 under S. 13 (1) (e) because there was no effective assignment made by him in favour of defendants Nos. 2 and 3 in respect of the tenancy rights, decree could be passed and in fact has been passed against him, with perfect justification, under S. 12 (3) (a) as also under S. 13 (1) (g) of the Rent Act. That decree is equally binding upon defendants Nos. 2 and 3 for the reasons mentioned above. Secondly, as from the date of expiration of the rent note dt. 1-1-1969, Ex. 127, defendant No. 1 had become only a statutory tenant in respect of the suit premises. It is well known that all that a statutory tenant continues to have as 'interest' in the premises of which he was previously a contractual tenant is the right to have his possession protected. His 'interest' is confined only to the possession of the premises. When, therefore, a statutory tenant parts even with his possession of the premises in favour of a stranger, he can be and must be said to have transferred 'in any other manner his interest therein.' The transfer may not amount to subletting within the meaning of S. 13 (1) (e) of the Rent Act or it may not amount to assignment within the meaning of S. 15 of the Rent Act, but it will amount to transfer in any other manners his interest in the suit premises within the meaning of S. 13 (1) (e) and since defendant No. 1 had admittedly parted with the possession of the suit premises in favour of defendants Nos. 2

and 3, he must be deemed to have incurred the liability of eviction under the said S. 13 (1) (e) of the Rent Act,

19. In this connection it is useful to refer to the decision of the Supreme Court in *Anand Nivas Pvt. Ltd. v. Anandji Kalyanji's Pedhi*, AIR 1965 SC 414. The relevant portion of the report reads as follows (at p. 422):—

"A person remaining in occupation of the premises let to him after the determination of or expiry of the period of the tenancy is commonly, though in law not accurately called a statutory tenant. Such a person is not a tenant at all; he has no estate or interest in the premises occupied by him. He has merely the protection of the statute in that he cannot be turned out so long as he pays the standard rent and permitted increases, if any, and performs the other conditions of the tenancy. His right to remain in possession after the determination of the contractual tenancy is personal, it is not capable of being transferred or assigned, and devolves on his death only in the manner provided by the statute."

It has been further held by the Supreme Court in *Hiralal v. Kasturbhai*, AIR 1967 SC 1853, that even after the determination of a lease of a contractual tenant, the sub-tenant who becomes a statutory tenant does continue to have some kind of interest subsisting in his favour. That interest is the right to remain in possession. It is on this basis that it was held in that case that a notice terminating the tenancy of a contractual tenant did not ipso facto result in determining the entirety of tenant's interest in the suit premises.

20. Reading the above two decisions together one can safely attribute an intention to the legislature, while enacting S. 13 (1) (e) of the Rent Act read with S. 15 of the same, to proscribe every kind of transfer of rights of the tenant, except that which is specifically permitted. Transfer of possession is one kind of interest, which is proscribed. Unpermitted transfer of possession by the tenant must, therefore, inevitably result in the tenant being exposed to the liability for eviction under the said S. 13 (1) (e) irrespective of the question whether the tenant is a contractual tenant or a statutory tenant.

21. I am alive to the fact that while dealing with the question whether a

statutory tenant had a right to assign business premises held by him, the Supreme Court in *Anand Nivas* case (AIR 1965 SC 414) (supra) has made an observation that the word 'tenant' finding place in S. 13 (1) (e) means a contractual tenant. However, it cannot be said to be the intention of the Supreme Court to hold that S. 13 (1) (e) did not apply to a statutory tenant. That would lead to an anomalous result that a contractual tenant who had all the rights in respect of the suit premises including possessory right could not assign or sublet the premises let out to him, whereas a statutory tenant who had no other right except the right of protection of his possession could assign or sublet the suit premises with impunity. This argument of Mr. Rane must, therefore, fail.

22. Moreover, to my mind this distinction between statutory tenant and contractual tenant and the view that S. 12 applies to former whereas S. 13 (1) applied to the latter needs a second look having regard to the law recently declared by the Supreme Court in *V. Dhana-pal Chettiar v. Yesodai Ammal* AIR 1979 SC 1745. There it has been held by a Bench of Seven Judges of the Court that a notice of termination of tenancy under S. 106 of the Transfer of Property Act is not at all indispensable pre-requisite for a suit for eviction. Now, the following factual and legal position in the urban places to which the Bombay Rent Act applies is well recognised and well settled and is that:—

(1) The preponderating number of tenancies governed by that Act are monthly tenancies;

(2) The tenancies were initially brought about by the Contract between the landlord and the tenant which was the reason why they were called 'contractual tenancies';

(3) The contractual tenancy of such monthly tenancy could be terminated by the landlord at any time by giving a notice of its termination as per the provisions of S. 106 of the T. P. Act;

(4) By virtue of such notice of termination the status of the contractual tenant stood converted into that of a mere statutory tenant;

(5) The view of law taken by our High Court and shared by various other High Courts, as also, at one time, by the Supreme Court, was that unless the contractual tenancy of the tenant was ter-

minated or stood terminated, no suit for the tenant's eviction could be filed on any of the grounds mentioned in the Rent Act.

As an inescapable corollary to the last mentioned proposition, suit for possession, whatever may be the ground for it, could be filed only against a statutory tenant. This is the result of inexorable logic or ratiocination. No suit could be filed without termination of tenancy and termination of tenancy inevitably made the tenant a statutory tenant. Could it be then said that when Supreme Court observed in *Anand Nivas* case (AIR 1965 SC 414) (supra) that S. 13 (1) (e) of the Rent Act contemplated a contractual tenant, did it mean that suit under S. 13 (1) (e) could be filed against the tenant without a notice of termination of the tenancy of the contractual tenant? On the interpretation of the law as it then stood, this was inconceivable. As per the interpretation of this branch of law which held the field at that time, unless the lease stood determined by efflux of time or by virtue of operation of some forfeiture clause, no eviction suit could have been filed even under said S. 13 (1) (e) unless notice of termination of the tenancy was duly given to the tenant. And the moment the said notice was complete, the tenant became a statutory tenant. Where, then, remained any field in which said S. 13 (1) (e) could operate?

22-A. But whatever may be the position before *Dhanpal's* case (AIR 1979 SC 1745) (supra), the position is materially and significantly changed by the said decision of the Supreme Court because the most relevant context in which the *Anand Nivas* case was decided has itself vanished or at least changed. Take for instance the position under S. 12 (1) of the Rent Act. The majority view in *Anand Nivas* case (AIR 1965 SC 414) *prima facie* appears to be that S. 12 (1) contemplates a suit against a statutory tenant only. This observation was evidently made because such a suit had to be preceded by a notice terminating the tenancy which made the tenancy a statutory tenancy. But what happens now after the pronouncement of the correct law by the Supreme Court in *Dhanpal's* case (AIR 1979 SC 1745)? No landlord need give notice under Sec. 106 of the Transfer of Property Act, as a precursor to the suit. No such notice before the suit means no conversion of the contractual tenancy into a statutory tenancy. If what is apparent-

ly the majority view in *Anand Nivas' case* (AIR 1965 SC 414), viz. that S. 12 (1) (and consequently entire Sec. 12) contemplates a suit only against a statutory tenant is correct, no suit under Sec. 12 without notice under S. 106 of the Transfer of Property Act as a precursor to it would be competent at all. This is something which flies in the face of the law declared by the Supreme Court in *Dhanpal's* case (supra). What all this means is that the difference between contractual and statutory tenancy is rendered more academic than real by virtue of the pronouncement of law in *Dhanpal's* case. Suit could be filed against contractual tenant as well as a statutory tenant. But it could be filed only on the grounds mentioned in Ss. 12 and 13 of the Rent Act. And if the grounds existed and were proved, the suit would culminate in a decree against the tenant irrespective of the question whether the defendant tenant was contractual tenant or a statutory tenant.

23. I have given the illustration of S. 12 of the Rent Act advisedly. It shows that after the final pronouncement of law by the Supreme Court it must be held that the so-called difference between contractual tenancy and statutory tenancy corpus juris of our Rent legislation is more academic than real. If this is so with reference to S. 12 of our Rent Act, it is difficult to see how it is not so with reference to S. 13 (1) (e) of the Rent Act. It, therefore, follows that S. 13 (1) (e) contemplates the liability as much of a statutory tenant as of a contractual tenant. In this view of things it is really unnecessary to examine whether defendant No. 1 was a contractual tenant or statutory tenant on the date when he parted with possession of the suit premises. He, therefore, fully divested himself of the protection of the Rent Act. There being no lawful assignment in favour of defendants Nos. 2 and 3, they never became transferees for the protection either under any particular provision of the Act or under the general scheme of the Act. The decree for possession passed against them is, therefore, unassailable.

24. While taking this view as regards the effect of *Dhanpal's* case (AIR 1979 SC 1745) I am alive to the judgment of a Division Bench of this Court dated 13th September 1979 in Spl. C. A. No. 2447 of 1974: (reported in AIR 1980 Bom 341) my attention to which was invited by Mr. Rane in a slightly different context. As

stated above, it was his first contention that there was an assignment of tenancy rights of defendant No. 1 in favour of defendants Nos. 2 and 3, but if defendant No. 1 himself had only a statutory tenant with him, his act of assignment of that tenancy was nothing short of futility because statutory tenancy, as per the said judgment of the Division Bench was per se non-transferable. It was in this context that Mr. Rane invited my attention to this ruling which, he conceded demolished one limb of his client's argument. But the view that I have taken regarding the effect of Dhanpal's case is bound to necessitate a second look at the question that arose before the Division Bench. In this connection I must hasten to add that with great respect, I am in full agreement with the reasoning on which the judgment is based. If the judgment in Dhanpal's case (AIR 1979 SC 1745) was not before me, it would be difficult to find fault with the Division Bench judgment. The judgment in Anand Nivas' case (AIR 1965 SC 414), assuming it was of two learned Judges of the Supreme Court was relied upon with approval by a Bench of 4 learned Judges of the Court in *Jai Singh Murarji v. Sovani (P) Ltd.*, AIR 1973 SC 772. Hence there was no escape from the conclusion which was arrived at by the Division Bench. But evidently the judgment in Dhanpal's case, though delivered on 23-8-1979, was not and could not be brought to the notice of the Division Bench while giving decision dated 13th September 1979. The Dhanpal's case was first reported in October 1979 in the AIR series. As discussed above, the said judgment changes the entire complexion of the question involved.

25. All the same, if I was required to go into the question whether statutory tenancy was per se non-transferable, I would have certainly referred this matter to a Division Bench for considering the effect of the judgment in Dhanpal's case (AIR 1979 SC 1745) on this branch of law. But in view of my finding that in fact there was no transfer or assignment of any character by defendant No. 1 of his tenancy rights in favour of defendants Nos. 2 and 3, I think it to be wholly unnecessary to do so.

26. In view of this position to my mind, there is hardly any substance in the petition filed by the original defendants Nos. 2 and 3. If defendants Nos. 2 and 3 have no right either under the Transfer of Property Act or under the

Rent Act, it is difficult to see how they can resist the decree for possession passed against them. Once it is accepted that the said two defendants have not a tittle of right, title and interest in the suit premises either under the general law or under the special statute, it is impossible to hold that the decree passed by the lower Court against defendant No. 1 on the ground of default in payment of rent for a period exceeding six months as also on the ground that the premises are bona fide required by the respondent-landlord for his own occupation became assailable by defendants Nos. 2 and 3. In a way defendants Nos. 2 and 3 in that case would have no locus standi to file the petition. I may mention here that in this view of things, Mr. Rane has not even challenged the finding of the lower Court or even touched the finding recorded by the lower Court in connection with the respondent's plea of bona fide requirement and defendant No. 1's default in the payment of rent. No argument was advanced before me by Mr. Rane to contend that the decision of the lower Court on the ground of bona fide requirement was in any way erroneous nor was it contended by him that the decree against defendant No. 1 could not be passed on the ground that he had committed default in payment of rent for a period exceeding six months.

27. This disposes of the first contention of Mr. Rane and together with it, in fact, the entire petition. However, I propose to deal also with the remaining two propositions urged by Mr. Rane. Mr. Rane urged that the petitioners were not statutory tenants even after the expiry of the period of rent note of 11 months from 1-1-1969. Evidently this contention was urged by him in order to surmount the above mentioned Division Bench ruling that a statutory tenancy was per se non-transferable. Coming to the first of these contentions raised by Mr. Rane that the petitioners were the contractual tenants, Mr. Rane's said contention is based only upon the notice given by the landlord-respondent No. 1 on 9-1-1971, Ex. 102, in these proceedings. In the said notice the landlord had mentioned that the tenancy of defendant No. 1 was being put to an end by him with effect from the end of 31-1-1971. From this, Mr. Rane contended that respondent No. 1 had recognised the tenancy of defendant No. 1 till 31-1-1971.

28. If we carefully go through the notice, we find that what respondent No. 1

has in fact done is that he has terminated the statutory tenancy of defendant No. 1. It may be that termination of such tenancy is not necessary having regard to the provisions of law. Rightly or wrongly what respondent No. 1 has sought to do is to determine the statutory tenancy. This is clear from the fact that he has given three reasons for terminating the tenancy. Firstly, he contends that the premises are required by him for his personal occupation and that is the reason why he has determined the occupation of defendant No. 1 as tenant with effect from the end of 31-1-1971. Secondly, he has mentioned that defendant No. 1 has not paid rent as required by the rent note and that is the reason why he has terminated the tenancy from the end of 31-1-1971. The third ground is that the defendant No. 1 has let the suit premises without the permission of respondent No. 1. It will be thus seen that the landlord has relied mainly on the provisions of the statute for the purpose of determining the tenancy of defendant No. 1. Now, it is well-known that so far as the tenancy under the Transfer of Property Act is concerned, no reasons are required to be assigned at all for the termination of the tenancy if the termination is to be made under S. 106 of the Transfer of Property Act. A notice simpliciter terminating the tenancy in the manner prescribed by law is enough for the purpose of termination. No reasons or grounds as such are required to be furnished for the termination of the tenancy. In fact mention of the grounds would not validate the notice if the same was otherwise invalid and non-mention of the same would not invalidate it if it was otherwise valid. Statutory tenancy, on the other hand is determined by the decree passed by the Court only on the grounds in question. The landlord is evidently not conversant with subtleties and niceties of this distinction, but he knows that the tenant continues to be tenant for all practical purposes. Evidently this is the reason that propelled him to serve this notice. Evidently, this is done by way of abundant caution. To my mind, it would be eminently unjust and unfair to allow the defendants to make capital of the landlord's ignorance of the law. Moreover, this contention is being raised before me for the first time. At no time in either of the courts below has any of the defendants contended that a new contractual tenancy was either created or evidenced

by the said notice. No issue is got framed for that contention. A number of explanations could have been given by the plaintiff if any issue in that behalf was sought. The very fact that the termination is based upon those particular grounds, which are recognised by the Rent Act, shows that the respondent No. 1 was aware that defendant No. 1 was entitled to the protection of the statute, meaning thereby that he was a statutory tenant, and, hence, that he was advised that that tenancy should be terminated. It is not a notice of termination of tenancy as required by 106 of the T. P. Act at all. The notice proceeds upon the assumption that the tenant is entitled to the protection of the Rent Act and by the notice the tenant is informed that he is no more entitled for protection of the Rent Act, in view of the grounds stated in the notice. It cannot be, therefore, said that respondent No. 1 had treated defendant No. 1 as his contractual tenant even after the expiry of the period of the rent note dated 1-1-1969.

29. Assuming, however, that I am wrong on this point and assuming that defendant No. 1 was a contractual tenant on 9-1-1971, still it is to be noted that the rent note incorporates a specific prohibition against assignment. Mr. Rane contends that the notification issued by the Government authorising the assignment of tenancy under the proviso to S. 15 (1) of the Act has an overriding effect over the contractual prohibition. He contends that the assignment made in pursuance of or in accordance with the said notification will be lawful despite the contractual prohibition.

30. I am afraid this contention is basically erroneous. There is nothing in the proviso to S. 15 (1) nor is there anything in the notification issued under the same which has an effect of giving the proviso or the notification an overriding effect over the contractual prohibition against assignment. Whenever the contract sought to be overridden by the statutory provision is intended, specific provision in that behalf is made by the statute. As for instance in sub-sec. (2) of S. 15 of the Rent Act which came on the statute book with effect from 21st May 1959, a condition in the deed of lease prohibiting sublease or assignment was overridden by the said sub-section (2) of S. 15. This is what the relevant provision of the said sub-section (2) states:

"....., and accordingly, notwithstanding in any contract or in the judgment, decree or order of a Court, any such sublease, assignment or transfer or any such purported sublease, assignment or transfer in favour of any person who has entered into possession shall be deemed to be valid and effectual for all purposes....."

Juxtaposing this provision against the notification issued by the Government under the proviso to S. 15 (1), it will be found that the assignment which is permitted by the notification is not subject to any such non obstante clause. It is not provided therein that notwithstanding anything provided in any contract, the assignment effected as per the notification would be valid and lawful. On the plain reading of the notification, therefore, it cannot be said that there is any overriding effect given to the notification over the contractual prohibition against subletting or assigning.

31. Moreover, even the abovementioned Division Bench ruling of this Court in Spl. C. A. No. 2447/74 clearly brings out the position that if the tenancy per se is not transferable then the notification authorising the assignment would be of no avail to the assignee. It was held in that case that the statutory tenancy was not per se non-assignable having regard to the provisions of S. 12 (1) of the Rent Act and, hence, it was held that the notification would not give any added right to the transferee, if the tenancy was per se non-transferable. A tenancy can be said to be per se non-transferable on various grounds. One of such grounds is that there is a condition in the lease-deed itself that the tenancy could not be transferred. Such a condition would be a perfectly valid condition and it would be an organic part of the totality of the rights known as tenancy rights. The tenancy in such a case would be per se not transferable. This being the position the contention of Mr. Rane in this behalf must fail.

32. In the result the petition fails and is dismissed.

33. Rule earlier issued is discharged. In the circumstances of the case there will be no order as to costs.

Petition dismissed.

AIR 1982 BOMBAY 254

CHANDURKAR AND MEHTA, JJ.

Smt. Chandra Srinivasan and others,
Petitioners v. D. M. Sukhtankar and
others, Respondents.

Writ Petn. No. 1492 with Appeal No.
487 of 1981, D/- 5-12-1981.

Bombay Municipal Corporation Act (3 of 1888), S. 69 (c) Proviso — Scope and object — Approval of Standing Committee to the proposal of Municipal Commissioner — Approval not granted within 15 days from date it was put on the agenda of the meeting — Effect — Whether Standing Committee can substitute proposal — Amendment destructive of main motion whether can be considered as amendment — Requirements of revocation of earlier decision. (Meeting — Amendment of motion and revocation of decision).

The requirement of S. 69 (c) is that the approval of the Standing Committee is to be sought by the Municipal Commissioner for a particular contract. Primarily, the power to enter into a contract is the power of the Commissioner under the Act. On this power, there is a restriction. In case the contract involves expenditure exceeding one lakh of rupees, the Commissioner has to seek the previous approval of the Standing Committee. What the Standing Committee is expected to do is also specified in the proviso. The Committee is expected to consider and dispose of the proposal made by the Commissioner. There is no power in the Standing Committee to substitute its own proposal for the proposal made by the Municipal Commissioner. The provisions of S. 69 are very clear and leave no one in doubt that the proposal has to be initiated and made by the Commissioner himself and there is no jurisdiction or power of the Standing Committee to substitute its own proposal for the proposal of the Municipal Commissioner. (Para 18)

The object of the Proviso introduced in S. 69 by an amendment in 1973 was not to by-pass the Standing Committee or deprive it of its legitimate function or power under the Bombay Municipal Corporation Act, but to see that the Standing Committee disposed of the proposal before it within the specified period of time as expediti-

ously as possible. However, for some reason or the other if the Standing Committee was not able to dispose of the proposal seeking approval, then the statute stepped in and approval was taken to have been given by the Standing Committee and the fetter on the power of the Municipal Commissioner to get positive approval of the Standing Committee was removed. On the expiry of fifteen days, the Municipal Commissioner was free to proceed with the proposal even if the Standing Committee either did not dispose it of or they continued to discuss it. Having regard to the mandatory provisions in the proviso, any discussion of the proposal beyond the period of fifteen days from the time when the proposal was first put on the agenda of a meeting of the Standing Committee would be wholly an exercise in futility and the legal effect in the form of deemed permission could not be prevented by any further discussion by the Standing Committee at any point of time beyond the period of fifteen days specified in the proviso.

(Para 14)

There can be no amendment which negatives or which is substantially destructive of the main Motion which is before the meeting or Committee for consideration. To substitute another proposal for the proposal of the Municipal Commissioner is a thing which is wholly impermissible to be done by the Standing Committee.

(Para 19)

A revocation of an earlier decision must expressly be a decision taken consciously with the express and sole intention of revoking the earlier action. There can never be an implied revocation of something which is the effect of a statutory provision, apart from the fact that the statutory effect of a provision like the proviso to S. 69 (c) cannot be undone by any resolution of the Standing Committee.

(Para 22)

D. R. Dhanuka with A. R. Rana and L. A. Kasturay, for Petitioners (Respondents Nos. 1 to 4 in the Appeal); K. K. Singhvi with R. L. Dalal and N. V. Kamat for Respondents Nos. 1 and 3 (the Appellants in Appeal); Bhimrao Naik with G. S. Bhatt, for Respondent No. 2 (Respondent No. 5 in Appeal); Mahabaleshwar Morje, for Respondent No. 4 (Respondent No. 6 in Appeal); Subhash N. Parikh, for Respondent No. 5 (Respondent No. 7 in Appeal).

CHANDURKAR, J.:— This is a joint petition filed by one social worker in Municipal Ward No. 48 (Petitioner No. 1) a Municipal Councillor in Ward No. 104 (Petitioner No. 2), the District President of the Janata Party, North Central Bombay (Petitioner No. 3) and the Secretary of the Samajwadi Mahila Sabha of Maharashtra State (Petitioner No. 4) and it is substantially directed at the action of the Municipal Commissioner (Respondent No. 1) in accepting the tender given by Respondent No. 2 M/s. Degremont International, on the footing that the Standing Committee of the Municipal Corporation of Greater Bombay must be deemed to have approved the Commissioner's proposal made to the Standing Committee recommending that the tender of M/s. Degremont International (hereinafter referred to as "Respondent No. 2") should be accepted.

2. The facts which have given rise to this petition are not in dispute. Sealed tenders for the supply, delivery, erection and commissioning of the water supply plant at Panjrapur were invited by the Consultants of the Municipal Corporation. The works included the following:—

(i) Filtration of the clarified water by means of rapid gravity filters; and

(ii) Storage and application of the Chlorine to the raw and/or settled water and to the filtered water.

Global tenders were invited as per the International Competitive Bidding Procedure by public advertisements. In pursuance of these advertisements, which were published not only in the Indian newspapers, but also abroad by issuing Circular letters to the Consultants of Foreign Embassies and to the Contractors on the Mailing List, 15 firms sent the tender documents. Out of these 15 firms, 7 tendered for the work on the due date i. e. 2nd April 1981. In view of the controversy in the petition, it is necessary to refer to the tenders of only two firms. The amounts quoted by them were as follows:—

(i) M/s. Candy Filters (India) Ltd.,
Rs. 2,88,10,000/-

(ii) M/s. Degremont International
Rs. 3,09,27,594/-

3. The tenders of the seven firms were scrutinised and evaluated by M/s. Tata Consulting Engineers in association with M/s. Binnie and Partners (India) Ltd., who were the Consultants of the Municipi-

pal Corporation, and an Officer of the Municipal Corporation specially deputed for this purpose. It is really not necessary for the purpose of this petition to refer to the merits and demerits of each of the tenders as evaluated by the Consultants and it is enough to mention that the tenders of four Firms were outright rejected by the Consultants on several grounds, one of the grounds being that in some cases their bids were not competitive with the remaining bids. The Consultants laid down that in the contract specifications, each tenderer must fulfil four mandatory conditions, which were as follows:—

(a) Variable declining rate filtration,
(b) The feed back system of inlet level control,

(c) The level difference of 3 metres between the inlet to the filters and Chlorine Contact Tank Weir, and

(d) The pressure conduit system between the filters and Chlorine Contact Tank.

On a consideration of the tender of M/s. Candy Filters (India) Ltd., Respondent No. 5 in the petition, the Consultants came to the conclusion that they were unable to recommend the offer of M/s. Candy Filters primarily because of its basic technical deficiencies. With regard to the other firm viz. M/s. Geo Miller and Co. Pvt. Ltd., the Consultants found that the entire system which the firm intended to use for the first time had never been tested, nor had it been used by them in any of their works and this made the tender of M/s. Geo Miller and Co. Pvt. Ltd. unacceptable. In respect of the other firm viz. M/s. V. M. Jog and Co., the Consultants found that on assessment, their technical capability for the type and size of the work required by the Corporation was not satisfactory and their offer was higher than the offer of M/s. Degremont International. The Consultants found that the offer of M/s. Degremont International was the only offer which was based on a proven design and its reliability as regards performance could, therefore, be taken as assured.

4. In views of this recommendation of the Consultants the Municipal Commissioner sent a proposal to the Standing Committee of the Municipal Corporation on 14th August 1981, Ex. B, giving details of the evaluation of the different tenders by the Consultants and the operative part of the letter seeking approval reads as follows:—

"I now seek the approval of the Standing Committee under S. 69 (c) of the Bombay Municipal Corporation Act to enter into a contract with M/s. Degremont International for supply, delivery, erection and commissioning of filtration and chlorine plant at Panjrapur at the rates and on the terms and conditions of their tender with modifications referred to above, at which the total cost of the work including municipal supervision, contingencies (physical and cost), Import duties costs to Rs. 5,24,72,000/- as detailed below..." The letter seeking approval mentioned that the requisite sanction of the Government of India and the World Bank would be obtained before work order was placed. It may be mentioned at this stage that the expenses for this project which is intended for the supply of filtered water to the people of Bombay are to be incurred out of a loan given to the Municipal Corporation by the World Bank. The last paragraph of the letter of the Municipal Commissioner reads as follows:—

"The tender of M/s. Degremont International is valid for acceptance up to 29th August 1981. This may, therefore, be treated as URGENT BUSINESS".

5. Now, this item with regard to the approval sought by the Municipal Commissioner was put on the agenda of the Standing Committee of the Municipal Corporation for the meeting to be held on 19th Aug. 1981 and on the agenda it was Item No. 45. Meetings of the Standing Committee were held on the 19th, 20th, 25th Aug. and 1st Sept. 1981, but admittedly there was no discussion on Item No. 45. It appears to have been taken up for discussion on 9th Sept. 1981 when the discussion remained inconclusive and it was, therefore, taken up again on 16th Sept. 1981. The Commissioner was present at both these meetings.

6. Some reference is required to be made to the proceedings of the Standing Committee on 16th Sept. 1981. It appears that the Resolution before the Standing Committee on 16th Sept. 1981 was as follows:—

"That the Commissioner's proposal contained in para 10 of his letter, be approved and the applicant's letter, dated 21st Aug. 1981, on the subject, be recorded"

The reference to the applicant's letter is in the context of a letter said to have been addressed by M/s. Geo Miller & Co.

Pvt. Ltd. to the Standing Committee. The contents of that letter are nowhere on record, nor does that letter appear to have been relied on by anybody. The proceedings record the fact that an amendment was proposed by Shri S. R. Rao, and seconded by Shri Ramesh Sanghvi. The amendment read as follows:—

"That approval be given, under S. 69 (c) of the B. M. C. Act to a contract being entered into by the Commissioner with M/s. Candy Filters (India) Ltd. for supply, delivery, erection and commissioning of Filtration and Chlorination Plant at Panjrapur etc. at the cost and on the terms and conditions of their tender instead of with M/s. Degremont International as proposed by the Commissioner and the applicant's letters, dated 21st Aug. 1981, be recorded".

This purported amendment was put to vote and was carried by 7 votes to 6. But when it was put to vote as a substantive proposition, the votes were equal, 7 and 7, for and against, and the Chairman gave his casting vote against the substantive proposition and declared it lost.

7. At this stage, a Member of the Standing Committee proposed an amendment, which reads as follows:—

"That approval be given, under S. 69 (c) of the B. M. C. Act to a contract being entered into by the Commissioner with M/s. Geo Miller & Co. Pvt. Ltd. for supply, delivery, erection and commissioning of Filtration and Chlorination Plant at Panjrapur etc. at the cost and on the terms and conditions of their tender instead of with M/s. Degremont International as proposed by the Commissioner and the applicant's letters, dated 21st Aug. 1981, on the subject, be recorded".

When Shri Sharad Rao desired to second this amendment, the Chairman pointed out that he had moved the earlier amendment and, therefore, he could not second this amendment, upon which the amendment was seconded by Shri R. T. Kadam. A point of Order was raised objecting to the amendment on the ground that the member could not move an amendment at that stage after the earlier amendment was put to vote as a substantive proposition which was lost, and that the amendment should have been moved before the earlier amendment was put to vote as a

substantive proposition. The Chairman of the Standing Committee adjourned the meeting because, according to him, the Point of Order involved legal implications and he would reserve his ruling.

8. The next meeting of the Standing Committee was held on 30th Sept., 1981. The Chairman of the Committee upheld the Point of Order and ruled that "nothing remained before the Committee for consideration so far as Item No. 45 was concerned in view of what he had stated earlier" and added that "since there was nothing before the Committee in respect of the said Item No. 45 of 19th August, 1981 the Commissioner should bring a fresh proposal before the Committee in the matter." The proceedings are reproduced by us from the extracts of the Minutes filed along with the Petition.

9. Now, after the earlier meeting of the Standing Committee was adjourned on 16th Sept., 1981, a letter came to be addressed by the Chief Engineer, Water Supply Projects, to the Respondent No. 2 on 21st Sept. 1981, stating therein:—

"... the Municipal Commissioner has, in pursuance of the provisions of the proviso to S. 69 (c) of the Bombay Municipal Corporation Act, accepted your tender on behalf of the Municipal Corporation of Greater Bombay, subject only to the formal approval of the World Bank which is awaited, for the execution of the work of supply, delivery, erection and commissioning of Filtration and Chlorination Plant at Panjrapur, at the rates and on the terms and conditions of your tender with modifications referred to below"

The letter also specified that in accordance with the terms of the tender, Respondent No. 2 should execute the contract agreement and furnish the performance guarantees within one month from the receipt of that letter. It is not in dispute now that consequent upon this letter, a contract has been duly executed on the 19th October, 1981 with Respondent No. 2 granting it the contract to carry out the project.

10. The petitioners originally filed this petition on 15th October, 1981. There is some discrepancy about the reliefs which the petitioners are asking if we go strictly by the prayer clause. But there is no dispute that the petitioners feel aggrieved by the letter, dated 21st Sept., 1981,

the effect of which was that the Commissioner treated the approval as having been granted in view of the provisions in the proviso to S. 69 (c) of the Bombay Municipal Corporation Act. The main grievance made in petition as originally filed was that Item No. 45, which dealt with the proposal made by the Municipal Commissioner and to which the Municipal Commissioner sought approval, was finally disposed of by the Standing Committee and the fact that an amendment was moved to the effect that the contract of the work should be given to Messrs Candy Filters showed that there was no proposal to grant the contract to Respondent No. 2, to which the provisions of the proviso to Section 69 (c) would be attracted. The petition proceeds on the footing that no proposal having been approved in respect of Respondent No. 2, the Municipal Commissioner was not entitled to proceed with the proposal of granting the contract to Respondent No. 2. The petition originally seems to have come up for admission on 16th Oct., 1981 when no order was made either with regard to the admission or any interim relief. It came up for admission then after the Diwali Vacation and was admitted and the learned single Judge made an order of interim stay in terms of prayer (c) (i) of the petition. Prayer (c) (i) of the petition asked for a relief that pending the hearing and final disposal of the petition "the operation of the letter/order dated 21st Sept., 1981 (Ex. 'E') hereto be stayed". Now, strictly there is no letter on record issued by the Municipal Commissioner on the 21st Sept., 1981. Ex. E is really an intimation given by the Municipal Commissioner to the Standing Committee on 29th Sept., 1981 in which he intimated to the Standing Committee that he had issued a letter to Respondent No. 2 on 21st Sept., 1981 that he had accepted their tender on behalf of the Municipal Corporation of Greater Bombay. The Commissioner of the Municipal Corporation filed an Appeal against this order of the learned single Judge, being Appeal No. 487 of 1981, which was admitted on 5-11-1981 and an interim order was made by us staying the impugned Stay Order, but we gave directions that no additional moneys be paid to Respondent No. 2 pending the appeal. The appeal was directed to be heard peremptorily on 30th Nov., 1981. However, since any decision in the appeal would really have disposed of the petition itself, the parties

agreed that it would be advisable to have the petition itself heard by the Bench and after obtaining appropriate orders of the learned Chief Justice, the petition was placed before us for hearing yesterday afternoon.

11. When the petition was taken up, Mr. Dhanuka appearing on behalf of the petitioners applied for an amendment of the Petition. The amendment sought to raise what are considered to be strictly questions of law and the new grounds of attack introduced by the amendment were:

(1) Respondent No. 2 having extended the due date of acceptance of the tender to 15th Oct., 1981, the original proposal made by the Municipal Commissioner on 14th Aug. 1981 was varied and the varied proposal not having been put on the agenda afresh, the 15 days' period under the proviso to S. 69 (c) of the Bombay Municipal Corporation Act was not attracted;

(2) The Municipal Commissioner in view of his conduct consisting of attending the meetings of the Standing Committee and taking part in the discussion of Item No. 45 should not have proceeded to award the contract to Respondent No. 2 in the face of the decision of the Standing Committee to amend the original proposal in favour of Messrs Candy Filters;

(3) The Municipal Commissioner did not act in good faith and his action smacks of mala fides, arbitrariness, unreasonableness and an attempt to disregard totally the view of the elected Corporators.

12. We shall now take up the arguments advanced before us by Mr. Dhanuka. But before we do that, it is necessary to reproduce the provisions of S. 69 (c) of the Bombay Municipal Corporation Act. S. 69 reads as follows:—

"With respect to the making of contracts under or for any purpose of this Act, the following provisions shall have effect, namely:—

(a) every such contract shall be made on behalf of the corporation by the Commissioner;

(b) no such contract, for any purpose which in accordance with any provision of this Act, the Commissioner may not carry out without the approval or sanction of some other municipal authority, shall be made by him until or unless such approval or sanction has first of all been duly given;

(c) no contract, other than a contract relating to the acquisition of immovable property or any interest therein or any right thereto, which will involve an expenditure exceeding one lakh rupees, shall be made by the Commissioner unless the same is previously approved by the Standing Committee or in case the expenditure is to be incurred for the purposes of Cl. (g) of S. 61 by the Education Committee:

Provided that, where the previous approval of the Standing Committee is sought by the Commissioner for any contract for the purposes of Chapter IX or X, the Standing Committee shall consider and dispose of the proposal made by the Commissioner in that behalf, within fifteen days from date on which the item is first included in the agenda of any meeting of that Committee, failing which, the previous approval to such contract shall be deemed to have been given by the Committee, and a report to that effect shall be made by the Commissioner to the Corporation"

The provisions of S. 69 are clear that where a contract under or for any purpose of Bombay Municipal Corporation Act is to be made, every such contract has to be made on behalf of the Corporation by the Commissioner. Further, a contract other than a contract relating to the acquisition of immovable property or any interest therein or any right thereto, if it involved an expenditure exceeding one lakh of rupees, cannot be made by the Commissioner unless the same is previously approved by the Standing Committee. Then there is a proviso and under the proviso it is provided that where the previous approval of the Standing Committee is sought by the Commissioner for any contract for the purposes of Chapter IX or X and there is no dispute that the present contract is covered by Chapter X — it is obligatory on the Standing Committee to "consider and dispose of the proposal made by the Commissioner within fifteen days from date on which the item is first included in the agenda of any meeting of that Committee." The consequence of failure of the Standing Committee to consider and dispose of the item within the specified period of fifteen days is that "the previous approval to such contract shall be deemed to have been given by the Committee". In cases where the proviso operates, the Commissioner has to make a report to the Corporation.

13. The proviso, therefore, introduces a fiction if the Standing Committee does not consider and dispose of the proposal made by the Commissioner within the period statutorily fixed by the proviso. The only circumstance on which the fiction comes into operation is the expiry of fifteen days from the date on which the item is first included in the agenda of a meeting of the Standing Committee without disposal of the proposal. It is clear that the legislature contemplated that it was obligatory on the part of the Standing Committee to dispose of the proposal of the Commissioner within a period of fifteen days.

14. The proviso itself was introduced in S. 69 by an amendment in 1973 by Act No. 34 of 1973. The original Bill which deals with several amendments of the Bombay Municipal Corporation Act dealt with this amendment in the form of an addition of a proviso to S. 69, Cl. (c) in Cl. 2 of the Bill. It would be permissible to refer to the reasons which prompted the legislature to introduce the proviso in S. 69 (c) as well as some other provisions in the Act. The Statement of Objects and Reasons refers to the fact that the water supply system and the drainage system, which were about hundred years old, were now inadequate having regard to the increased population of Greater Bombay and, therefore, it became imperative for the Corporation to take immediate steps to improve these services in the interest of public health, sanitation etc. The Corporation, therefore, decided to undertake heavy capital works expenditure programmes to be spread over a period of eight years, with the help of the World Bank to improve the water supply and sewerage system in Greater Bombay. The World Bank had approved the projects and it was found necessary "with a view to obtaining the loan from the World Bank in time and completing these works within the prescribed time-limit" to make certain amendments to the Bombay Municipal Corporation Act to enable the Commissioner to execute these works as expeditiously as possible. When this proviso was debated in the legislature, suggestions were made that in place of the proposed period of seven days, the period should be four weeks and another suggestion was that it should be fifteen days. When the provision was

finally passed, the period of seven days was changed to fifteen days and the proviso was put on the statute book. It is clear, therefore, that the object of this proviso was not to by-pass the Standing Committee or deprive it of its legitimate function or power under the Bombay Municipal Corporation Act, but to see that the Standing Committee disposed of the proposal before it within the specified period of time as expeditiously as possible. However, for some reason or the other if the Standing Committee was not able to dispose of the proposal seeking approval, then the statute stepped in and approval was taken to have been given by the Standing Committee and the fetter on the power of the Municipal Commissioner to get positive approval of the Standing Committee was removed. On the expiry of fifteen days, the Municipal Commissioner was free to proceed with the proposal even if the Standing Committee either did not dispose of it or they continued to discuss it. Having regard to the mandatory provisions in the proviso, it appears to us clear that any discussion of the proposal beyond the period of fifteen days from the time when the proposal was first put on the agenda of a meeting of the Standing Committee would be wholly an exercise in futility and the legal effect in the form of deemed permission could not be prevented by any further discussion by the Standing Committee at any point of time beyond the period of fifteen days specified in the proviso.

15. Having thus considered the scope of the proviso, we will now take up the first contention advanced before us by Mr. Dhanuka that the proposal having stated in the last paragraph, which we have reproduced above, that the tender of Respondent No. 2 was valid for acceptance up to 29th Aug., 1981 and this period having expired prior to 3rd Sept., 1981, i. e. before the expiry of fifteen days' period from 19-8-1981 when the proposal was first put on the agenda of the meeting of the Standing Committee for that day, there was in fact no proposal in existence on 3rd Sept., 1981. The argument is that the time fixed by the tenderer viz. Respondent No. 2 for acceptance of its tender was an essential term of the offer or tender and since no fresh proposal was made after 29th Aug., 1981, there was no proposal in respect of which deemed approval under the proviso could be invoked by the Municipal Commis-

sioner. It is not now in dispute in this case that the date for acceptance was extended by Respondent No. 2 to 15th Oct., 1981 and this information was supplied to the Standing Committee on 16th Sept., 1981. It is difficult for us to appreciate how the information conveyed by the Municipal Commissioner to the Standing Committee that the tender was valid for acceptance up to 29th Aug., 1981 can be said to be a part of the proposal contemplated by S. 69 (c). The effective part of the proposal, which we have reproduced above, would show that in substance the proposal of the Commissioner was that the Consultants of the Corporation had recommended the tender of Respondent No. 2 for acceptance having considered the merits and demerits of each of the tenderers. The terms of the tender of Respondent No. 2 were set out in the proposal. When the Municipal Commissioner informed the Standing Committee in Para 16 of his letter, reproduced earlier, that the tender was open for acceptance up to 29th Aug., 1981, it was clearly intended to give notice to the Standing Committee that the matter required to be urgently decided and indeed, this is expressly made clear by the Municipal Commissioner when he stated in the letter communicating the proposal that "This may, therefore, be treated as Urgent Business". It is unfortunate that in spite of the urgency made out by the Commissioner, the matter was not treated as urgent by the Standing Committee, with the result that the Commissioner became entitled to invoke the proviso to S. 69 (c).

16. It can hardly be disputed that when Respondent No. 2 kept its tender for acceptance up to 29th Aug., 1981, that was a term for its own benefit and nothing prevented Respondent No. 2 from extending this date. As a matter of fact, the letter produced before us, D/- 21-8-1981, addressed by Respondent No. 2 to M/s. Tata Consulting Engineers, with a copy to the Bombay Municipal Corporation and the London Consultants, categorically stated :

"As desired by Bombay Municipal Corporation we hereby extend our Tender Validity up to 15th Oct, 1981".

It is not, therefore, possible to accept the contention that there was no proposal subsisting on 3rd Sept., 1981, the date having been extended by Respondent

No. 2 itself up to 15th Oct., 1981. Till that date the tender was open for acceptance.

17. It is then alternatively contended by Mr. Dhanuka that the proviso merely provided for an enabling power of the Municipal Commissioner to proceed with a proposal on the basis of deemed approval and since it was not obligatory on the Municipal Commissioner to proceed with the proposal on the basis of deemed approval, he need not have sent the letter of acceptance of the tender to Respondent No. 2 on 19th Oct., 1981 when the Standing Committee had clearly debated the matter on 9th, 16th and 21st Sept., 1981 at which the Municipal Commissioner was himself present. The argument appears to be that the theory of deemed approval is an afterthought after the Commissioner found that there was an express disapproval, inasmuch as the Standing Committee had at its meeting on 16th Sept., 1981 declined its approval to grant the contract to Respondent No. 2. Another limb of the same argument is that the power under the proviso was exercised by the Municipal Commissioner in the teeth of indications to the contrary by the Standing Committee, in so far as the proposal to accept the tender of Respondent No. 2 was concerned. It is urged that the very fact that till 19th Oct., 1981 no agreement was executed showed that there was in fact no urgency and the action of the Municipal Commissioner amounted to abuse of power. This contention necessitates the scrutiny of the proceedings of the Standing Committee on 16th Sept., 1981. We have already reproduced above the extracts from the Minutes of the proceedings of that meeting. The resolution before the Standing Committee on that day was that the Commissioner's proposal contained in para 10 of his letter be approved. This must be taken to be the main Resolution which was before the Standing Committee. Now, what was sought to be done when this subject was taken up was that what purported to be an amendment was sought to be moved and the amendment was that approval under S. 69 (c) be given to a contract being entered into by the Commissioner with Messrs. Candy Filters (India) Ltd. (Respondent No. 5). As already pointed out, this amendment was said to have been carried, but when put to vote as a substantive proposition, it was lost as a result of the casting vote of the Chairman of the Standing Committee. Now, if we

merely go by what really happened at the meeting of the Standing Committee, there cannot be any doubt that the proposal made by the Commissioner that the contract was to be given to Respondent No. 2 was not approved. A Section of the Members of the Standing Committee seemed to be in favour of considering whether the contract should be given to Messrs. Candy Filters. But when even that proposal was put to vote, the proposal was lost by the casting vote of the Chairman. We are, not however, concerned as to whether the Standing Committee desired or did not desire to grant the contract to Messrs. Candy Filters. We are only concerned in this petition with the limited question as to whether having regard to the proceedings of the Standing Committee at its meeting of 16th Sept., 1981, the Standing Committee can legally be said to have decided that it was not granting its approval and whether it was permissible for the Standing Committee to consider this question at its meeting of 16th Sept., 1981. As we have earlier pointed out, the moment fifteen days had expired, there was a statutory bar to the consideration of the proposal in the sense that the proposal could no longer be discussed as it must be deemed to have been approved in view of the provisions of the proviso to S. 69 (c).

18. Apart from this, it is impossible for us to appreciate how what was suggested as an amendment could really be, in the legal sense of the terms, an amendment of the Resolution which was properly before the Standing Committee. Once again going back to the provisions of S. 69 (c), the requirement thereof is that the approval of the Standing Committee is to be sought by the Municipal Commissioner for a particular contract. Primarily, the power to enter into a contract is the power of the Commissioner under the Act. On this power, there is a restriction. In case the contract involves expenditure exceeding one lakh of rupees, the Commissioner has to seek the previous approval of the Standing Committee. What the Standing Committee is expected to do is also specified in the proviso. The Committee is expected to consider and dispose of the proposal made by the Commissioner. There is no power in the Standing Committee to substitute its own proposal for the proposal made by the Municipal Commissioner. The provisions of S. 69 are very clear and leave

no one in doubt that the proposal has to be initiated and made by the Commissioner himself and there is no jurisdiction or power of the Standing Committee to substitute its own proposal for the proposal of the Municipal Commissioner.

19. Apart from this legal infirmity in the proceedings of 16th Sept., 1981, there is another infirmity, inasmuch as what was suggested as a purported amendment could really not be an amendment at all. It is well known that there can be no amendment which negatives or which is substantially destructive of the main Motion which is before the meeting of Committee for consideration. The position is well set out by Shackleton in his *Treatise on "The Law and Practice of Meetings"*, 6th Edition, at page 100 as follows:—

"An amendment is a proposed alteration in the terms of a motion (or of an amendment already before the meeting) by those whose views would not be met by either the acceptance or rejection of the motion or amendment as moved. It should take the form of omitting, substituting or inserting certain words in the original motion (or amendment). The alteration should not be such as to constitute a direct negative of the motion, for the same result could be achieved by an adverse vote; neither should it be beyond the scope of the original motion".

Thus, what was really sought to be done in the form or guise of an amendment of the Resolution, which was before the Standing Committee viz. that the Commissioner's proposal should be approved, was not to amend the substantive motion, but to substitute another proposal for the proposal of the Municipal Commissioner, a thing which was wholly impermissible to be done by the Standing Committee. As a matter of fact, what purported to be an amendment was not an amendment at all. Therefore, notwithstanding the fact that the Minutes did record that according to some members the contract had to be given to Messrs. Candy Filters, the legal effect is that at the meeting of 16th Sept, 1981 the proposal of the Municipal Commissioner was not disposed of by the Standing Committee and indeed the whole debate was futile in view of the statutory provision in the Proviso to S. 69 (c) of the Act.

20. It is also difficult for us to appreciate the argument that the Municipal Commissioner should not have acted on

the basis of deemed approval in view of the indication to the contrary by the Standing Committee. We are in this petition concerned with the exercise of the statutory power by the Municipal Commissioner, and if the pre-condition to the exercise of the statutory power exists, no fault can be found with the Municipal Commissioner if he has taken the view that the proviso to S. 69 (c) has operated in respect of the proposal made by him. Indeed it appears to us that it was obligatory on him to act in the manner he has done and if he had not given effect to the proviso, he would have really failed in his duty to act according to the statutory provisions. The circumstance that he was present at the meeting of 16th Sept., 1981 and intimated to the Standing Committee that the date was extended up to 15th Oct., 1981 by Respondent No. 2 had no relevance in so far as the statutory effect of the proviso to S. 69 (c) was concerned. Its operation does not depend on the conduct of any person and it is not within the power of either the Commissioner or the Standing Committee to prevent the statutory effect of the proviso to S. 69 (c).

21. Once the proviso to S. 69 (c) had come into operation, the circumstance that the Commissioner did not write to Respondent No. 2 earlier has also no relevance.

22. An argument was also advanced that if specific approval was given by the Standing Committee to the Municipal Commissioner's proposal, that approval could have been revoked by the Standing Committee in the appropriate manner and, therefore, a deemed approval, which is a creation of the statute, could also be withdrawn by a Resolution of revocation and the further argument was that the decision of the Standing Committee at its meeting of 16th Sept., 1981 expressing its views against granting of the contract to Respondent No. 2 must be considered as an implied revocation. The argument of implied revocation must be rejected outright. Whether the approval expressly granted could be revoked or not is not relevant for the purpose of this case, but it cannot be disputed that a revocation of an earlier decision must expressly be a decision taken consciously with the express and sole intention of revoking the earlier action. There can never be an implied revocation of something which is the effect of a statutory provision, apart

from the fact that it does not appear to us that the statutory effect of a provision like the proviso to S. 69 (c) can be undone by any resolution of the Standing Committee.

23. It was faintly argued that the Municipal Commissioner has not acted in good faith and that his action smacks of mala fides, arbitrariness, unreasonableness and an attempt to disregard totally the views of the elected Corporators. Beyond making the averment and the further averment that the Municipal Commissioner has obviously acted at the dictates of someone to the prejudice of the Corporation, there is no material on record which necessitates our consideration of this contention on its merits. However, it is obvious to us that the fact remains that the Standing Committee was not able to make up its mind within the prescribed period when the matter was discussed by it. It was discussed in utter disregard of the legal provisions in the proviso to S. 69 (c) when the discussion was a futile exercise and if under these circumstances the Municipal Commissioner has given effect to the law contained in the proviso to S. 69 (c), it cannot be challenged merely because some Members of the Standing Committee did not want the contract to be given to Respondent No. 2. On a consideration of the arguments before us, it is obvious that the whole petition is misconceived and must fail.

24. So far as the Appeal is concerned, having regard to the fact that we have found no substance in the petition, it is not necessary to decide the Appeal on merits and the appeal has now become infructuous.

25. In the result, the petition is dismissed. However, in the circumstances of the case, we do not think that it is necessary to make any order as to costs. We, therefore, make no order as to costs. Rule discharged.

Order accordingly.

AIR 1982 BOMBAY 263

V. S. KOTWAL, J.

Kranti Mohan Guruprasad Mehra and another, Appellants v. Fatehchand Vasuram Behal, Respondent.

A. F. O. No. 546 of 1980, D/- 27-3-1981.

Civil P. C. (5 of 1908). Section 9A (as inserted by Maharashtra Act 25 of 1970) — Objection to jurisdiction of Court — Issue to be tried as preliminary issue — Determination of such issue and question relating to interim relief — Distinction in procedure.

The scheme of Section 9A unmistakably indicates that the Court is expected to determine the objection to jurisdiction as an issue in the suit which should be treated as a preliminary issue and having regard to the concept of the pleading, the issues arising therefrom and the determination of such issues on evidence and on the avvil of procedure as prescribed under the Code, it would be clear that the determination of such an issue even at that stage would be on the consideration of all aspects in which the issue is enveloped; secondly, it would be after giving the parties a full opportunity to lead all the necessary material and the evidence as they would have done when the issue was framed at the trial and lastly the determination of such an issue even at that stage would get a label of finality in so far as that proceeding and the suit is concerned. That means it is not as if that the same issue need be re-heard in the second round, when the other issues are heard at the trial, and it is equally not as if that the first round being only a prima facie, superficial view on a tentative objection while the second round being a full-fledged, final decision or adjudication on all aspects of the merits transforming the said objection into a regular issue. It is this depth that is in contrast with the thinner one of the interim application for an interim relief which is to be decided essentially on the prima facie view without probing deeper in the finer shades and aspects. One tends to touch the root whereas the other remains on the surface. This difference would equally be alive even if both the matters are heard at one and the same time. Therefore, permissibility and desirability of such a feature of

composite hearing are two separable features and the course to be adopted can well be left to the presiding Judge in the context of the facts and circumstances of each case. If it is decided to consider only the preliminary issue and to keep back for the time being the interim application, then the possibility of any irreparable harm being caused to either side can well be avoided as Clause (2) of Section 9A takes care of such a situation under which even during this interim period till the adjudication of the preliminary issue, the Court is empowered to grant the interim relief purely on interim basis. Section 9A, therefore, opens an umbrella under which exists a self-contained scheme with a definite object. AIR 1974 Bom 288 and AIR 1977 Bom 35, Rel. on.

(Paras 14, 15)

Cases Referred : Chronological Paras
 AIR 1977 Bom 35 : 1976 Mah LJ 456 15
 AIR 1974 Bom 288 15

V. H. Gumaste with Mrs. Usha V. Madhabhavi for Appellants; C. K. Jaisinghani, for Respondent.

JUDGMENT:— For some reason or the other, the partners of a partnership firm had fallen out, and it is on account of the subsequent events that this proceeding has come into existence. The plaintiff who is the respondent herein was one of the partners along with the 1st appellant, that is the 1st defendant in the suit along with certain other persons in a partnership firm which was dealing in textiles and the concern was known in the mercantile world as Bhuvaneshwari Silk Mills. This partnership firm came to be dissolved on Aug. 25, 1977 by a deed of dissolution with the net result that under the settlement, the plaintiff had become the owner of the powerlooms 16 in number which were initially a part of the partnership property. First in all 25 looms were put in operation by the partnership firm and 8 looms had been entrusted to the 1st defendant under the said settlement.

2. On Oct. 5, 1977, the plaintiff and the 1st defendant recorded a separate agreement of hire purchase in respect of 8 out of the said looms with the consideration fixed at Rs. 1,20,000/- under a stipulation that the same should be discharged by payment of monthly instalments of Rs. 2500/- with interest at 18 per

cent on the unpaid amount. The monthly instalments were to be paid on or before the 10th day of every month, and it was to commence from Nov. 10, 1977. The agreement contains several other clauses which are normally incorporated in a hire purchase agreement. Under Cl. 5, the plaintiff had a right to terminate the agreement with or without notice and to retake and resume the possession of the looms, if there is a default of payment for 3 instalments, and further it gave a right to the plaintiff even to construct or erect a brick wall in the shed where the looms were installed right from the beginning in such a manner so that the said 8 looms could be separated from the other looms belonging to the 1st defendant. The agreement also contained several other clauses, the consideration of which need not detain us in this proceeding.

3. On the date of the agreement, a cheque for Rs. 2500/- towards the initial payment under the agreement was given, and it is claimed that the said cheque bounced and was dishonoured, and no further payments towards instalments have ever been paid meaning thereby that in spite of this specific agreement executed between the parties, it had not been honoured by one party who had taken the looms on hire, and thereby committed the breach, and according to the plaintiff's contention, he was vested with the rights *ex facie* to proceed against the defendants for the purpose of resuming the property. The agreement also stipulated that in case the contract had to be terminated on account of lapse on the part of the defendants, then a certain amount of damages was required to be paid as contained in the condition in Cl. 6 under which the hirer was obliged to pay to the owner the stipulated hire including interest up to the date of such determination including the apportioned hire for any broken period of the month and 40 per cent of the balance of total unpaid hire as mentioned in Cl. 3 as compensation for extra depreciation in the value of the said looms.

4. In view of the lapse committed by the defendants, the plaintiff filed Suit No. 596 of 1979 in the City Civil Court for Gr. Bombay canvassing all these contentions and ultimately claiming various reliefs. The first was regarding the

declaration to the effect that the said agreement had been validly terminated or determined and that the plaintiff is the owner of the said looms in question who was the 1st defendant be declared to have no concern whatsoever with the same. Rendering of the accounts of the business carried by the 1st defendant on the basis of the said looms as from Aug. 1, 1977 was the subject-matter of the other relief. The plaintiff also asked for a decree for the profits which have been earned by the defendant from the said date and for which purpose, the accounts were sought to be taken. A decree for damages was also asked for. The other important relief claimed was that the 1st defendant himself or through his servants and agents be restrained permanently from interfering with the plaintiff's possession of the said 8 looms and also from preventing the plaintiff from erecting a brick wall in the said shed. Interim reliefs were also claimed to the effect of asking for an interim injunction on the same lines and also asking for the appointment of Receiver with further stipulation that either of the parties may be permitted to function the looms as an agent of the Receiver. The suit came to be filed on Feb. 5, 1979.

5. A notice of motion was taken out by the plaintiff for claiming interim re-

lief on the lines suggested earlier. It is important to note that no ad interim relief was granted, but the learned Judge felt the necessity of issuing notice to the other side and the question was deferred till then, except appointment of Receiver and the incidental relief, though the more prominent relief of injunction was not granted.

6. After the service of the notice, both the defendants put in their affidavits and resisted the said notice on all counts. It was inter alia contended that no cause of action accrued in favour of the plaintiff for initiating the said proceeding. A point of substantial importance which is also of primary significance was canvassed on behalf of the defendants in terms that the City Civil Court had no jurisdiction and also the suit as framed is not maintainable in view of the insufficiency of the Court-fee stamp. It was also submitted that on merits, no prima facie case has been made out by the plaintiff nor is there any right existing in his favour much

less there is any injury to any such right and lastly the balance of convenience was entirely in favour of the defendants. It was further submitted that the accounts of the partnership at the relevant time were really not settled, and in reality quite a substantial amount to the tune of about Rs. 3,00,000/- was due to the 1st defendant from the plaintiff as it was canvassed in that behalf that at the time of the dissolution of the partnership and the settlement of accounts, apart from the looms and certain bales of cloth, the substantial part of the assets of the partnership, though being the subject-matter of the accounting, had remained to be undecided, and it was further contended on the basis of various writings which were available that the plaintiff had held certain assets which ultimately should have gone to the share of the 1st defendant, and that is how, the plaintiff was under a liability and obligation to pay such a large amount to the defendants and before it could be settled the plaintiff devised this mode in a mood to short-circuit the said process. The further submission flows out of this on behalf of the defendants is that in reality it would be the defendants who would be required to recover certain amounts from the plaintiff, and as such that would be an additional ground for not granting an equitable relief in favour of the plaintiff.

7. In spite of the vigorous controversy that was apparently reflected through the documents and the arguments, the order in contrast reflects on unsatisfactory picture and I am constrained to observe that there is no detailed discussion as such on such an important matter and the question of jurisdiction has practically been dealt with almost in a summary manner. Apart from this, the more disturbing feature is that when a specific plea was raised on behalf of the defendants vis-a-vis lack of jurisdiction in the said court with a further application and a motion to decide that question of jurisdiction at the threshold, the learned Judge declined to uphold that contention and felt that he could well decide the said question along with the notice of motion on its own merits simultaneously. That is how both these questions were bundled up in one order, and both were answered in favour

of the plaintiff. The learned Judge felt that he had pecuniary jurisdiction to entertain the suit, and he also felt that in substance, the suit was not one for possession. He also negated the defendants' contention that the court-fee of Rs. 30/- was insufficient as essentially it was a suit for recovery of possession and the value of the property on the showing of the plaintiff himself was worth Rs. 1,20,000/- and the further contention is that even on the basis of the stipulations in the agreement vis-a-vis the quantum of damages and the amounts payable to the plaintiff, it would still exceed the pecuniary jurisdiction of the said court. On merits, the learned Judge held that in view of the agreement coupled with the fact that no instalment has been paid by the defendants, a prima facie case has been made out by the plaintiff; that the plaintiff had a legal right covered under the agreement vis-a-vis the property in question as the property in goods had never been transferred to the defendants and there was an obvious injury to the said legal rights inasmuch as the defendants were utilising the said looms and earning profits adverse to the interest of the plaintiff. As regards the balance of convenience, the learned Judge felt that it tilted in favour of the plaintiff. In keeping with these findings, the learned Judge granted the notice of motion and passed the order containing several clauses. Thus, the appointment of the Court Receiver was made vis-a-vis the said looms. An option was however given to the defendants when it was directed that the Receiver shall not take possession of the looms if the 1st defendant would deposit Rs. 60,000/- within one month, an additional sum of Rs. 15,000/-, each for 3 months and Rs. 2500/- per month thereafter till completing the initial consideration of Rs. 1,20,000/- and the 1st defendant was also given an option along with this to give an undertaking for the interim period till the payment of the said amounts not to deal, alienate or dispose of the property in question. On the 1st defendant declining to exercise the option, the Court Receiver was to take possession of the looms in question immediately. It was further stipulated that since then, that is, from the date of the order, the 1st defendant be deemed

to be functioning as the Receiver's agent and the 1st defendant was also restrained from dealing with the looms to the prejudice of the plaintiff. This order which was recorded on Dec. 1, 1980 is being impugned in this proceeding on behalf of the defendants.

8. The learned counsel on both the sides have agitated more or less the same points, though in more details, since the matter deserves a detailed investigation and consideration. Mr. Gumaste the learned counsel on behalf of the appellants made a strenuous grievance about the manner in which the impugned order has been scribed and an equal grievance was made about the learned Judge's order in negating the defendants' contention about deciding the question of jurisdiction first. The learned counsel submits that in reality this is nothing but a suit for possession as there is a liberal user of the terminology in that sense conveying the meaning that the physical possession of the property had passed on to the 1st defendant though the property in goods may remain with the plaintiff, and that the plaintiff was seeking to recover possession from the defendants. Several clauses in the agreement, several features in the plaint and several recitals in the documents are relied upon for that purpose. The corollary of this submission that flows or emits out of the first is to the effect that even in reality, this is a suit for recovery of possession of the property, the value of which on the ascertainment of the plaintiff himself is to the tune of Rs. 1,20,000/-, then obviously it would fall beyond the pecuniary jurisdiction of the City Civil Court, and therefore, apart from lack of jurisdiction in the City Civil Court, it would also follow that a suit has been filed on the wrong forum when it ought to have been filed in this Court. In addition to this reference to the property and its value vis-a-vis, the claim for possession, it was further contended that there is an apparent garb created by the plaintiff to cover up the real nature of the transaction and also to save the court-fees and also to justify filing of a suit on the wrong forum, and if this garb is torn out, then it would be clear that apart from the question of possession, there is no question of rendering of the accounts and further there is no question of the quantum of damages remain-

ing unascertained, as according to the learned Counsel, different clauses in the agreement take care of these features in no uncertain terms on the basis of which the total sum which could be payable by the plaintiff to the 1st defendant would never remain in any nebulous form and in that event even that amount would exceed the pecuniary jurisdiction of the City Civil Court and consequently not paying the court fees on the said ascertained amount would again be fetter to the suit. Several aspects were canvassed on the merits of the matter, one of which relating to a large and substantial amount being due to the 1st defendant from the plaintiff. A grievance was also made as regards the rigour in the final order passed by the learned Judge and lastly the grievance was made that no sufficient time was given for the defendants even to move this Court. All these submissions were preceded by another serious grievance that no fair opportunity was given to the defendants to agitate all the points and the learned counsel who appeared in the trial court was also not heard fully.

9. Mr. Jaisinghani the learned counsel for the respondents/plaintiff has sought to repel all these contentions on merits. According to him, there is no question of user of any garb or a pretext inasmuch as under the various clauses of the agreement and in the nature of the hire purchase agreement and in the nature of the transaction, the plaintiff never lost possession apart from not losing the title or the property in goods and what was sought to be done was merely to resume that possession with there being no discontinuity as such. The learned counsel further submit that by asking for a relief of restraining the defendants from not interfering with his right to erect the brick wall and to deal with the property in question, the plaintiff has in reality not asked for possession of the property as such, but since the possession continued with him, he had merely asked for a mandate of non-interference to that right from the defendants. It was further submitted that in view of this position, the City Civil Court would obviously be vested with the requisite jurisdiction, and as regard the quantum of amount payable

to the plaintiff, the said obviously could not be ascertained unless the accounts are taken as the looms were being run and operated by the defendant No. 1 adverse to the plaintiff's interest. The learned Counsel submits that since the year 1977, that is from the date of the agreement, no amount has been paid towards either of the instalments. The contention about the substantial amount being due from the plaintiff to the defendant No. 1 is also denied. As regard the question of jurisdiction and the so called procedural lapse committed by the learned trial Judge, Mr. Jaisinghani the learned Counsel submits that it squarely falls under the provisions contained in S. 9A of the Civil P. C.

10. I have already indicated the skeleton of the contentions raised on behalf of both the sides, even on merits. However, this proceeding can be disposed of on a short premise without expressing any opinion on the merits or any aspect, though I may hasten to add that the aspects sought to be propogated by both the sides are not such which can be disposed of almost in a summary manner and the same requires a deeper investigation and probe on the anvil of ratio of the various judicial pronouncements which are sought to be cited in this proceeding.

11. Section 9A of the Code, which is the product of the amendment by the Code of Civil Procedure (Maharashtra Amendment) Act, 1970 under Maharashtra Act No. XXV of 1970 when the said Section has been inserted, consists of two parts. The first sub-clause envisages that if at the hearing of an application for granting or setting aside an order granting any interim relief, including injunction and appointment of receiver made in a suit, an objection to the jurisdiction of the Court to entertain the suit is taken by any of the parties, then the Court shall proceed to determine at the hearing of such an application the issue about the jurisdiction as preliminary issue before granting or setting aside the order already granted for interim relief. Sub-cl. (2) provides that in spite of the provisions contained in sub-cl. (1), pending the determination of such an application vis-a-vis the claim of jurisdiction, an interim relief can be granted,

12. The combined reading of these two clauses of the said provisions would entail into projecting certain logical and inescapable deductions, is contemplated that in the first instance, after filing of the suit, there comes into existence an application for interim relief. Such a prospective interim relief can be in different shape and thus can be by way of injunction, appointment of receiver or otherwise, and this last residuary clause would include other interim reliefs. Either of the two situations in that behalf can be visualised. It may be that an interim injunction or any interim relief would be granted in a notice of motion till the service of the said notice on the other side or that this interim relief may also be postponed till that time. The contesting party, therefore, on its appearance or any time thereafter ask for setting aside the interim relief, if so granted earlier or oppose the granting of any such interim relief if not granted so far, and it is in that context that the provision contemplates an application either for granting or for setting aside an order granting any interim reliefs. If a motion or an application vis-a-vis the jurisdiction of the Court to entertain the suit itself is made by the other contesting party, then it must be attended to immediately. This is obviously in consonance with the legislative intent in inserting this provision that a suit which is capable of being disposed of on the basic premise of jurisdiction, then it should be done so before any further proceeding is taken or the suit is allowed to linger and secondly, if the very foundation of the jurisdiction is brought under controversy, and if it is spelt and if the said plea is ultimately upheld, then the Court would obviously have no jurisdiction even to grant an interim relief. Such a motion can be made even at the inception, and need not be necessarily at a later stage. However, the same can be made even at the time of granting of the interim relief, and it can equally be made at the time of setting aside such an interim relief, if already granted. Once such an application or a motion is initiated by one of the parties, then the necessary obligation ipso facto devolves on the court with the resultant consequence that the question of interim relief has got to be shelved in the back-

ground, though temporarily, and to bring on the fore-front the main motion about the jurisdiction. The Court is further enjoined to proceed to hear such an application or a motion and determine the same. For that purpose, it is prescribed that the same should be treated as a preliminary issue in the suit, and it is further prescribed that this has to be done before granting of the said interim relief or if any relief is so granted, then before setting it aside. The application for interim relief has got to be heard and disposed of expeditiously and a further qualification is cast that in view of the objection to the jurisdiction, the matter need not be adjourned to the hearing of the suit. This and the other aspect indicated earlier manifestly suggest the legislative intent that in the first instance the objection to jurisdiction itself should be dealt with expeditiously and obviously before granting the interim relief; that it should not be responsible for lingering of the suit, and that is why it should be treated as a preliminary issue and thirdly the decision of such a preliminary issue need not be postponed to the full dressed trial on merits on other issues, and thus its hearing and adjudication is brought in advance and lastly the application for interim relief also need not be postponed to the final hearing of the suit.

13. When sub-cl. (2) comes into operation, it is not as if that the entire field for the interim relief is re-opened, but what is contemplated by that provision is that if the exigencies of the situation impress the Court that either of the sides should be protected without wasting any time, howsoever short it may be, which may be consumed for determining the said preliminary issue, then the Court may on merits grant such an interim relief as it thinks proper. There are obviously two qualifications annexed by this provision. The first is that such an interim relief, even for such an interim period is to be given only if the court is satisfied that some protection is necessary even during the short span of time during the pendency of the application taking objection to the jurisdiction. And such concession can be bestowed in favour of the party even at the time of the motion made by the other side regarding the jurisdiction of the court, but certainly before its determination.

Lastly, there is a qualification or a limitation about the tenure of such an interim relief, viz., that if such an interim relief is granted, then it shall hold good and be in force only up to the moment when the application or motion vis-a-vis the jurisdiction is heard and finally decided on merits treating the same as a preliminary issue.

14. It is true that it may be permissible for the Court to adopt a composite hearing of the said preliminary issue and the interim relief and even to determine the preliminary issue at such hearing and it may even be conceivable in certain circumstances to make such determination on both counts by a composite order, however the governing clause remaining intact would enunciate that the adjudication of the preliminary issue would precede the decision of the interim application, the applicability of which would be insisted upon equally in such a composite hearing or even in a composite order recorded on both counts, which principle is obviously founded on the sound premise that it is only the finding or decision on the preliminary issue of jurisdiction would govern the further jurisdiction of the Court to grant the interim relief. However, in that event it cannot be underestimated that though existing in the same proceeding, both matters would run on different tracks, though parallel to each other and further more the depth of the field of either of these two items would be distinct with clear gradation. Thus, it cannot be over-looked that the scheme of the said provision unmistakably indicates that the court is expected to determine the objection to jurisdiction as an issue in the suit which should be treated as a preliminary issue and having regard to the concept of the pleading, the issues arising therefrom and the determination of such issues on evidence and on the anvil of procedure as prescribed under the Code, it would be clear that the determination of such an issue even at that stage would be on the consideration of all aspects in which the said issue is enveloped; secondly, it would be after giving the parties a full opportunity to lead all the necessary material and the evidence as they would have done when the issue was framed at the trial and lastly the determination of such an issue even at that stage

would get a label of finality in so far as that proceeding and the suit is concerned. That means it is not as if that the same issue need be re-heard in the second round, when the other issues are heard at the trial, and it is equally not as if that the first round being only a prima facie, superficial view on a tentative objection while the second round being a full-fledged, final decision or adjudication on all aspects of the merits transforming the said objection into a regular issue. The user of certain phraseology cannot be without any purpose or significance. It is this depth that is in contrast with the thinner one of the interim application for an interim relief which is to be decided essentially on the prima facie view without probing deeper in the finer shades and aspects. One tends to touch the root whereas the other remains on the surface. This difference would equally be alive even if both the matters are heard at one and the same time. Therefore, permissibility and desirability of such a feature of composite hearing are two separable features and the course to be adopted can well be left to the presiding Judge in the context of the facts and circumstances of each case. If it is decided to consider only the said preliminary issue and to keep back for the time being the interim application, then the possibility of any irreparable harm being caused to either side can well be avoided as cl. (2) takes care of such a situation under which even during this interim period till the adjudication of the preliminary issue, the Court is empowered to grant the interim relief purely on interim basis.

15. Section 9A of the Code, therefore, opens an umbrella under which exists a self-contained scheme with a definite object. I am fortified in this view by ratio of two decisions of this Court in *Porbunderwala v. Gulam Hussein*, AIR 1974 Bom 288 and *Radhakishin v. Sheila Govind Mirchandani*, 1976 Mah LJ 456 : (AIR 1977 Bom 35).

16. The learned trial Judge has no doubt observed in his order that according to him, the provisions of S. 9A of the Code do not make it necessary for a split hearing of the motion into two distinct stages and does not prevent the court from hearing the motion on merits unless it has heard and decided the

point relating to the jurisdiction and it is in keeping with this view that the learned Judge appears to have directed both the learned Counsel to address him simultaneously on the question of jurisdiction as well as on the merits of the motion. Mr. Gumaste the learned Counsel for the appellants makes a grievance that even assuming that such a course is permissible, yet in the first instance no adequate opportunity was given to the parties and especially to the defendants to substantiate their contention about lack of jurisdiction with the court and secondly the learned Judge has not considered all the aspects and has practically decided that issue also in the same manner in which the notice of motion was heard and decided on merits. This submission cannot be said to be without any substance. The main contention of the defendants is that there is no pecuniary jurisdiction vested in the said Court having regard to the real nature of the transaction and the valuation of the property and especially when the gist of the relief sought for and the tenor of the pleading expressly indicates that the plaintiff was asking for possession of the property. It is true that the learned Judge was of the opinion that the plaintiff had never lost possession inasmuch as the custody or physical possession by the defendants was that of a bailee. The learned Judge relied on some of the conditions and in particular condition No. 4 in Clause 6 of the agreement. The learned Judge, therefore, was of the opinion that it was not necessary for the plaintiff to value his claim on the basis of the price of the goods, and therefore, the valuation as made by the plaintiff on his claim was proper and justified. It is apparent that this is the only discussion by the learned Judge on this aspect which has got to be examined in the context of the contentions raised on behalf of the 1st defendant. Mr. Jaisinghani the learned counsel for the respondent/plaintiff adopting the reasons assigned by the learned Judge further submitted that this is a peculiar kind of transaction under which not only the property in goods is not transferred from the owner, but it can be held that even the possession would continue to remain with the owner till all the instalments are paid, which submission is

disputed on behalf of the appellants, and Mr. Gumaste sought to rely on several statements in the plaint in support of his submission that on the showing of the plaintiff himself, he had lost possession and that he was asking to get back the possession. Reliance was placed on some decisions on either side and a grievance was equally made on behalf of the appellants that all these aspects which were argued before the learned trial Judge have not been considered at all, and this point has been disposed of only in one short para. It is the further contention of the defendants that it was futile for the plaintiff to suggest that the damages and other amounts payable to him could not be assessed inasmuch as the same can be easily ascertained even on the basis of certain stipulations in the agreement in that behalf and when so assessed, the same would equally be beyond the pecuniary jurisdiction of the court and it is with that object that the plaint has been purposely kept vague and Mr. Gumaste submits that the learned trial Judge has not applied his mind to this aspect at all. In my opinion, the contentions deserve a serious consideration and having regard to the nature of the controversy, it would have been better in the fitness of things if there was a detailed discussion at least trying to meet various points raised on behalf of both the parties, particularly when, as stated earlier the learned Judge was actually deciding the preliminary issue on jurisdiction not for the interim period and was not viewing the matter on the surface as could be done while granting or refusing to grant the interim application, but was required to go deeper as the decision of that issue had a capacity of finality in so far as the suit is concerned. This, however, may not be confused as if the said finding is being upset on merits inasmuch as under the circumstances, it is not desirable as also not necessary to express any view and finding either way as the matter requires further investigation, and if need the appellants/defendants would be required to be given an adequate opportunity to substantiate their contentions by producing any further material. It is submitted with some justification that since the interim application was being disposed of, it may be that all the rel-

evant material necessary for the proper adjudication of the preliminary issue could not have been produced, which could have been so produced if the learned Judge had decided to try that issue separately or independently. It was also contended that some aspects were not allowed to be elaborated while in respect of many there has been utter non-application of mind and the proceeding has been disposed of in a too summary manner. In view of this position, it is desirable to afford a reasonable opportunity to the defendants in that behalf.

17. On merits also, the discussion by the learned trial Judge is not in detail and the said aspect equally suffers from an identical deficiency. No doubt there is an agreement, apparently in favour of the plaintiff, the execution of which is not seriously disputed by the 1st defendant, who however has several contentions in that behalf as reflected in the affidavit. According to him, a partnership earlier was in existence between himself and one Mehra and after the retirement of Mehra, the plaintiff and one Khanna as also one Madan were taken as partners. He has contended that the plaintiff's activities were against the interest of the partnership on account of which he was obliged to file a complaint with the police. The said partnership came to be dissolved by a deed of dissolution on March 25, 1977. According to him further that the accounts were not settled and the large amount was due from the plaintiff to him over the sale of certain quantity of saris and grey cloth. He has also indicated the real nature of the transaction. The learned trial Judge no doubt was impressed by the existence of the said agreement along with the conditions therein as also the conduct of the 1st defendant in giving a cheque for Rs. 2500/- on October 15, 1977, which was the day of execution of the agreement and which cheque bounced back. The learned Judge also felt that there was something inherently improbable in the 1st defendant's case of the plaintiff being indebted to him. As regards the non-settlement of accounts, the learned Judge realised that one letter was addressed by the plaintiff to the bankers of the dissolved firm which was in consonance with the defendants' case and

the learned Judge has observed: "there appears to be some truth in what the 1st defendant says". Along with this, Mr. Gumaste the learned Counsel submits that two important features, apart from the contention of the defendant No. 1 are not properly considered. Thus, even though the agreement pertains to an amount of Rs. 1,20,000/- still the amount of monthly instalment was fixed at Rs. 2,500/- only when the looms were to be operated by the 1st defendant, which would mean that the entire amount under the agreement would be satisfied after several years. It was also submitted that the agreement was executed on October, 15, 1977 and the cheque for Rs. 2,500/- towards the 1st instalment was issued on the same day and the plaintiff must have realised soon thereafter that it was dishonoured and even according to the plaintiff, nothing has been paid thereafter by the defendants to the plaintiff, meaning thereby that till the filing of the suit there was absolutely no payment made by the defendants. This would mean that the plaintiff must have realised long back about the intention of the defendants to dishonour the agreement and to grab the property whereby the plaintiff was loser all along and under the terms of the agreement, the plaintiff was entitled to terminate the agreement immediately and also got a right to recover the balance of the amount with damages. The learned Counsel submits that in spite of this, the suit came to be filed as late as on February 5, 1979. The learned trial Judge does not appear to have considered all the facets of the matter in proper perspective, and therefore, it is yet another ground for having hearing of the matter on merits afresh.

18. In this view of the matter, the only course open is either to send back the matter to the trial Court for a fresh hearing or to hear it on merits in this proceeding itself. However, it is well settled that normally a matter should be decided on merits by the Court of the first instance who has an advantage of considering all the material on facts and whose decision would provide some assistance while dealing with the matter in appeal. In view of this, it is deemed proper to send back the matter to the trial Court for being heard on merits afresh on the preliminary issue of juris-

diction as also on merits regarding the notice of motion so that both the parties would get an adequate opportunity to ventilate their grievances. It is true that it may consume some time in view of this remand. However, it is in this situation that the provisions contained in cl. (2) can be brought effectively in operation. Mr. Jaisinghani the learned Counsel submits that some protection should be afforded to his client as prima facie the agreement is in his favour and the looms are in the custody of the defendant No. 1, and the learned Counsel further submits that status quo be maintained which plea is opposed by Mr. Gumaste on behalf of the defendants.

19. On considering the pros and cons of the matter and examining the rival contentions, in my opinion, it may not be a proper exercise of discretion to allow the status quo in its entirety is (sic) maintained as under which the appellants/defendants have deposited so far cash amount to the tune of Rupees 45,000/-, and have also furnished a bank guarantee to the tune of Rupees 52,500/- in addition to giving an undertaking not to alienate, transfer, dispose of or to deal with the property in question. However, since the attack on behalf of the defendants is at the very root of the matter and when entire field of merits on both the counts is left open and when even the notice of motion is to be heard afresh on merits, it would not be proper to retain all the said conditions. The two items viz., the payment of cash amount and furnishing of bank guarantee will have to be lifted as those would not be in consonance with the view that I am taking in this matter and especially when the entire matter is yet to be agitated afresh on all aspects including the question of jurisdiction and the merits. However, the item of the undertaking already given by the appellants/defendants deserves to be retained as affording adequate protection even for the interim period and in addition thereto, in my opinion, it would be just and proper to bind down the 1st defendant to furnish solvent security to the tune of Rs. 35,000/- to the satisfaction of the Registrar, City Civil Court, Bombay, which amount is calculated on the basis that it will accrue and become due on the date of the suit under the agreement and under

the stipulation of payment by instalments. It is however made clear that both these conditions viz., about the undertaking and furnishing of the security shall remain in force only as an interim relief till the final disposal of the motion or the application of the 1st defendant challenging the jurisdiction of the City Civil Court and would continue to be in force till the disposal of the interim application for the interim relief under the notice of motion in the event the issue of jurisdiction is decided against the defendants and in the event of the notice of motion and the preliminary issue are disposed of at one and the same time by a common order, then the said undertaking and security shall remain in force till the passing of that order.

20. Nothing hereinabove observed shall be taken as an expression of opinion so as to fetter the discretion of the learned Judge while dealing with the matter on merits afresh. The learned trial Judge shall decide the matter in light of the observations hereinabove giving full opportunity to both the sides to canvass their contentions and to place all the relevant material in both the categories including the preliminary issue about the jurisdiction and the said material can be in the shape of affidavits, documents or even in the form of leading evidence, if so desired by the parties. The decisions on the said preliminary issue would obviously govern the further course in the proceeding before the learned trial Judge. At the composite request of both the sides and having regard to the urgency of the matter, the learned trial Judge shall endeavour to decide the proceeding in question expeditiously and as far as possible and feasible under the circumstances by the end of July, 1981.

21. Before parting, I may incidentally refer to a rather disturbing development in the trial Court. After the impugned order was passed, the learned Counsel for the defendant No. 1 applied for the stay of the order for a period of two weeks to enable him to approach this Court to get interim and urgent orders. This motion was rejected, though on the ground that since the receiver was not to take possession of a certain period, no prejudice would be caused to the defendants. However, the rigour

of the order was not wiped out, since while rejecting the motion itself the learned Judge observed and stipulated that if the 1st defendant did not give an undertaking as prescribed within one week, then it would be taken to mean that he did not wish to avail of the concession of the payment offered to him under the order. The inevitable implication of this order is that if such an undertaking was not given within one week, then it would convey to the court the reluctance of the defendants to exercise the option. The further necessary consequence would obviously be serious in the receiver getting a clear direction thereby to take charge of the property without waiting for any further period. If that be so, then denying a short period of two weeks for the defendants to move this Court appears to be rather harsh and certainly unjustified apart from being not quite fair. It cannot be underestimated that it is the privilege of a Court to pass an order one way or the other on merits, in accordance with law, yet a laudable principle is implicit in the system to give a fair deal to each of the litigants who knocks the door of the Court and implicit therein is a further laudable principle that every litigant who is aggrieved by the order of the Court of the first instance has a legitimate right to move the higher Court to ask for redress, and therefore, a reasonable opportunity should normally be given in that behalf to all the litigants, provided of course the prayer on the face of it does not appear to be frivolous or vexatious. This principle is essential to be preserved so as to instil a sense of confidence in the system of administration of justice.

22. In the result, the appeal is allowed. The impugned order dated December 1, 1980, recorded by the learned Judge of the City Civil Court, Bombay in notice of motion No. 550 of 1979 in Suit No. 596 of 1979 is set aside.

The proceedings are sent back to the City Civil Court, Bombay for disposal of the matter afresh on merits expeditiously in the light of the observations hereinabove.

The undertaking given by the 1st defendant not to transfer, alienate, dispose of or deal with in any manner the property in question viz., 8 powerlooms

installed in the shed in question shall remain in force not only till the disposal of the application or the motion raising the question of jurisdiction but also would continue to be in force till the disposal of the notice of motion on merits, if such an occasion arises, and in the event of the notice of motion and the preliminary issue are disposed of at one and the same time by a common order, then the said undertaking shall remain in force till the passing of that order. In addition thereto the 1st defendant shall furnish a solvent security to the tune of Rs. 35,000/- to the satisfaction of the Registrar of City Civil Court, Bombay which security shall remain in force till the disposal of the application about the jurisdiction of the said Court as raised by the 1st defendant, and in case the issue is decided in favour of the plaintiff, then the said security shall continue to be in force till the final disposal of the notice of motion, and in the event of the notice of motion and the preliminary issue are disposed of at one and the same time by a common order, then the said security shall remain in force till the passing of that order.

The order directing the 1st defendant about payment of cash amount and also furnishing bank guarantee is rescinded with the result that the 1st defendant is at liberty to withdraw the cash amount of Rs. 45,000/- so far deposited by him in the trial court and the bank guarantee furnished by him also stands lifted. It is, however, directed and made clear that the 1st defendant shall get the liberty to withdraw the said amount of Rs. 54,000/- so far deposited by him only after furnishing the solvent security for Rs. 35,000/-, as stipulated earlier. There will be no order as to costs.

In view of the above order and direction, the civil application does not survive.

Order accordingly.

AIR 1982 BOMBAY 274

BHARUCHA, J.

Janardan Mahadev Dhuru and others,
Plaintiffs v. Vijaynath Moreshwar Dhuru
and others, Defendants.

Suit No. 470 of 1972, D/- 9-3-1982.

Partition Act (4 of 1893), Ss. 2, 3 — Power of Court to order sale in partition suit — Has no inherent power dehors provisions of Act — Partition suit — Property incapable of partition and prayer in plaint indicating that plaintiffs wanted sale of property — Suit not under Partition Act — Held, as Court had no inherent power to order sale dehors the Act, suit was liable to be dismissed. (Civil P. C. (1908), O. 20, R. 18). AIR 1973 SC 643 and AIR 1952 Cal 893, Rel. on; (1966) 72 Cal WN 837, Ref., AIR 1958 Andh Pra 647 Held not good law in view of AIR 1973 SC 643. (Paras 12, 17)

Cases Referred: Chronological Paras
 AIR 1973 SC 643 11
 (1966) 72 Cal WN 837 14
 AIR 1958 Andh Pra 647 8
 AIR 1952 Cal 893 10, 14

C. A. Phadkar with S. V. Vaidya, for Plaintiffs; S. N. Variava and D. S. Devitre, for Defendants.

ORDER:— This suit concerns the partition of immovable property situate at Mahim, Bombay, belonging to a joint family. One Laxman, who died long back, left behind 3 sons. Mahadeo, one of his sons, died in 1970 and left behind the first plaintiff, a son. The second plaintiff is the first plaintiff's wife and the third and fourth plaintiffs are their daughters. A second son, Moreshwar, died in 1962 leaving behind four sons and a widow. The widow died during the pendency of the suit. The sons and their families are defendants, represented by Mr. Variava, learned counsel. Moreshwar also left behind four daughters, who are defendants 14, 15, 16 and 17. Defendant 17 has not chosen to appear though she is represented. Against defendants 14, 15 and 16 the suit was dismissed upon the application of Mr. Phadkar, learned counsel for the plaintiffs. A third son of Laxman, Kesharinarath, died in 1945 leaving behind a widow and son. The widow, the son and the son's wife are defendants, represented by Mr. Devitre, learned counsel.

2. The joint family is admitted. It is admitted that the suit property is joint family property. There is no dispute

that the joint family owns property other than the suit property.

3. In para 5 of the plaint the plaintiffs claim a partition of the suit property and their 1/3rd share therein. It is there averred that the suit property cannot be divided by metes and bounds, and it is submitted that it should be sold and the net sale proceeds divided amongst the branches in accordance with their respective shares. By prayer (a) of the plaint a declaration is sought, "if necessary", that the plaintiffs, as representing the branch of Mahadeo, have a 1/3rd share in the joint Hindu family. By prayer (b) the plaintiffs ask "that the suit property be sold by and under the directions of this Hon'ble Court, with liberty to the plaintiffs to bid at sale and that 1/3rd of the net sale proceeds may be handed over to the plaintiffs....."

4. The plaint makes allegations of the defalcation of the income of the suit property and of the payment by the plaintiffs of an antecedent debt. Mr. Phadkar has not pressed these allegations.

5. In the written statement it is contended that the suit is not maintainable for want of necessary parties. The sale of the suit property is opposed. It is denied that it cannot be divided by metes and bounds. In the supplementary written statements it is contended that the plaintiffs have no right to buy the share of the defendants in the suit property. It is also contended that the suit property should be divided by metes and bounds in accordance with the report of the Commissioner appointed by the court, to which reference shall immediately be made.

6. On the notices of motion taken out by the parties the court appointed, by consent, R. L. Chawla, Architect, "Commissioner to inspect the property and to evaluate and to report on the valuation of the property and also as to whether the property is capable of partition by metes and bounds in three equal or nearly equal shares". Chawla made a report on 31st March 1973. He stated that "the property in the present condition is not capable of being divided strictly according to B.M.C. D.C. (Bombay Municipal Corporation Development Control) Rules but I have tried to divide it into nearly three equal parts at various boundaries of structure. This division will not be approved by Bombay Municipal Corporation strictly under the rules, but it may be considered as a family partition, the parties agree (sic) to develop the

individual portions strictly according to D.C. Rules regarding open spaces and floor space index prevalent in the locality and do not ask any concession under pretext of hardship."

7. Issues have been framed upon the basis of the pleadings. The parties have led no oral evidence.

8. It is common ground that this is not a suit under the Partition Act. Mr. Phadkar, learned counsel for the plaintiffs, submitted that the suit property should be sold by public auction. He submitted that the court had inherent power to order the sale, dehors the provisions of the Partition Act. In support of the submission he referred to the judgment of a Division Bench of the Andhra Pradesh High Court in Ramaprasada Rao v. Subbaramaiah, AIR 1958 Andh Pra 647. The point before the court was whether it had power dehors the provisions of the Partition Act to direct the sale of joint family property and divide the proceeds between the members. The court observed, ... "But many contingencies may be visualised when in practice the division by metes and bounds of every item of joint family property is not possible. A property might have to be allotted to one of the sharers and the others have to be compensated with money; this was called owelty. A court might be confronted with a situation where a property was not capable of physical partition or was such that, if divided, would lose its intrinsic worth. In such a case, that property was allotted to one sharer and compensation in money value is given to the others" and, if such a course is not possible, it is sold outright and the sale proceeds divided between the joint owners. All the aforesaid and similar other methods are adopted by courts in making an equitable partition of the joint properties either with the consent of the parties or, where such consent is not forthcoming, in exercise of its own discretion.

9. The provisions of the Partition Act do not, in any way, entrench upon the undoubted power of the court to effectuate a partition between co-owners in one or other of the methods suggested above.

10. Mr. Variava, on the other hand, drew my attention to the judgment of a Division Bench of the Calcutta High Court in the case of Nitya Gopal v. Pran Krishna, AIR 1952 Cal 893. The court considered the law as it stood and came to the conclusion that earlier cases did not support the position that the court had an

inherent power of sale in case it found that the property could not be conveniently partitioned or that partition would affect its intrinsic value. The cases showed, in fact, that there was so inherent right to sell the property. The court then considered the provisions of the Partition Act and concluded that it conferred on the court, in a suit for partition, a power of sale in certain specified cases. No general power of sale could be spelt out from its provisions. The court then made reference to cases dealing with Ss. 2 and 3 of the Partition Act and found that there was no current of decisions which compelled it to hold that there was an inherent power in the court to direct a sale in lieu of partition. The court held that there was no power in the court to order a sale in a partition suit if it was not covered by the provisions of the Partition Act.

11. Mr. Variava also made reference to the Supreme Court's judgment in R. Ramamurthi v. V. Rajeswararao, AIR 1973 SC 643. The principal question before the Supreme Court concerned the interpretation of Ss. 2 and 3 of the Partition Act. In para 8 of the judgment the following observations were made:—

"..... It would appear from the Objects and Reasons for the enactment of the Partition Act that as the law stood the court was bound to give a share to each of the parties and could not direct a sale or division of the proceeds. There could be, instances where there were insuperable practical difficulties in the way of making an equal division and the court was either powerless to give effect to its decree or was driven to all kinds of shifts and expedients in order to do so. The court was, therefore, given a discretionary authority to direct a sale where a partition could not reasonably be made and the sale would, in the opinion of the court, be more beneficial to the parties. But having regard to the strong attachment of the people in this country to their landed possessions the consent of the parties interested at least to the extent of a moiety in the property was made a condition precedent to the exercise by the court of the new power. At the same time in order to prevent any oppressive exercise of this privilege those shareholders who did not desire a sale were given a right to buy the others out at a valuation to be determined by the Court".

12. When the Andhra Pradesh judgment was cited by Mr. Phadkar, I was,

with respect, not inclined to follow it. The view I tentatively expressed then was fortified by the said decision of the Calcutta High Court with which I respectfully concur. The observations of the Supreme Court put the matter beyond controversy. The court has no power, other than the power conferred under the Partition Act to order sale of property in a partition suit. The suit property cannot, therefore, be ordered to be sold, whether by public auction or by an auction between the parties to the suit,

13. Mr. Phadkar contended that if I would not order sale of the suit property I should partition it as proposed by the report of Chawla with the qualification that the plaintiffs should be allotted, out of the three portions, demarcated by Chawla, one of the two portions which had a frontage on the Caddel Road. The extract from Chawla's report which I have quoted earlier shows that the suit property is not capable of being divided according to the Municipality's Development Control Rules and that the division which is contemplated by the report could operate only as a family arrangement. It is thus clear that the suit property cannot be divided by metes and bounds. For that to be done, the divisions would have to be made separate and distinct for all purposes and their respective owners would have to be made completely independent of and not reliant upon each other. The court cannot, in the circumstances, order the division of the suit property upon the basis of Chawla's report, with or without qualification. This could only have been done by consent and consent is not forthcoming.

14. It was contended by Mr. Variava that the suit as it was framed was not a suit for partition but for sale and that of only one of the joint family properties. He submitted that if I hold, as I do, that the suit property could not be sold, then I must order the suit to be dismissed. He placed reliance upon the judgment of a learned single Judge of the Calcutta High Court in *Khanta Kali v. Radha Rani Debi*, (1966) 72 Cal WN 837. The learned Judge expressed the view that in cases not contemplated under the Partition Act the court had inherent power to direct a sale. He said, however, that he was bound by the decision in *Nitya Gopal's case* (AIR 1952 Cal 893) (ibid) and so could not in the case before him order sale. He had asked plaintiff's counsel whether he would

agree to a partition if the other parties paid him the value of the share at a valuation fixed by the Court but this was not acceptable. The other parties to the suit, who were the holders of a 2/3rd share, were already in possession of the property. A sale by public auction to a stranger might not only disintegrate the family but would render it homeless. Thus, even assuming that he had inherent jurisdiction to direct sale of the property by public auction, it was not a fit and proper case to do so. As the plaintiff had asked for no other relief, the application had to be dismissed with costs.

15. It was Mr. Variava's submission, in the alternative, that if I concluded that the suit was a partition suit, I should order a valuation of the 1/3rd interest of the plaintiffs in the suit property and require the defendants to pay the amount of that valuation to the plaintiffs. Mr. Devitre adopted this, as he adopted the other of Mr. Variava's submissions.

16. The sale of the suit property not being permissible, I have the difficult task of deciding whether I should direct valuation of the 1/3rd share of the plaintiffs in the suit property and payment thereof by the defendants to the plaintiffs and/or whether I should dismiss the suit.

17. Upon a construction of the plaint, it is not a suit for partition in the true sense. The relevant prayer of the plaint (prayer b) and the relevant paragraph of the plaint (para 5) make it clear, that all that the plaintiffs seek is a sale of the suit property. This being impermissible, the suit, as I think, must be dismissed.

18. There is another, though not entirely legal, reason for following this course. The plaintiffs reside in a part of the suit property. Were I to order partition by payment by the defendants to the plaintiffs of the plaintiffs' share in the suit property upon a valuation to be made, the plaintiffs would be required to surrender possession of the part of the suit property which is in their possession. I cannot be blind to the fact that obtaining satisfactory alternative accommodation in this city would then become for the plaintiffs a virtually impossible task.

19. Mr. Variava submitted that the suit should also be dismissed because it had been dismissed against defendants 14, 15 and 16, who were necessary parties. Mr. Phadkar contended that these ladies

were not necessary parties inasmuch as they were married and had lost their right to claim maintenance thereout. Coming as I do to the conclusion that the suit must be dismissed on merits, I do not find it necessary to decide this preliminary issue.

I answer the issues thus:—

1. Not necessary.
2. In the negative, it cannot be divided by metes and bounds.
3. In the negative.
4. Not pressed, inasmuch as it is common ground that the suit is not under the Partition Act.
5. In the negative.
6. Does not arise.
7. to 10: Not pressed.
20. In the result, the suit is dismissed. The defendants do not press for costs; there shall, therefore, be no order as to costs.

21. Upon Mr. Phadkar's request, the Court Receiver do continue in possession of the suit property until 12th April 1982. The Court Receiver then do hand-over (a) possession of the suit property to the plaintiffs and defendants 1 to 9 and 11 to 13 and (b) to their advocates all recoveries made from the suit property after deducting his costs, charges and expenses. The Court Receiver do thereupon stand discharged without passing accounts.

Suit dismissed.

AIR 1982 BOMBAY 277

MASODKAR AND BHARUCHA, JJ.

The Oriental Fire & General Insurance Co. Ltd., Appellants v. Balkrishna Ramchandra Nayan and others, Respondents.

First Appeal No. 535 of 1979, D/- 4-3-1982.

Motor Vehicles Act (4 of 1939), Sections 110-E, 110B, 96 (4) and 110F — Powers of tribunal under Section 110E — Has power to issue certificates of recovery of moneys payable by insured to insurer under award, where insurer has paid in excess of his liability — Even under Rule 294, Bombay Motor Vehicles Rules, tribunal can adopt procedure under Section 110E to order recovery of moneys that becomes due as and by way of restitution. (Bombay Motor Vehicles Rules (1959), Rule 294).

While making an award under Section 110B, the tribunal is required to

DZ/DZ/778/82/HR/RSK

specify the amount to be paid under the award by the insurer, the owner and the driver of the vehicle involved. Apportionment of liability between them is a function of the tribunal and the apportionment is a part of the award. The recovery of the amount paid in excess of its liability by one opposite party from another opposite party is, then, the recovery of moneys due under an award and Section 110E is attracted. It must also be noted in this connection that Section 110E refers to moneys due from any person under an award. It is therefore, not correct to say that the tribunal does not have the power to issue a certificate under Section 110E to recover moneys due by one opposite party from another opposite party. The contention that the Act does not contemplate payment of an amount larger than that found to be the liability of a party and it, therefore, does not provide for the recovery of the excess is without force. The tribunal has, as the last words of Section 110B show, the power to make joint and several awards and Section 96 (4) contemplates a situation where the insurer makes a payment under the award larger than his limited liability.

(Paras 15, 16)

Reference must also be made to Section 110F whereunder the jurisdiction of the civil courts is barred in respect of "any question relating to any claim for compensation which may be adjudicated upon by the claims tribunal." It is necessary to lay stress on the words "any question relating to any claim for compensation." The determination of the liability of a party and, therefore, the determination and recovery of the excess thereon paid by him under an award is such question, and its seizure by a civil court is barred.

(Para 17)

Under Rule 294 of the Bombay Motor Vehicles Rules the tribunal is empowered to exercise all the powers vested in a civil court under the provisions of Section 144 of the C. P. C. 1908. The tribunal is, therefore, empowered to order recovery of moneys that become due as and by way of restitution. It may do so by adopting the procedure under Section 110E.

(Paras 18, 19)

In the instant case, the tribunal made an award for the sum of about Rs. one lakh and forty thousand without apportioning the liability between the insurer and the insured. The Insurance Company paid the entire amount due under the award. Later, on an application by

the insurer to the tribunal for apportionment of liability between the insurer and insured, the tribunal declared that the liability of the insurer was limited to Rs. 20,000/- only. Thereupon the insurer filed an application before the tribunal to recover from the insured, the excess amount paid by the insurer under the award. The tribunal declaring that it was not empowered under Section 110E to issue a certificate of recovery in respect of moneys payable by the owner of a vehicle to its insurer, rejected the application and directed the insurer to file a civil suit against the insured for reimbursement of the excess amount.

Held, there was no reason why the order by which the liability of the insurer under the award was restricted to Rs. 20,000/- could not be said to be a variation of the award, for, under the provisions of Section 144 Civil P. C., the variation did not have to be only in appeal or revision but could be in any other proceedings also. Looked at even as restitution, the tribunal could and should have exercised powers under Section 110E upon the application of the insurer. The tribunal erred in referring the insurer to a civil suit to recover the excess amount. (Paras 17, 19)

V. H. Gumaste with S. M. Mhamane, for Appellants; A. P. Vaze (for No. 1) and S. T. Tijoriwala i/b Nalin Parekh and G. S. Bhat (for Nos. 2 and 3), for Respondents.

BHARUCHA, J.:— This is an appeal against an order of the Motor Accidents Claims Tribunal for Greater Bombay rejecting the application of the appellants to direct by an award the owners of the vehicle concerned, the opposite parties to the application and the respondents 2 and 3 before us, to pay to the appellants the sum of Rs. 1,88,125/- with interest thereon at the rate of 6% per annum from 20th March, 1978 till payment.

2. On 14th April 1969 an accident took place at Bombay involving a vehicle owned by the respondents. One Dr. Balkrishna Nayan (respondent 1) was injured in the accident. He filed before the tribunal application No. 727 of 1969 against the respondents 2 and 3 for compensation. The appellants were joined as insurers of the vehicle. On 12th December, 1974, the tribunal made an award directing the respondents 2 and 3 and the appellants to pay to Dr. Nayan the sum of Rs. 1,43,400/- with interest there-

on at the rate of 6% per annum from the date of the filing of the claim till payment and costs in the sum of Rupees 1,000/-. Against the award an appeal was filed in this court (being First Appeal No. 449 of 1975) by the respondents 2 and 3 and the appellants. On 23rd March, 1976, the appeal was dismissed. The court then passed, *inter alia*, the following orders:—

"(2) The award passed by the tribunal is confirmed but the appellant-insurance company is given liberty to apply on depositing Rs. 20,000/- with interest as ordered in the award from the date of the application to the date of the deposit, for not issuing a certificate, against the insurance company under Section 110E for the balance of the amount awarded on the ground that the liability of the insurance company is limited to Rs. 20,000/- under Section 95 (2) or the amount for which the insurance company has issued the policy, whichever is higher.

(3) The tribunal to decide the question of the liability of the insurance company on its application for the said purpose under Section 110E after giving an opportunity to all the parties."

3. The matter was carried in appeal to the Supreme Court by the respondents. On 26th January, 1972, the Supreme Court dismissed the appeal. Dr. Nayan then filed before the Supreme Court Civil Miscellaneous Petition No. 1347 of 1978 in the appeal. In that petition the Supreme Court on 3rd February, 1979 passed the following order:—

"Heard learned counsel for all the three parties, namely the claimant, the insurers, as also the insured. In our opinion, reading the judgment of the High Court and of this Court passed in appeal as well as in the review matter, it is clear that the award made by the Tribunal for the amount of about Rs. one lakh and forty thousand casting a joint and several liability on the insured and the insurers has remained intact. It has not been affected in any way by any direction given by the High Court as affirmed by this Court. In other words, it is open to the claimant to claim the whole of that amount from the insurer or the insured in accordance with the Motor Vehicles Act, 1939.

The Tribunal, however, as directed by the High Court, and the said direction having not been interfered with by this Court, may proceed to determine the

liability of the insurer, if the insurance company has carried out the condition for determination of that liability, namely, deposit of Rs. 20,000/- with interest. But it is made clear that the determination of this liability will be only for the purpose of apportioning the liability between the insured and the insurer as between themselves. It will not affect the joint and several award made against them in favour of the claimant and will not affect or delay his right at all for the realisation of the amount. If the insurer is made to pay an amount in excess of the amount of liability determined by the Tribunal in pursuance of the direction of the High Court it will be open to the insurer to proceed against the insured in accordance with law for reimbursement of the said amount. We, therefore, direct the Tribunal to proceed in this matter in the light of this order."

4. On 20th March, 1978, the appellants paid the entire amount due under the award.

5. In the meantime, on 10th May, 1976, pursuant to the said directions of this court in the appeal, the appellants made an application to the tribunal to apportion the liability under the award between themselves and the respondents 2 & 3. On 9th November, 1978, the tribunal declared that the said liability of the appellants was limited to Rs. 20,000/- only. On 15th November, 1978, the appellants filed the present application before the tribunal to recover from the respondents 2 and 3 the excess amount paid by the appellants under the award.

6. The tribunal by the order under appeal, dt. 20th Feb. 1979, came to the conclusion that Section 110E of the Motor Vehicles Act, 1939 (hereinafter referred to as "the said Act") did not empower the tribunal to issue a certificate of recovery in respect of moneys payable by the owner of a vehicle to its insurer. In its view, an award of the tribunal could not settle a claim between the owner and the insurer and could not direct the owner to pay moneys to the insurer. It held that the appellants would have to proceed against the respondents 2 and 3 in a suit in civil Court for reimbursement of the excess amount. The tribunal rejected the application.

7. Against that order this appeal is filed.

8. It was contended by Mr. Gumaste, learned counsel for the appellants, that it was clear from the said directions of this

court in the appeal and of the Supreme Court that the tribunal was to decide the question of the appellants' liability under Section 110E of the Act. That provision empowered the tribunal to issue a certificate in respect of moneys due under an award to the Collector whereupon the Collector had to proceed to recover the moneys due in the same manner as arrears of land revenue. In Mr. Gumaste's submission it was incumbent upon the tribunal to proceed to carry out these directions regardless of its own interpretation of its powers. He submitted that it was not open to the respondents 2 and 3 to challenge before the tribunal its power in the application; they should have challenged the applicability of Section 110E of the Act before this Court when it gave the directions of 23rd March, 1976 or before the Supreme Court when it affirmed the same. Mr. Gumaste submitted that there was, in any case, power vested in the tribunal to issue a certificate to recover amounts due by one opposite party to another under an award. To substantiate this contention Mr. Gumaste took us through the scheme of Chap. VIII of the Act and showed us that under the Bombay Motor Vehicles Rules the tribunal was vested with the powers exercisable by a civil court under S. 144 of the Code of Civil Procedure, 1908.

9. Mr. Tijoriwala, learned counsel for the respondents 2 and 3 submitted that no appeal lay against the order passed by the tribunal rejecting the application, for it was not an award. He also contended that the tribunal had no power to issue a certificate under Section 110E against one opposite party to recover moneys due to another opposite party. In his submission, by the order dated 9th November, 1978, the tribunal had only determined the amount of the liability of the appellants as the insurers and this was not tantamount to an award to which the provisions of Section 110E would apply.

10. In view of the fact that we have permitted the appellants to challenge the said order also under Articles 226 and 227 of the Constitution, the point as to the maintainability of the appeal need not be considered.

11. This court in the appeal gave by its said directions liberty to the appellants to apply to the tribunal for the balance of the amount awarded on the ground that its liability was limited. It expressly directed the tribunal to decide the question of the appellants' liability

for the said purpose under Section 110E. Section 110E reads thus:

"Where any money is due from any person under an award, the Claims Tribunal may, on an application made to it by the person entitled to the money, issue a certificate for the amount to the Collector and the Collector shall proceed to recover the same in the same manner as an arrear of land revenue."

From the phraseology used there can be no doubt that this Court intended and directed that the provisions of Sec. 110E be put into effect upon the appellants' application for determination of their liability, which meant that the Tribunal was directed to issue a certificate u/s. 110E for recovery from the respondents 2 and 3 of such excess amount as had been paid by the appellants under the award.

12. The Supreme Court by the order dt. 3rd February 1979 ordered the Tribunal "as directed by the High Court, and the said direction having not been interfered with by this court" to proceed to determine the liability of the appellants. The Supreme Court thus made it clear that this Court's order in its fullest amplitude remained operative and the Tribunal was directed to comply with it. The further statement in the order that it would be open to the appellants to proceed against the respondents 2 and 3 in accordance with law for reimbursement of the excess amount after the excess amount was determined by the Tribunal pursuant to this Court's directions only affirms that this Court's directions were fully effective. It does not exclude, as was sought to be suggested by Mr. Tijoriwala, the operation of S. 110E as a method of recovery of the excess amount.

13. In our view, upon an interpretation of the said directions of this court in the appeal and of the Supreme Court, the Tribunal was obliged to determine the liability of the appellants and to employ the provisions of S. 110E to recover the excess amount paid by the appellants under the award from the respondents 2 and 3. Any quarrel with the employment of these provisions for this purpose should have been raised by the respondents 2 and 3, not before the Tribunal, but before this Court in the appeal or before the Supreme Court when it endorsed this court's directions. This is sufficient to allow the appeal.

14. Since, however, the question of the power of the Tribunal to issue the certificate u/s. 110E has been canvassed, we propose to discuss our findings there-

on. S. 110B and S. 110D must be first set out:

"110B. On receipt of an application for compensation made under Section 110A, the Claims Tribunal shall, after giving the parties an opportunity of being heard, hold an inquiry into the claim and may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid, and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be."

"110D. (1) Subject to the provisions of sub-section (2), any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court:

Provided that the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(2) No appeal shall lie against any award of a Claims Tribunal, if the amount in dispute in appeal is less than two thousand rupees."

15. It will be observed that the Tribunal is required in making the award to specify the amount to be paid thereunder by the insurer, the owner and the driver of the vehicle involved. Apportionment of liability between them is a function of the tribunal and the apportionment is a part of the award. The recovery of the amount paid in excess of its liability by one opposite party from another opposite party is, then, the recovery of moneys due under an award and S. 110E is attracted. It must also be noted in this connection that S. 110E refers to moneys due from any person under an award. It is, therefore, not correct to say, as the Tribunal did, that the Tribunal does not have the power to issue a certificate u/s. 110E to recover moneys due by one opposite party from another opposite party.

16. Mr. Tijoriwala placed reliance upon the fact that the appellants had not raised the plea that their liability was limited before the Tribunal. He submitted that, had they done so, as they should have done, the Tribunal would have had to apportion liability and would have

given an award under which the liability of the respondents 2 and 3 and the appellants was several, in which case the appellants could not have been made to pay under the award an amount larger than the amount of their liability and no question of recovering the excess would have arisen. The fact, he urged, did not contemplate payment of an amount larger than that found to be the liability of a party and it, therefore, did not provide for the recovery of the excess. We do not see the force of this argument. The Tribunal has, as the last words of S. 110B show, the power to make joint and several awards and S. 96 (4) contemplates a situation where the insurer makes a payment under the award larger than his limited liability.

17. Reference must also be made to S. 110F whereunder the jurisdiction of the Civil Courts is barred in respect of "any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal." It is necessary to lay stress on the words "any question relating to any claim for compensation." The determination of the liability of a party and, therefore, the determination and recovery of the excess thereon paid by him under an award is such question, and its seizure by a Civil Court is barred. The impugned order is erroneous insofar as it refers the appellants to a civil suit to recover the excess amount.

18. Under S. 111A of the Act the State Government is empowered to make rules to provide, inter alia, what powers vested in a civil Court may be exercised by the Tribunal. Under R. 294 of the Bombay Motor Vehicles Rules the Tribunal is empowered to exercise all the powers vested in a civil Court under the provisions of S. 144 of the C.P.C., 1908. The relevant portion of S. 144 provides as follows:

"(1) Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the court which passed the decree or order shall on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified, and for this purpose, the court may make any orders, including orders for the re-

fund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation, reversal, setting aside or modification of the decree or order."

19. The Tribunal is, therefore, empowered to order recovery of moneys that become due as and by way of restitution. It may do so by adopting the procedure u/s. 110E. There seems to us to be no reason why the order by which the liability of the appellants under the award was restricted to Rs. 20,000 may not be said to be a variation of the award for, under the provisions of S. 144, the variation need not be only in appeal or revision but may be in any other proceedings also. Looked at even as restitution, the Tribunal could and should have exercised powers u/s. 110E upon the application of the appellants.

20. In the premises, the appeal must be allowed. The order of the Motor Accidents Claims Tribunal dt. 20th Feb. 1979 is set aside. The Tribunal is directed to issue a certificate u/s. 110E certifying that the sum of Rs. 1,88,125 with interest thereon at the rate of 6% per annum from today till payment is recoverable by the appellants from the respondents 2 and 3.

21. The respondents 2 and 3 shall pay to the appellants the costs of the appeal.
Appeal allowed.

AIR 1982 BOMBAY 281

MASODKAR AND BHARUCHA, JJ.

K. G. Agarwal, Appellant v. The Divisional Superintendent, South Central Railway, Solapur and another, Respondents.

First Appeal No. 463 of 1977, D/- 10-2-1982.

Arbitration Act (10 of 1940), S. 13 — Power of arbitrator to award interest subsequent to date of award — Dispute regarding claim arising out of contract referred to arbitration but disputes in suit and question of interest subsequent to date of award not included in reference — Held, arbitrator had no power to award interest after date of award. AIR 1967 SC 1032, Disting. (Para 4)

Cases Referred : Chronological Paras
AIR 1967 SC 1032 : 1967 All LJ 419 2

BHARUCHA J.— A dispute between the parties regarding a claim arising out of a contract was referred to sole arbi-

DZ/DZ/B650/82/HR/RSK

tration. On 25th February 1976 the arbitrator made an award in favour of the appellant in the sum of Rs. 59,500/-. He prescribed "that this amount shall be paid to Shri K. C. Agarwal (the appellant) not later than 31st May, '76 and for any delay beyond this date, the money in Award will carry a simple interest at the rate of 6% per annum." The arbitrator applied to the Civil Judge, Senior Division, Pune, for a decree in terms of the award. The respondents contended before the court that the arbitrator had no power to award interest after 31st May, 1976. The court accepted the contention and passed a decree in terms of the award excluding the direction for payment of interest. It directed that the amount of Rs. 59,500/- deposited by the respondents in the court should be paid over to the appellant without delay. Being aggrieved by this decision, the appellant has preferred this appeal.

2. It was contended before us that the arbitrator had power to direct payment of interest for the period subsequent to the date of the award. In this behalf Mr. Naik, learned counsel for the appellant, cited the judgment of the Supreme Court in *Union of India v. Bungo Steel Furniture*, AIR 1967 SC 1032. In that case disputes in a suit, including the question of interest, were referred to an arbitrator. The arbitrator awarded interest on the principal amount awarded from the date of the award till the date of the decree. The Supreme Court held that the arbitrator had jurisdiction to do so. A reference in respect of such interest had been made to him. It was an implied term of the reference that the arbitrator would decide the dispute according to existing law and give such relief with regard to interest as a court could give if it decided the dispute. The principle of S. 34 of the Code of Civil Procedure could be applied by the arbitrator in a case where a Court in a suit could grant a decree for interest.

3. Power in respect of interest on an award is given by Section 29 of the Arbitration Act, 1940. Thereunder, where an award is for the payment of money, the Court may, in passing a decree on the award, order interest from the date of the decree at such rate as it deems reasonable to be paid on the principal sum adjudged by the award and confirmed by the decree.

4. Where, therefore, as in the instant case, disputes in a suit are not referred to arbitration and there is nothing to indicate that the question of interest subsequent to the date of the award has been referred to the arbitrator, the arbitrator has no power to award interest upon the principal amount he awards subsequent to the date of his award.

5. The appeal has no merit and is dismissed with no order as to costs.

Appeal dismissed.

AIR 1982 BOMBAY 282

JAHAGIRDAR, J.

Rahimtulla Abdul Rahiman Nakib,
Petitioner v. Chandrakant Anant Moog
and others, Respondents.

Special Civil Appln. No. 1513 of 1977,
D/- 10-3-1981.

Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Sections 12 (2), 13 — Eviction suit by co-heirs of deceased landlord — All the co-heirs need not be joined in the notice and in the suit. (T. P. Act (1882), Section 106). Judgment of Kanade, J., 1981 Bom CR 271. Followed. AIR 1973 Guj 131 (FB) and AIR 1976 Bom 417, Not followed in view of AIR 1977 SC 1599.

(Paras 7, 8)

Cases Referred: Chronological Paras

1981 Bom CR 271	7
AIR 1977 SC 1599	4, 8
AIR 1976 SC 2335	6
AIR 1976 Bom 417 : 78 Bom LR 195	3
AIR 1973 Guj 131 (FB)	8
(1962) 65 Bom LR 15: 1963 Mah LJ 309	3

Arvind V. Bandivadekar, for Petitioner;
Bhimrao N. Naik, for Respondents.

ORDER:— In this petition under Article 227 of the Constitution, a question of law has been raised, but I am relieved of entering into a detailed discussion of the same because that has been already decided by authorities which are binding upon me. The petitioner is the tenant of a room forming part of a building bearing C. T. S. No. 2197 situated at Kolhapur and the respondents' father was the original owner of the said house. It is an admitted position that the respondents' father has died and the respondents are some of the

DZ/DZ/B633/82/HR/RSK

legal representatives of the original owner. It has been brought on record that apart from the five respondents, their father left behind him his widow and three daughters. The foundation of the arguments advanced in the two Courts below and repeated before me is this fact that it is not the five respondents alone who are the owners of the suit premises, but their mother and the three sisters are also owners of the same.

2. Regular Civil Suit No. 438 of 1973 was filed by the five respondents for possession of the suit premises on the ground, among others, that the petitioner was in arrears of rent for a period of more than six months and he has not complied with the requirements mentioned in Section 12 (2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, hereinafter referred to as "the Bombay Rent Act". Both the Courts below have upheld the claim of the respondents and decreed the suit for possession. The trial Court passed the decree on 31st of January, 1976, which has been confirmed by the Appeal Court in Civil Appeal No. 172 of 1976 by its judgment and order dated 30th of June 1977. The petitioner has now approached this Court under Article 227 of the Constn.

3. Mr. Bandivadekar, the learned Advocate appearing in support of the petition, has repeated the challenge as to the competence of the respondents to file the suit when the other heirs of the original landlord have not been joined either in giving the notice under Section 12 (2) of the Bombay Rent Act or in the suit which was filed for possession. Mr. Bandivadekar has contended that the reliance placed by the learned Assistant Judge on the judgment of this Court in *Nishramal Chhogala v. N. B. Patel*, (1963) 65 Bom LR 15, is wrong because subsequently this judgment has been distinguished by *Bhasme J. in Mohan Sons Pvt. Ltd. v. Sonoo Jamsetji*, (1976) 78 Bom LR 195: (AIR 1976 Bom 417). Mr. Bandivadekar has naturally relied upon the later judgment which apparently supports his contention that some only of the owners of a building cannot file a suit for possession under the provisions of the Bombay Rent Act.

4. Much water, however, has flown down the Ganges after the judgment of

Bhasme J. was given. In *Smt. Kanta Goel v. B. P. Pathak*, AIR 1977 SC 1599, a similar question arose and has been answered conclusively. In that case the suit premises had been leased to the tenant by one Pandit Saraswatidas who died in the year 1972 leaving behind him the plaintiff, two other sons and a daughter as his legal representatives. It was the plaintiff alone who filed the application or the suit before the Rent Collector under the provisions of the Delhi Rent Control Act, 1958. One of the contentions which was taken in the Court below as well as in the higher Courts was that the plaintiff alone could not file a suit for possession of the premises leased to the tenant and in order that the suit should be properly constituted all the legal representatives of the original owner or in other words all the owners of the building at the time of the institution of the suit must necessarily join in the suit. This argument was rejected by the Supreme Court. However, in *Kanta Goel's* case the other co-owners of the suit premises had been joined as parties at the High Court stage. The contention which was raised on behalf of the tenant was summarised by the Supreme Court in the following words (at p. 1601):—

"The presence of the co-heirs at the High Court level was inconsequential, according to the appellant, and their absence at the trial stage vitiated the order of the Controller."

After examining some other incidental questions which also arose, the Supreme Court proceeded to mention as follows:—

"Equally without force in our view is the plea that one co-lessor cannot sue for eviction even if the other co-lessors have no objection." (Para 6)

5. Thereafter the Supreme Court proceeded to examine the definition of "landlord" contained in the Delhi Act, which is *pari materia* with the definition of "landlord" contained in the Bombay Rent Act, and after doing so the following law was laid down:— (Para 6)

"The first respondent (the plaintiff), together with the other respondents, constituted the body of landlords and, by consent, implicit or otherwise, one of them representing them all, was collecting rent. In short, he functioned, for all practical purposes as the land-

lord, and was therefore entitled to institute proceedings qua landlord."

6. Thereafter, referring to an earlier judgment of the Supreme Court in *Sri Ram Pasricha v. Jagannath*, AIR 1976 SC 2335, the Supreme Court proceeded to hold as follows:—

"That case also was one for eviction under the rent control law of Bengal. The law having been thus put beyond doubt, the contention that the absence of the other co-owners on record disentitled the first respondent from suing for eviction, fails."

7. The judgment of the Supreme Court in *Kanta Goel's* case has been referred to and naturally followed by *Kanade J.* in Special Civil Application No. 2554 of 1975 decided on 2nd of July 1980*. There is thus no alternative for me but to dismiss this petition whose main challenge is based on the judgment of *Bhasme J.* referred to above.

8. Mr. Bandivadekar has referred me to the judgment of a Full Bench of the Gujarat High Court in *Nanalal Girdharilal v. Gulamnabi Jamalbhai Motorwala*, AIR 1973 Guj 131, which to a great extent supports the petitioner in the instant case. But in view of the judgment of the Supreme Court in *Kanta Goel's* case (AIR 1977 SC 1599), it is not possible to hold that the question is any longer open to an argument of the type advanced by Mr. Bandivadekar. For the same reason I am left with no alternative but to reject the contention of Mr. Bandivadekar relating to the necessity of all the co-owners joining in a notice u/s. 12 (2) of the Bombay Rent Act. A notice u/s. 12 (2), for similar reasons as mentioned in *Kanta Goel's* case, can be issued by the Rent Controller or one of the co-heirs.

9. In the result, this petition must fail. Accordingly, rule is discharged with no order as to costs.

10. Mr. Bandivadekar requests for time to vacate the premises. The decree shall not be executed till 30th of Sept. 1981, provided that the petitioner files in this Court an affidavit on or before 30th of March 1981:

(i) giving an undertaking to this Court that he shall give vacant and peaceful possession of the suit premises

to the respondent on or before 30th of Sept., 1981 and that in the meantime he shall not induct anyone in the suit premises in any capacity or otherwise pari with the suit premises in any manner whatsoever; and

(ii) that he shall go on depositing the rent of the suit premises for every month by the end of that month.

Petition dismissed.

AIR 1982 BOMBAY 284

MADON, J.

Bhausahab Tavnappa Mahajan and others, Appellants v. State of Maharashtra and others, Respondents.

Second Appeal No. 909 of 1980, D/-1-9-1981.

(A) *Maharashtra Agricultural Produce Marketing (Regulation) Act (20 of 1964), S. 3 (1) — Notification under — Requirement as to publication in newspaper is directory — Held, fact that only gist of notification was published in local vernacular newspaper did not make notification invalid. (Interpretation of Statutes — Mandatory or directory provisions).* AIR 1974 Bom 181, Rel. on. (Para 5)

(B) *Evidence Act (1 of 1872), S. 114 (e) — Presumption under — Publication of Govt. notification — Court called upon to decide whether notification was published in accordance with relevant statutory provisions — Evidence led by Govt. to prove due publication — Held presumption that notifications had been regularly published could not be drawn u/s. 114 (e).*

Illustration (e) to S. 114 cannot and does not apply where the point at issue is not whether an official act was properly performed, but the point at issue is whether such an act was in fact performed, and (2) where evidence has been led on behalf of the Government or the concerned authority to prove that a particular official act had been regularly performed and that evidence clearly shows that such performance had not taken place. In either of these cases, there is no place or scope for drawing any presumption u/s. 114. The first point to notice about S. 114 is that it uses the words "may presume" in contradistinction to the words "shall presume".

Under S. 4 of the Act whenever it is provided by that Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it, and whenever it is directed by that Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved. Therefore, it is open to a Court either to draw or not to draw a presumption u/s. 114. Normally, the Courts would draw such a presumption when the actual performance of the act is not in dispute in order not to waste public time on the leading of formal proof with respect to the regularity of its performance, but the position is entirely different where the very issue which the Court has to decide is as to the performance of that official act itself. Further it must be borne in mind that by the very terms of the section a presumption u/s. 114 is to be drawn in relation to the facts of a particular case, AIR 1945 Bom 368 and AIR 1968 SC 1413, Rel. on. (Paras 7, 8, 9)

Held, when the very issue before the Court was whether the Govt. notifications had been duly published and evidence had been led by the Govt. to prove the point in issue, the question of drawing any presumption u/s. 114 (e) regarding due publication of notifications did not arise. The lower Appellate Court was in error in drawing a presumption u/s. 114 and in holding that the said notification had been duly published as required by the relevant statutory provisions. Further, it was strange that those desiring to prove that the said notification had been properly published did not care to produce any evidence other than two letters. Either no other documentary evidence at all existed, or if it existed and was not produced, the Court was entitled to presume u/s. 114 (g) that such evidence if produced would have been unfavourable to the person withholding it. (Paras 8, 9)

(C) Maharashtra Agricultural Produce Marketing (Regulation) Act (20 of 1964), S. 3 (1) last part — Maharashtra Agricultural Produce Marketing (Regulation) Rules (1967), R. 3 — Last part of S. 3 (1) dealing with third mode of publication and provisions of R. 3 are mandatory — Held, Notification No. APMC/Kolhapur 67, dt. 3-2-68 issued u/s. 3 was invalid for non-compliance with manda-

tory provisions — Consequently, Notification No. APMC/Kolhapur/68 dt. 16-5-68 issued u/s. 4 pursuant to notification u/s. 3 was also invalid. (Interpretation of Statutes — Mandatory and directory provisions).

The notification u/s. 3 is issued so as to enable those who may be affected by the declaration of intention were it implemented to submit their objections thereto for the consideration of the prescribed authority. It is also there for those desiring to make suggestions, some of which may be worthwhile, for the prescribed authority to take the suggestions into consideration before issuing a final notification u/s. 4. The said Act is a regulatory statute. It affects the right to carry on trade and business of several persons. It also affects agriculturists. It is, therefore, necessary that the Government's intention to issue a notification u/s. 4 of the said Act should be brought to the notice of all persons concerned, not only the wholesale dealers in the particular agricultural produce but also all agriculturists. Generally, agriculturists are not literate, and even if they can read, they usually do not subscribe to newspapers. They however, often have occasion to visit the offices of Mamlatdars, Tahsildars, Mahalkaris, Naib-Tehsildars and Panchayat Samitis, and when they do so, when any notice is put up on the notice-board there, either they or someone of them who may be able to read it may come to know about it and inform the others. For people of this class the best mode of publication would be by oral proclamation by beat of drums. Bearing all these factors in mind, though S. 3 left it to the discretion of the State Govt. to publish a notification u/s. 3 in such manner as in its opinion was best calculated to bring it to the notice of concerned persons, the State Government, instead of leaving such mode of publication to the individual opinion of different officers, thought it fit to prescribe how such publication should be done, and this it did by making R. 3 of the said Rules. That rule itself also uses the word 'shall'. It uses the word 'shall' because by the terms of S. 3 (1) of the said Act with respect to the third mode of publication the word 'shall' is used. The object underlying this provision would clearly show that

what was intended by the Legislature in requiring the State Government to publish a notification in the manner best calculated to bring to the notice of the persons in the area the Government's intention was to make it a mandatory requirement and that it was in order not to leave the compliance of such mandatory requirement to the individual notions of different officers that the State Government made the said R. 3, making the modes of publication specified therein to be mandatory and obligatory. To hold that the provisions in question are directory would be fraught with grave danger, for it would leave it open to executive officers by not complying with any one of them to flout and set at naught the Will of the Legislature and the mandatory requirements imposed upon them by the State Government. The provisions contain procedural safeguards, and procedural safeguards are as important as substantive safeguards. Therefore, the last part of S. 3 (1) dealing with the third mode of publication and the provisions of R. 3 are mandatory and not directory. (1967) 1 WLR 1311 (1325) (CA), AIR 1964 SC 1687 and AIR 1974 Bom 181, Ref. (Paras 11, 12)

Held, as the mandatory provisions were not complied with, Notification No. APMC/Kolhapur/67 dt. 3-2-68 issued u/s. 3 was inoperative and invalid. As the said notification u/s. 3 was invalid and inoperative, the condition precedent for the issuing of a notification u/s. 4 was not fulfilled, and, therefore, Notification No. APMC/Kolhapur/68 dt. May, 16, 1968 u/s. 4 was also invalid and inoperative. AIR 1972 SC 892 (893, 895), Rel. on. (Para 12)

(D) Civil P. C. (5 of 1908), S. 11 — Res judicata — Validity of Govt. notifications challenged under Art. 226, Constitution, on ground that they were not duly published — Notifications held to be duly published — Suit filed not by petitioners but by a different party challenging notifications on same ground — Suit is not barred by res judicata.

The plaintiffs were members of an unregistered association known as the Kolhapur Grain Merchants Association and had filed a suit challenging certain notifications issued by the Govt. under the Maharashtra Agricultural Produce Marketing (Regulation) Act, 1963 on the

ground that the said notifications were not duly published. The very same notifications had been challenged earlier in a petition under Art. 226 of the Constitution by three firms doing business in onions. Being an application under Art. 226 of the Constitution, the matter was decided on affidavits. Amongst the various grounds raised to challenge these notifications one ground was that the notification u/s. 3 and, therefore, the notification u/s. 4 was also invalid. An affidavit in reply was filed to that petition by the Under Secretary to the Government, Agriculture and Co-operation Department, in which was set out in detail how the said notifications were published. The Court accepted the statements made in the affidavit of the Under Secretary and held that the notifications had been properly published.

Held, the decision in the writ petition did not operate as res judicata in respect of the subsequent suit. The petitioners were entirely different from the plaintiffs in the suit. Those petitioners were not even members of the Kolhapur Grain Merchants Association on whose behalf the suit was filed. Secondly, that was a petition under Art. 226 of the Constitution which was decided on affidavit. Here, there was a suit which had to be decided on evidence and not by accepting implicitly statements made in the written statement of the respondents. Therefore, the question of res judicata did not arise at all. (Para 13)

Cases Referred: Chronological Paras

AIR 1980 SC 1124:	1980 All LJ 490	5
AIR 1974 Bom 181:	1974 Mah LJ 338	5, 11
(1973) Special Civil Appln. No. 2363 of 1969, D/- 6-7-1969 (Bom), Bajomal Parchomal Gaijwani v. State of Maharashtra		13
AIR 1972 SC 892		12
AIR 1968 SC 1413:	71 Bom LR 48	8
(1967) 1 WLR 1311 (CA)		12
AIR 1964 SC 1687		12
AIR 1961 SC 751:	1961 (1) Cri LJ 773	10
AIR 1945 Bom 368:	47 Bom LR 431:	
(1946) 47 Cri LJ 123		8

A. M. Setalvad with G. R. Rege, for Appellants; A. B. Naik, Asstt. Govt. Pleader and K. J. Abhyankar, for Respondents.

JUDGMENT:— The appellants are members of an unregistered association known as the Kolhapur Grain Mer-

chants Association, and had filed the suit, out of which this Second Appeal arises in a representative capacity under R. 8 of O. 1 of the Civil P.C., 1908. The said suit was tried by the Joint Civil Judge, Senior Division, Kolhapur. In the suit the Appellants challenged certain notifications issued under the Maharashtra Agricultural Produce Marketing (Regulation) Act, 1963, (Maharashtra Act No. XX of 1964). The Appellants' challenge succeeded, and the trial Court declared the said notifications to be null and void, and restrained the Respondents from enforcing the said notifications. The trial Court also directed the parties to bear their own costs of the suit. Though the Appellants' challenge on certain grounds succeeded, their challenge on the ground that these notifications infringed the provisions of Arts. 14 and 19 (1) (g) of the Constitution of India was negatived. Against the said judgment and decree of the trial Court, not only Respondents Nos. 1 and 2, namely, the State and the Director of Agriculture, Forest and Rural Finance, Government of Maharashtra, filed an appeal but Respondents Nos. 3 to 5, namely, the Kolhapur Agricultural Produce Market Committee and the President and the Secretary of the said Committee, also filed an appeal. The Appellants also appealed against that part of the judgment which negatived their constitutional challenge to the validity of the said notifications. All these appeals were heard together by the Court of the Assistant Judge at Kolhapur, and by a common judgment the lower appellate Court allowed the appeals filed by the Respondents and dismissed the Appellants' appeal. The lower appellate Court directed the Appellants to pay the costs of the suit and the appeals. It is against this appellate decree that the Appellants have preferred this Second Appeal.

2. It will be now convenient to set out in some detail the facts which have given rise to this litigation. By a notification dt. Mar. 1, 1949 issued under the Bombay Agricultural Produce Markets Act, 1939 (Bom XXII of 1939), an Agricultural Produce Market Committee was established to regulate the marketing of groundnut (shelled and unshelled) and gur in the area of Karvir, Radhanagari and Bhudargad Talukas and Panhala

Mahal of the Kolhapur District. By another notification dt. Mar. 8, 1959 issued under the said Bombay Agricultural Produce Markets Act the market area of the said Committee was extended so as to include Shanuwadi Taluka of Kolhapur District, and its operation was also extended to regulate the marketing of groundnut (shelled and unshelled) and gur in the said extended area. By another notification dt. Oct. 6, 1963, also issued under the said 1939 Act, the market area of the said Committee was further extended so as to include the area of 43 villages mentioned in the said notification situate on the north of Vedganga river from Kagal Taluka, and its operation was equally extended to regulate the marketing of groundnut (shelled and unshelled) and gur in the extended area. Thereafter the Director of Agricultural Marketing and Rural Finance, Maharashtra State, intended to extend the market area of the said Committee so as to include in it the area of Gagan-Bawada Mahal of the Kolhapur District as also to extend its operations to regulate the marketing of paddy (husked and unhusked), jowar, bajari, wheat, tobacco, cotton (ginned and unginned), chillies, turmeric, gram, gram-dal, tur, tur-dal, udid, udid-dal, masur, masur-dal, mug, mug-dal, onion, peas, val, chola, kulthi, cattle, sheep and goats in addition to groundnut (shelled and unshelled) and gur in the whole of the market area as extended by the said Committee. There does not appear to be any particular dispute that while groundnut and gur grow in Kolhapur District, the other grain seeds which were intended to be got regulated by the said Committee are brought into Kolhapur from other places. A notification, namely, Notification No. APMC/Kolhapur/67 dt. Feb. 3, 1968 was published in the Maharashtra Government Gazette. Part I. Poona, dt. Mar. 14, 1968. The said notification was issued u/s. 3 of the Maharashtra Agricultural Produce Marketing (Regulation) Act, 1963 (hereinafter referred to as "the said Act"), which had repealed and replaced the said 1939 Act. By the said notification, objections and suggestions were invited by the Director of Agricultural Marketing and Rural Finance, Maharashtra State, Poona, within a period of one month from the date of the said notification. Accordingly, the said Kolha-

pur Grain Merchants Association submitted its representation dt. Apr. 11, 1968. By the telegram dt. Apr. 25, 1968 representatives of the said Association were asked to meet the said Director on Apr. 30, 1968. The said meeting took place, and the representatives of the said Association put forward their point of view before the said Director, apparently without any success, because a notification, namely, Notification No. APMC/Kolhapur/68 dt. May 16, 1968, issued by the said Director u/s. 4 of the said Act was published in the Maharashtra Government Gazette, Part I, Poona Division, dt. June 13, 1968. It is these two notifications which were challenged by the Appellants in their suit.

3. In order to understand the contentions of the Appellants with respect to the said notifications advanced before me at the hearing of this Second Appeal, it is necessary now to refer to certain provisions of the said Act. Sections 3 and 4 of the said Act provide as follows:

"3. Notification of intention of regulating marketing of agricultural produce in specified area.

(1) The State Government may, by notification in the Official Gazette, declare its intention of regulating the marketing of such agricultural produce, in such area as may be specified in the notification. The notification may also be published in the language of the area in any newspaper circulating therein, and shall also be published in such other manner as in the opinion of the State Government is best calculated to bring to the notice of persons in the area, the intention aforesaid.

(2) The notification shall state that any objections or suggestions which may be received by the State Government within a period of not less than one month to be specified in the notification will be considered by the State Government.

4. Declaration of regulation of marketing of specified agricultural produce in market area.

(1) On the expiry of the period specified in the notification issued under Section 3, the State Government shall consider the objections and suggestions, if any, received before the expiry of such period and may, if it considers

necessary, hold an inquiry in the manner prescribed.

Thereafter, the State Government may, by another notification in the Official Gazette, declare that the marketing of the agricultural produce specified in the notification shall be regulated under this Act, in the area, specified in the notification. The area so specified shall be the market area. A notification under this section may also be published in the language of the area in a newspaper circulating therein, and shall also be published in such other manner as in the opinion of the State Government is best calculated to bring to the notice of persons in the area the declaration aforesaid.

(2) On any declaration being made under sub-section (1) no local authority shall thereafter, notwithstanding anything contained in any law for the time being in force, establish, authorise or continue or allow to be established or continued any place in the market area for the marketing of that agricultural produce.

(3) Subject to the provisions of Section 3, the State Government may, at any time by notification in the Official Gazette, exclude from a market area any area, or include therein an additional area, or may direct that the regulation of the marketing of any agricultural produce in any market area shall cease, or that the marketing of any agricultural produce (hitherto not regulated) shall be regulated in the market area."

Section 58 confers upon the State Government the power to delegate inter alia to the Director of Agricultural marketing all or any of the powers conferred upon it by the said Act. It was in pursuance of such delegated authority that the said Director issued the said two notifications. Section 60 confers upon the State Government the power to make rules for carrying into effect the purposes of the said Act, including prescribing the manner of holding an inquiry. In pursuance of this rule-making power the State Govt. has enacted the Maharashtra Agricultural Produce Marketing (Regulation) Rules, 1967 (hereinafter referred to as "the said Rules"). Rule 3 of the said Rules is important and requires to be reproduced in extenso. It is as follows:

"3. Additional mode of publication of notification under Sections 3 and 4.— A notification under Section 3 declaring the intentions of the State Government of regulating the marketing of any agricultural produce in any area specified in such notification and the notification under Section 4 regulating the marketing of agricultural produce in any area shall, in addition to their publication in any newspaper circulating in any such area as required by that section, also be published by affixing copies thereof at the chavdi of each village included in such area and by exhibiting them on the notice board in the office of the Mamlatdar, Tahsildar, Mahalkari or Naib-Tahsildar and of the Panchayat Samiti within whose jurisdiction such area is situated. The State Government shall also require a revenue officer specified in this behalf to give wide publicity to the notification by beat of drums in any such area."

Rule 4 of the said Rules prescribes the procedure for holding inquiry for considering objections and suggestions. Under that rule the Inquiry Officer is by notice to require the persons making the objections and suggestions to appear before him not earlier than fifteen days from the date of the notice. From the dates set out above, it will be apparent that a much shorter time than the prescribed period of fifteen days was given to the said Association. Since, however, no point has been made with respect thereto before me, I do not propose to express any opinion about it.

4. Before me Mr. Setalvad, learned Counsel for the Appellants, has confined himself to raising two points:

(1) The said Act, having been enacted to regulate the marketing of agricultural produce, can only permit the regulation of the first marketing of the product in question. Once the product is marketed, it enters the stream of commerce and becomes a commercial commodity like any other commercial commodity. The application of the provisions of the said Act to such products is not permissible under the said Act and that in any event is not a reasonable restriction on the fundamental rights of the Appellants to carry on trade and business guaranteed to them by Article 19 (1)(g) of the Constn.

(2) The provisions of Rule 3 of the said Rules relating to the additional modes of publication are mandatory; and they not having been complied with, the said notifications are invalid and inoperative.

5. So far as the first point is concerned, Mr. Setalvad frankly stated that in view of the judgment of the Supreme Court in *Ram Chandra Kailash Kumar & Co. v. State of Uttar Pradesh*. AIR 1980 SC 1124, it was not open to him to urge this point before me. So far as the second point is concerned, Mr. Setalvad confined his challenge only to the said notification Dt. February 3, 1968, it being an accepted position that the notification under Section 3 of the said Act is a condition precedent to the issuance of a notification under Sec. 4 of the said Act, and that if a notification under Section 3 of the said Act has not been validly or duly published, it would not be operative and would not entitle the State Government to issue a notification under Section 4. The said notification dated February 3, 1968 is expressly stated to be issued under Section 3 of the said Act. Surprisingly enough, though the said notification Dt. May 16, 1968 is also expressly stated to have been issued under Section 3 of the said Act, its entire tenor shows that it was actually issued under Section 4 of the said Act. However, before the trial Court the position was conceded by the Appellants that the said notification dated May 16, 1968 should be treated as having been issued under the said S. 4. Turning now to S. 3, it prescribes three modes of publication :

(1) Publication in the Official Gazette.

(2) Publication in the language of the concerned area in any newspaper circulating in such area.

(3) Publication in such other manner as in the opinion of the State Government is best calculated to bring to the notice of persons in the concerned area the fact that certain agricultural produce specified in the notification are intended to be regulated under the said Act in the said area. There is no dispute, as indeed there cannot be any, that the said notification under S. 3 was published in the Official Gazette.

The word 'may' is used in the opening words of Section 3 not with respect to the publication of a notification under S. 3 in the Official Gazette but with respect to the declaration of Government's intention, because the Government may or may not want to regulate the marketing of certain agricultural produce. So far as the second mode, namely, publication in the language of the concerned area in a newspaper circulating in such area, is concerned, the fact established on the evidence is that the said notification under Section 3 was not at any time published in any vernacular newspaper circulating in the concerned areas, but what had happened was that the gist of the said notifications was published in the 9th March, 1968, issue of a Marathi newspaper 'Satyavadi'. Since, however, the word 'may' is used in Section 3 with reference to this particular mode of publication, prima facie it would be that this requirement is directory. In *Yadaorao v. Agricultural Produce Market Committee, Arvi*, 1974 Mah LJ 338 : (AIR 1974 Bom 181) a Division Bench of this High Court has held that the publication of a notification under S. 3 of the said Act in the newspaper is not obligatory and the failure of the State Government or of the Director to publish the notification in the newspaper does not vitiate the notification in any way. This judgment is binding upon me, and, therefore, the fact that only the gist of the said notification was published in a local vernacular newspaper cannot in any manner affect its validity. So far as the third mode of publication is concerned, the publication is to be in such manner as in the opinion of the State Government is best calculated to bring to the notice of the persons in the concerned area its intention to regulate the marketing of certain agricultural produce. This part of the section confers power upon the Government to select particular modes in order to meet different situations and local conditions. The State Government has, however, instead of leaving it to the discretion of its executive officers to select such mode as appears to them to be the best in the circumstances of a particular case in which such publication is to be made, itself prescribed the mode. The prescription of this mode is to be found in

Rule 3 of the said Rules which has been set out earlier. Under Rule 3 in addition to publication in the newspaper required by Section 3 the notification is also to be published (1) by affixing copies thereof at the chavdi of each village included in the concerned area, (2) by exhibiting copies of the notification on the notice-board in the office of the Mamlatdar, Tahsildar, Mahalkari or Naib-Tehsildar and of the Panchayat Samiti within whose jurisdiction such area is situated, and (3) by requiring a revenue officer specified in that behalf to give wide publicity to the notification by beat of drums in the concerned area. It is the contention of the Appellants that the modes of publication prescribed by the said Rule 3 are mandatory and that in the present case the requirements of Rule 3 have not been complied with. Mr. Naik, learned Counsel for Respondents Nos. 1 and 2, submitted that just as in the case of publication in the newspapers, publication in the manner required by the said R. 3 was directory and not mandatory, and if one of the three modes prescribed by the said Rule 3 had not been complied with or not complied with fully, it did not in any manner affect the validity of the notification. Mr. Abhyankar, learned Counsel for Respondents Nos. 3 to 5, conceded that the requirements of the modes of publication as found in the said Rule 3 are mandatory and not directory, but in his submission Illus. (e) to Section 114 of the Indian Evidence Act, 1872, applied to the case and the Court must, therefore, presume that the publication of the notification being an official act, such act had been regularly performed.

6. Before examining the legal aspects of these contentions it will be convenient to set out the facts which have been established on the record.

Neither the Appellants nor the Respondents led any oral evidence, but both sides produced certain documents which were exhibited. Three out of these documents are relevant for the present purpose. They are :

(1) The copy of the said notification dated February 3, 1968 sent by the Director of Agricultural Marketing and Rural Finance, Maharashtra State, to the Chairman of the Agricultural Produce Market, Kolhapur (Exhibit 133);

(2) a letter in Marathi bearing Number 670 dated March 21, 1968 from the Secretary of the Agricultural Produce Market Committee, Kolhapur, to the Mamlatdar, Taluka Karveer in the District of Kolhapur, (Exhibit 95);

(3) a letter in Marathi dated March 26, 1968 from the Tahsildar, Bhudargad, to the Secretary of the Agricultural Produce Market Committee (Exhibit 96). Apart from the above three documents, there is no other evidence whatever with respect to the publication of the said notification under Sec. 3 in any of the modes prescribed by the said R. 3. The said copy of the notification shows that copies thereof were forwarded to the Manager, Yeraoda Prison Press Poona, for the purpose of publishing the said notification in the Maharashtra Government Gazette. They were also sent to the Chairman of the Agricultural Produce Market Committee, Kolhapur, the Divisional Joint Registrar, Co-operative Societies, Poona, the Regional Publicity Officer, Kolhapur, the Collector of Kolhapur, the Chief Executive Officer, Zilla Parishad, Kolhapur, the President, Municipal Council, Kolhapur, as also to the District Deputy Registrar, Co-operative Societies, Kolhapur, the District Agricultural Officer, Kolhapur, and the Co-operation and Industries Officer, Zilla Parishad, Kolhapur. At the end of this list of officials to whom the copies were to be sent appears an endorsement containing the request to give wide publicity to the said notification as required by Rr. 3 and 4 of the said Rules "by pasting the notification on the market yard as well as in the Village Panchayat office etc." I will take it that though the said endorsement in terms specifically requires that copy of the said notification is to be pasted on the market yard and in the village Panchayat office, the abbreviation 'etc.' refers to the other modes of publication provided for in the said Rule 3. What happened thereafter is shown only by the two letters referred to above. In the said letter dated March 21, 1968 the Secretary of the Agricultural Produce Market Committee, Kolhapur, intimated to the Mamlatdar of Taluka Karveer about the publication of the said notification in the Gazette. He further stated that objections and suggestions had been called for by the said notification and

asked the Mamlatdar to affix the copy of the said notification annexed to his said letter on the notice board of his office and publish it. In the margin of the said letter is written in ink in marathi "and give wide publicity by beat of drums". These words do not appear in the body of the said letter, and the trial Court held that they were subsequently interpolated. The lower Appellate Court, however, did not accept this finding, but held that they were contained in the original letter when dispatched. I shall, therefore, proceed upon the basis of this finding of the lower Appellate Court. This letter, however, does not show that a similar request was made by the Secretary of the Agricultural Produce Market Committee, Kolhapur, to any Mamlatdar other than the Mamlatdar of Taluka Karveer. nor does it show that any such similar request was made to any Tahsildar, Mahalkari or Naib-Tehsildar or to any official of any Panchayat Samiti. The letter Dt. March 26, 1968 from the Tahsildar of Bhudargad is, however, a reply to the said letter dated March 21, 1968. It may show that a similar letter had been addressed by the Secretary of the said Committee to the other Mamlatdars and Tahsildars. What is significant about the said letter dt. March 21, 1968 are its contents. The said reply states that the notification sent to the said Tahsildar had been published by affixing it on the notice board. There is no mention whatever about the said notification having been published anywhere by beat of drums. From this it would follow that though in the letter to the Mamlatdar of Taluka Karveer the direction to give publicity to the said notification by beat of drums was mentioned in the margin thereof, no such direction was contained in the letter to the Tahsildar of Bhudargad, and in the absence of any other evidence to show that any such request was made to any other official, it is not possible to assume that such a request had been contained in all the letters written by the Secretary of the said Committee in this behalf. On the contrary, the said reply of the Tahsildar of Bhudargad is a clear indication to the contrary. What is strange is that nowhere on the record is there any compliance report showing that the publication in the modes required by the said R. 3 had been effected.

7. Mr. Abhyankar, learned Counsel for respondents Nos. 3 to 5, however, submitted that even though there may be no evidence with respect to such publication, the Court should proceed to apply the presumption laid down in Illus. (e) to S. 114 of the I. E. Act, 1872, and draw a presumption that the said notification had been regularly published as required by the said S. 3 and the said R 3. It is not possible to accept this submission for two reasons; (1) Illus (e) to S. 114 cannot and does not apply where the point at issue is not whether an official act was properly performed, but the point at issue is whether such an act was in fact performed, and (2) where evidence has been led on behalf of the Government or the concerned authority to prove that a particular official act had been regularly performed and that evidence clearly shows that such performance had not taken place. In either of these cases, there is no place or scope for drawing any presumption u/s. 114.

8. Section 114 of the I. E. Act provides as follows:

"114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

Then follow certain Illustrations as to the cases in which the Court may draw such a presumption. Illus. (e) being that the Court may presume that judicial and official acts have been regularly performed. The first point to notice about S. 114 is that it uses the words "may presume" in contradistinction to the words "shall presume". Under S. 4 of the I. E. Act whenever it is provided by that Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it, and whenever it is directed by that Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved. Therefore, it is open to a Court either to draw or not to draw a presumption u/s. 114. Normally, the Courts would draw such a presumption when the actual performance of the act is not in dispute in order not to waste public time on the leading of for-

mal proof with respect to the regularity of its performance, but the position is entirely different where the very issue which the Court has to decide is as to the performance of that official act itself. In *Emperor v. Leslie Gwilt*, (1945) 47 Bom LR 431: (AIR 1945 Bom 368), a Division Bench of this Court held that the meaning of Illus. (e) to S. 114 is that if an official act is proved to have been done, it would be presumed to have been regularly done, but this Illustration does not raise a presumption that an act was done of which there is no evidence and the proof of which is essential to the case. In this context the observations of the Supreme Court in *Gopal Krishna Kelkar v. Mohamed Haji Latif*, (1969) 71 Bom LR 48: (AIR 1968 SC 1413), are pertinent. The Court observed (at p. 51): (at pp. 1415, 1416).

"Even if the burden of proof does not lie on a party the Court may draw an adverse inference; if he withholds important documents in his possession which can throw light on the facts at issue, it is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof."

It is strange that those desiring to prove that the said notification had been properly published should not have cared to produce any evidence other than the said two letters referred to above. Either no other documentary evidence at all existed, or if it existed and was not produced, the Court would be entitled to presume that such evidence if produced would have been unfavourable to the person withholding it. This is a presumption which the Court could have legitimately drawn u/s. 114 of the I. E. Act read with Illus. (g) thereto.

9. Further, it must be borne in mind that by the very terms of the section a presumption u/s. 114 is to be drawn in relation to the facts of a particular case. Here the facts which constituted the evidence of the respondents were on record, and the question of drawing any such presumption in relation thereto could not have arisen. I therefore, hold that the lower Appellate Court was in error in drawing a presumption u/s. 114

and in holding that the said notification had been duly published as required by the relevant statutory provisions.

10. The question which now arises is whether by reason of the non-compliance of the statutory provisions the said notification is rendered invalid. The answer to this question depends upon whether the provisions of the last part of S. 3 of the said Act and of the said R. 3 are directory or mandatory. With respect to the other modes of publication, which in the opinion of the State Government are best calculated to bring to the notice of the concerned persons in the area the intention to regulate the marketing of any agricultural produce, the word used in S. 3 (1) is 'shall'. Prima facie, the word 'shall' makes a particular requirement mandatory and not directory. There are authorities which have laid down with reference to other statutory provisions and on the interpretation thereof the word 'shall' should be construed as 'may' and vice versa. It was the contention of Mr. Naik on behalf of the State Government and the Director of Agriculture, Forest and Rural Finance, Government of Maharashtra, that the provisions in question are directory and not mandatory. In *State of Uttar Pradesh v. Babu Ram Upadhyaya*, AIR 1961 SC 751, the Supreme Court has held that when a statute uses the word 'shall', prima facie it is mandatory, but the court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute and that for ascertaining the real intention of the legislature the court may consider inter alia the nature and the design of the statute, and the consequences which would flow from construing it one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provision is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered.

11. Bearing these observations in mind, let us see the intention underlying the various modes of publication pre-

scribed by the said S. 3 (1) and the said R. 3. The provision with respect to the publication of a notification u/s. 3 in a newspaper published in the local language and of its publication in such other manner as in the opinion of the State Government is best calculated to bring the intention in such other manner as in the opinion of the State Government is best calculated to bring the intention to regulate the marketing of an agricultural produce to the notice of the concerned person in the area is contained in one single section. While the word used with respect to the requirement of publication in a local newspaper is 'may', with respect to the other mode of publication it is 'shall'. This notification is issued so as to enable those who may be affected by the declaration of intention were it implemented to submit their objections thereto for the consideration of the prescribed authority. It is also there for those desiring to make suggestions, some of which may be worthwhile, for the prescribed authority to take the suggestions into consideration before issuing a final notification u/s. 4. The said Act is a regulatory statute. It affects the right to carry on trade and business of several persons. It also affects agriculturists. It is, therefore, necessary that the Government's intention to issue a notification u/s. 4 of the said Act should be brought to the notice of all persons concerned, not only the wholesale dealers in the particular agricultural produce but also all agriculturists. Generally, agriculturists are not literate, and even if they can read, they usually do not subscribe to newspapers. They, however, often have occasion to visit the offices of Mamlatdars, Tahsildars, Mahalkaris, Naib-Tahsildars and Panchayat Samitis, and when they do so, when any notice is put on the notice-board there, either they or someone of them who may be able to read it may come to know about it and inform the others. For people of this class the best mode of publication would be by oral proclamation by beat of drums. Bearing all these factors in mind, though S. 3 left it to the discretion of the State Government to publish a notification u/s. 3 in such manner as in its opinion was best calculated to bring it to the notice of concerned persons, the State Government, instead of leaving such mode of publication to the indivi-

dual opinion of different officers, thought it fit to prescribe how such publication should be done, and this it did by making R. 3 of the said Rules. That rule itself also uses the word 'shall'. It uses the word 'shall' because by the terms of S. 3 (1) of the said Act with respect to the third mode of publication the word 'shall' is used. In this connection, I may usefully advert again to the decision of this High Court in *Yadaorao v. Agricultural Produce Market Committee, Arvi*, 1974 Mah LJ 338: (AIR 1974 Bom 181). In that case the Court observed (at p. 348): (at Pp. 187, 188):

"The object of the provisions regarding the publication in Ss. 3 and 5 of the Act is that the notifications under Ss. 3 and 4 must come to the notice of the persons who are going to be affected thereby in the area in which the notifications were to be operative. But it must be noted that in both Ss. 3 and 4 when publication in any newspaper in the area is contemplated, the Legislature has advisedly used the words 'may also be published in the language of the area in any newspaper circulated therein'. In the same provisions while the word 'may' is used while referring to the publication in a newspaper, the Legislature while providing for additional publication in such other manner as in the opinion of the State Government is best calculated to bring to the notice of the persons in the area, has used the word 'shall'."

A little later the Court observed (at p. 349): (at p. 188):

"It is well known that normally a large part of the agricultural population, which is illiterate, does not subscribe or read newspapers. The newspapers cater to a negligible section of the community who are only literate and if the purpose of publication is to bring to the notice of the persons affected by the notifications, then that would be best served by adopting the method of publication by which a large section of the village community can be reached. That is why it appears that it has been made obligatory on the State Government to find out for itself the best manner of publication possible and that is also why the provisions of R. 3 have been made requiring the State Government to have the copies of the notification affixed on the notice boards in the offices of the

authorities specified under R. 3, which are many a time visited by the agriculturists. Beat of drums is a known method of publication and that has always been found to carry the matters to be publicised to the villagers positively."

12. The object underlying this provision would clearly show that what was intended by the Legislature in requiring the State Government to publish a notification in the manner best calculated to bring to the notice of the persons in the area the Government's intention was to make it a mandatory requirement and that it was in order not to leave the compliance of such mandatory requirement to the individual notions of different officers that the State Government made the said R. 3, making the modes of publication specified therein to be mandatory and obligatory. As pointed out earlier, the very same provision with respect to one mode of publication, namely, publication in a newspaper, uses the word 'may', while with respect to the additional mode of publication by the State Government it uses the word 'shall'. In *Labour Commr., Madhya Pradesh v. Burhanpur Tapti Mills Ltd.* AIR 1964 SC 1687, where a provision of the C. P. and Berar Industrial Disputes Settlement Act, 1947, which contained in one place the word 'may' and in another place the word 'shall', fell for consideration of the Supreme Court, the Supreme Court held (at p. 1689 (1)):

"The use of the word 'shall' in connection with the action to be taken on a reference by the State Government and 'may' in connection with the action on an application by others in the same section compel the conclusion that on an application by anybody other than the State Government, the State Industrial Court or a District Industrial Court may also refuse to take action."

In substance what the Supreme Court held was that when in the same provision the words 'shall' and 'may' occur, they have different meanings; the word 'shall' is to be construed as being mandatory while the word 'may' is to be construed as being directory. To hold that these provisions are directory would be fraught with grave danger, for it would leave it open to executive officers by not complying with any one of them to flout and set at naught the will of

the Legislature and the mandatory requirements imposed upon them by the State Government. The provisions contain procedural safeguards, and procedural safeguards are as important as substantive safeguards. In this connection, it is worthwhile to bear in mind the following observations of Danckwerts, L. J., in the English Court of Appeals in the case of *Bradbury v. Enfield London Borough Council*, (1967) 1 WLR 1311 at p. 1325 (C. A.):

".....in cases of this kind, it is imperative that the procedure laid down in the relevant statutes should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects. Public bodies and Ministers must be compelled to observe the law; and it is essential that bureaucracy should be kept in its place."

I, therefore, hold that the provisions in question of S. 3 and of the said R. 3 are mandatory and not directory and that they not having been complied with, the said notification u/s. 3 was inoperative and invalid. As the said notification u/s. 3 is invalid and inoperative, the condition precedent for the issuing of a notification u/s. 4 was not fulfilled, and, therefore, the said notification dt. May 16, 1968 u/s. 4 was also invalid and inoperative. In *The Municipal Corporation of Bhopal v. Misbabul Hasan*, AIR 1972 SC 892, 893, 895 (2), where the question was whether an amendment to a rule had been duly made, the Supreme Court held that where a condition precedent for the amendment of the rule had not been followed or complied with, the amendment was inoperative and invalid.

13. Only one point now remains to be dealt with. That is a contention raised by Mr. Abhyankar that the question as to whether the said notifications were duly published or not is barred by *res judicata* by reason of an unreported decision of a Division Bench of this High Court in Special Civil Application No. 2363 of 1969 *Bajomal Parchomal Gaijwanj v. State of Maharashtra* — decided by Vaidya and Dudhia, JJ., on July 6, 1973. In that case the very same notifications were challenged by three firms doing business in onions in Laxmipuri Market at Kolhapur. This being an application under Art. 226 of the Const.,

the matter was decided on affidavits. Amongst the various grounds raised to challenge these notifications, one ground was that the notification u/s. 3 and, therefore, the notification u/s. 4 was also invalid. An affidavit in reply was filed to that petition by the Under Secretary to the Government, Agriculture and Co-operation Department, in which was set out in detail how the said notifications were published. The Court accepted the statements made in the affidavit of the Under Secretary and held that the notifications had been properly published. It is very difficult to understand how this judgment can ever operate as *res judicata* or what relevance it has to the question which I have to decide. The petitioners there were entirely different from the Appellants here. Those petitioners were not even members of the Kolhapur Grain Merchants Association on whose behalf the suit out of which this Second Appeal arises was filed. Secondly, as mentioned earlier, that was a petition under Art. 226 of the Const. which was decided on affidavit. Here, there was a suit which had to be decided on evidence and not by accepting implicitly statements made in the written statement of the Respondents. Thirdly, if the said Under Secretary had set out in the said affidavit the different modes in which the notifications were published, one wonders what prevented the State Government and the concerned authorities from leading that evidence before the trial Court. I, therefore, find no substance in this contention raised by Mr. Abhyakar.

14. For the reasons set out above, this Second Appeal must succeed, and I accordingly allow this Second Appeal, set aside the decree of the lower Appellate Court and restore the decree of the trial Court. The Respondents will pay to the Appellants the cost throughout.

Appeal allowed.

AIR 1982 BOMBAY 295

DHARMADHIKARI AND

BHONSALE, JJ.

Gunwantrao Yeshwantrao Deshmukh, Petitioner v. State of Maharashtra and another, Respondents.

Writ Petn. No. 39 of 1981, D/- 15-6-1981.

DZ/DZ/B634/82/HR/RSK

(A) Bombay Village Panchayats Act, 1958 (3 of 1959), S. 36. r/w. proviso — Disqualification of Sarpanch — Failure of Sarpanch to hold meetings for some months — He is liable to be disqualified. Decision in Spl. Civil Appln. Nos. 2274 of 1965 and 11 of 1966, D/- 13-6-66 (Bom), Rel. on. (Para 6)

(B) Bombay Village Panchayats Act, 1958 (3 of 1959), Sections 36 and 39 — Order of disqualification — Whether amounts to removal — Sarpanch not convening meetings for some months asked to show cause why he should not be disqualified — Finding by Collector that explanation given did not constitute sufficient cause for not convening meetings — Held, order of disqualification passed in pursuance of such finding did not amount to removal but merely to a declaration of disqualification.

The disqualification from continuing as a Sarpanch for not convening the meeting of the panchayat as per the rules without a sufficient cause is automatic. The matter as to whether the disqualification has been incurred, if in doubt or dispute or whether there was sufficient cause for failure to convene the meeting without sufficient cause, then such a question has to be decided or adjudged by the Collector. This declaration cannot be equated with the removal of Sarpanch under Section 39 of the Act. The order passed by the Collector merely amounts to a declaration of disqualification. Section 39 of the Act deals with the removal of any member or Sarpanch or Upa-Sarpanch of the Panchyat. This removal is contemplated for the misconduct in the discharge of his duties or disgraceful conduct or incapacity to perform his duty, etc. The area and field covered by Section 39 is distinct and different from the one covered by Section 36. Disqualification is laid down by Section 36 itself. Once the facts constituting disqualification are proved and sufficient cause is not shown, then the disqualification to continue as Sarpanch comes into operation. The section does not contemplate any further order of removal as is contemplated by S. 39. (Para 7)

(C) Bombay Village Panchayats Act, 1958 (3 of 1959), Section 36 — Bombay Village Panchayats (Meeting) Rules (1959). Rr. 3, 13, 15, 23, 29, 39, 40. — Failure to hold meeting — Sufficient

cause for — Circulating memos issued by Sarpanch do not constitute sufficient cause for failure to convene meeting.

Village Panchayat is a body corporate having a perpetual succession etc. Now, any act of an individual separately or independently done, is not an act of a body corporate. A body corporate is not a human being and therefore can act through resolutions only. These resolutions can be adopted in a duly convened meeting. Section 36 read with rules enjoins a duty upon the Sarpanch or Upa-Sarpanch to convene the meeting as per the rules prescribed. The proviso makes this position further clear because it provides for a penalty for not convening meeting as per rules. The proviso therefore makes it very clear that the substantive part of the section is mandatory. If Rr. 3, 13, 15, 23, 29, 39 and 40 of the Rules are read together and harmoniously, it is quite clear that decision by circulation is wholly ruled out and is not contemplated. To say the least such a method is prohibited by necessary implication. In substance it will amount to negation of the object of S. 36 itself as well as rules framed thereunder. In these circumstances a thing which is prohibited by the statute itself cannot be pleaded as sufficient cause for failure to convene the meeting. A thing or act, which is either prohibited or not provided for or is inconsistent with the method prescribed, cannot be done even indirectly. The Legislature in its wisdom has used the word "Meeting" in Section 36 of the Act. In the very nature of things meeting contemplates coming together of more than one person for certain purposes. It is a meeting of minds. The object of meeting is to take collective decision which is to be expressed in the form of resolution. This active participation of the members of the panchayat is not possible by following circulation method. AIR 1978 Bom 28, Rel. on. (Paras 8, 9)

Held, the Collector was right in declaring that the circulating memos issued by the petitioner could not be accepted as sufficient cause for his failure to convene the meetings of the panchayat. The Collector had considered the cause shown by the petitioner and had also come to the conclusion that the circulating memos were issued by the Sarpanch for very trifling and non-urgent matter which could not be

treated as substitute for the meeting.
(Paras 8, 9)

Cases Referred : Chronological Paras

AIR 1978 Bom 28 : 1977 Mah LJ 689 9
(1966) Spl. Civil Appln. Nos 2274 of
1965 and 11 of 1966, D/- 13-6-1966
(Bom) 5

C. A. Phadkar, for Petitioner; C. J. Sawant with N. D. Bhatkar, for Respondents.

DHARMADHIKARI, J.:— The petitioner who is a Sarpanch of village Panchayat of Bodwad, has challenged in this writ petition the order passed by the Collector, Jalgaon Dt, 31st December, 1980 holding that the Petitioner stands disqualified as a Sarpanch under Section 36 of the Bombay Village Panchayats Act, 1958.

2. It appears from record that the Block Development Officer, Panchayat Samiti, Bhusawal submitted a report to the Collector on 17th September, 1980, bringing to his notice that the monthly meetings of the panchayat for the months April 1979, May 1979, July 1979, October 1979, Dec. 1979, Feb. 1980, Mar. 1980, April 1980, June and July 1980 were not convened by the Petitioner-Sarpanch and, therefore he is disqualified under Section 36 of the Bombay Village Panchayats Act from continuing as a Sarpanch of the Village Panchayat. After getting this report from the Block Development Officer, a show cause notice was served on the petitioner by the Collector on 17th October 1980. The Petitioner submitted his reply on 3rd November 1980, showing the cause as to why he should not be disqualified. According to the Petitioner the circulating memos were issued during these months and as these circulating memos served the purpose of the meetings, it was not necessary to convene the meetings of the village panchayat. The Collector however, came to the conclusion that this is not a sufficient cause for failure to convene the meetings as contemplated by Section 36 read with rules framed thereunder and, therefore, ultimately declared that the Petitioner is disqualified to continue as a Sarpanch.

3. It was neither disputed in the written reply submitted by the petitioner nor it is disputed in this petition, that in the months referred to

hereinbefore the meetings of the panchayat were not convened by him.

4. Shri Phadkar the learned Counsel appearing for the petitioner contended before us that under Section 36 read with the proviso, failure to call meetings in a financial year only can result in disqualification and an omission of not calling meetings for some months will not amount to failure to convene meetings of the panchayat in a financial year. According to Shri Phadkar in the present case the petitioner had not called meetings for about 10 months which period is spread over in two financial years and therefore it cannot be said that no meeting was called in a financial year as contemplated by the proviso to Section 36 of the Act, and therefore, the order passed by the Collector is wholly illegal.

5. It is not possible for us to accept this contention. It is not necessary to deal with this aspect of the matter in detail in view of the Division Bench decision of this Court in Spl. Civil Appln. No. 2274 of 1965 with Spl. Civil Appln. No. 11 of 1966 decided on 13th June 1966. The Division Bench of this Court consisting of K. K. Desai and Chandrachud, JJ. after making a detailed reference to S. 36 as well as rules framed thereunder has held as under :

"Now, it is clear on a reading of Rule 3 that it casts compulsory obligation in connection with holding of at least one meeting of the panchayat in every month. This provision indicates and appears to have been made because the due administration of the affairs of a village panchayat needs that it should be duly looked after and attended to by meeting of the Panchayat once in every month. The meeting of the panchayat under the above rule could be convened only by "the Sarpanch". The obligation under the rule could, therefore, be carried out and completed only by the action of convening the meeting of the panchayat that must be taken by "the Sarpanch" and in his absence by "the Upa-Sarpanch". The phrase "according to the rules prescribed in that behalf", as contained in the proviso to Section 36 has clear reference to the obligation created for holding one meeting of the panchayat every month as contained in Rule 3. In our view, it is the intent of the proviso that breach of that obliga-

tion and/or the failure to act according to the rules prescribed in connection with holding of the meeting of the panchayat should disqualify the Sarpanch from continuing in office. That is the result of the following phrase in the proviso:—

"Fails without sufficient cause, to convene the meetings of the panchayat according to the rules prescribed in that behalf." We are, in this connection, unable to accept the submission made by Mr. Rane that emphasis is on the phrase in any financial year "as contained in the proviso. We are unable to accept the contention of Mr. Rane that the phrase "the meetings", as contained in the proviso was intended to mean that the failure should be in connection with more than one meeting. In our view, the plural in the phrase "the meetings" was intended to include and to mean singular also. In our view, therefore failure to convene even a single meeting in breach of the rules prescribed would attract the penalty as contained in the proviso. The above interpretation is in consonance with the intent and purpose of Rule 3 and also the amended provisions of Section 36. We are, therefore, unable to accept the submission made as above by Mr. Rane on behalf of the petitioner."

6. In view of this decision of the Division Bench holding that even failure to convene a single meeting in breach of the Rules prescribed would attract the penalty as contained in the proviso to Section 36 of the Act, the submission made by Shri Phadkar cannot be accepted.

7. It was then contended by Shri Phadkar that the order passed by the Collector in effect amounts to removal of the Sarpanch and, therefore, is without jurisdiction because the power to remove a Sarpanch is conferred upon the Standing Committee under Sec. 39 of the Act and the Collector by taking action under Section 36 cannot exercise the said jurisdiction. It is not possible for us to accept this contention also. Section 36 of the Bombay Village Panchayat Act reads as under:

"The time and place of sitting, and the procedure at a meeting, of the panchayat shall be such as may be prescribed:

Provided that, if the Sarpanch, or in his absence the Upa-Sarpanch, fails without sufficient cause, to convene the meetings of the panchayat in any financial year according to the rules prescribed in that behalf, he shall be disqualified for continuing as Sarpanch or, as the case may be, Upa-Sarpanch or for being chosen as such for the remainder of the term of office of the members of the panchayat. The decision of the Collector on the question whether or not there was sufficient cause shall be final."

From the bare reading of this section it is quite clear that the disqualification from continuing as a Sarpanch for not convening the meeting of the panchayat as per the rules without a sufficient cause is automatic. The matter as to whether the disqualification has been incurred, if in doubt or dispute or whether there was sufficient cause for failure to convene the meeting without sufficient cause, then such a question has to be decided or adjudged by the Collector. This declaration cannot be equated with the removal of Sarpanch under Section 39 of the Act. The order passed by the Collector merely amounts to a declaration of disqualification. Section 39 of the Act deals with the removal of any member or Sarpanch or Upa-Sarpanch of the Panchayat. This removal is contemplated for the misconduct in the discharge of his duties or disgraceful conduct or incapacity to perform his duty etc. The area and field covered by Section 39 is distinct and different from the one covered by Section 36. Disqualification is laid down by Section 36 itself. Once the facts constituting disqualification are proved and sufficient cause is not shown, then the disqualification to continue as Sarpanch comes into operation. The section does not contemplate any further order of removal as is contemplated by Section 39 of the Bombay Village Panchayats Act. Therefore, it is not possible for us to accept this contention of Shri Phadkar.

8. It was then contended by Shri Phadkar that the Collector was in error in not considering the cause shown and in coming to the conclusion that the petitioner had failed to convene the meeting of the panchayat without any

sufficient cause. According to Shri Phadkar the business which is to be transacted by the Village Panchayat being obviously trifling one, what could be done in a meeting by circulation, then it cannot be said that there was failure to convene the meeting. According to Shri Phadkar in any case this could be treated as sufficient cause for not convening the meetings. It is not possible for us to accept this interpretation of Shri Phadkar for the obvious reasons. Section 36 read with rules enjoins a duty upon the Sarpanch or Upa-Sarpanch to convene the meeting as per the rules prescribed. The proviso makes this position further clear because it provides for a penalty for not convening meeting as per rules. The proviso therefore makes it very clear that the substantive part of the section is mandatory one. The rules framed under Bombay Village Panchayat Rules known as Bombay Village Panchayat (Meeting) Rules, 1959, prescribe that the panchayat shall meet at least once in every month on such day as may be fixed by the Sarpanch or in his absence by the Upa-Sarpanch. The Rule 3 which is mandatory in form, thereafter lays down that at least one meeting in every month should be convened. The rules also lay down as to how the business will be treated at the meeting. Rule 13 then lays down that no resolution of the panchayat shall be modified or cancelled within 3 months of the passing thereof unless certain conditions are fulfilled. According to Rule 15 every meeting is open to the public unless the person presiding decides that any enquiry or deliberations of the panchayat should be held in camera. Rule 23 then provides for as to how the motion will be considered. As per R. 29 when the votes are on voting paper which shall be not be signed by him etc. Then according to Rule 39 no motion shall be discussed or noted in the minute book unless and until it has been properly proposed and seconded. According to R. 40 the proceeding of each meeting of the panchayat is to be recorded in a bound book and a copy of the proceeding is to be submitted to the Chairman of the Panchayat Samiti and to the Chairman of the Standing Committee within 7 days of the meeting. If all these rules are read to-

gether and harmoniously it is quite clear that decision by circulation is wholly ruled out and is not contemplated. To say the least such a method is prohibited by necessary implication. In substance it will amount to negation of the object of Section 36 itself as well as rules framed thereunder. In these circumstances a thing which is prohibited by the statute itself cannot be pleaded as sufficient cause for failure to convene the meeting. The Collector has considered the cause shown by the petitioner and has also come to the conclusion that the circulating memos were issued by the Sarpanch for very trifling and non-urgent matter which cannot be treated as substitute for the meeting. In our opinion of finding recorded by the Collector is correct and calls for no interference, in this writ jurisdiction.

9. It cannot be forgotten that decentralization of power is one of the basic concepts of democracy. As a part of this scheme, village administration for the purpose of local self Government is entrusted to village panchayat. Village Panchayat is a body corporate having a perpetual succession etc. The enactment also provides for holding a meeting of 'Gram Sabha' which consists of entire adult population of the village. A body corporate is not a human being and therefore can act through resolutions only. These resolutions can be adopted in a duly convened meeting. Any act of an individual separately or independently done, is not an act of a body corporate. A thing or act, which is either prohibited or not provided for or is inconsistent with the method prescribed, cannot be done even indirectly. The Legislature in its wisdom has used the word "Meeting" in Section 36 of the Act. In the very nature of things meeting contemplates coming together of more than one person for certain purposes. It is a meeting of minds. (See 1977 Mah LJ 689 : (AIR 1978 Bom 28), Awadhoot v. State). The object of meeting is to take collective decision which is to be expressed in the form of resolution. This active participation of the members of the panchayat is not possible by following circulation method and, therefore in our opinion the Collector was right in coming to the conclusion that the circulating memos issued by the petitioner

cannot be accepted as sufficient cause for his failure to convene the meetings of the panchayat.

10. A grievance was also made by Shri Phadkar that a copy of the report submitted by the Block Development Officer was not submitted to the petitioner before calling upon him to submit his explanation or showing cause for his failure to convene meeting. Such a request was not made by the petitioner before submitting his written reply. The petitioner very well knew as to on what point his explanation was called for and in fact the petitioner has submitted his written reply on 3rd November, 1980 in reply to the show cause notice. Further the fact that the meetings of the village panchayat were not held is practically admitted. In these circumstances it cannot be said that any prejudice has been caused to the petitioner because of the non-supply of the copy of report submitted by the Block Development Officer.

In this view of the matter there is no substance in this writ petition. The petition fails and is dismissed. Rule is discharged. However, in the circumstances of the case there will be no order as to costs.

Petition dismissed.

AIR 1982 BOMBAY 300

DESHPANDE, Ag. C. J. AND

KOTWAL, J.

Gulab Shankar Walve and etc. etc.,
Petitioners v. The Spl. Land Acquisition
Officer and another, Respondents.

Writ Petns. Nos. 2407, 2431, 2432,
2439, 2440, 2454 and 2455 of 1980, D/-
24-11-1980.

(A) Maharashtra Re-settlement of
Project Displaced Persons Act
(41 of 1976), Sections 13-15 and Section
16 (2) — Compliance with require-
ments of Sections 13-15 is condition pre-
cedent for exercising powers conferred
under S. 16 (2).

The compliance with requirements of
Sections 13 to 15 is simply indispensable
and is condition precedent for invoking
the acquisition powers under the
L. A. Act contemplated to be exercised
under Section 16 (2) for the Act once

the Project together with affected or
benefited villages are notified under
Section 11 of the Act. The words "any
land required for carrying out the pur-
poses of the Act" in Section 16 (1) or
words to that effect in Section 16 (2)
obviously refer to the land in respect of
which assessment, as to the require-
ments of displaced persons and avail-
ability of land for the grants is made
under Section 13, and specification
whereof is made under Section 10 read
with Section 13 (3) or Section 15. The
extent of the area affected and benefited
is notified under Section 15. This is fur-
ther made clear under sub-secs. (3) and
(4) of Section 16 indicating the sources
of the land in respect of which acquisi-
tion powers under sub-sec. (2) of S. 16
are intended to be exercised. Thus, the
land to be acquired under sub-sec. (2)
of Section 16 cannot be ascertained till
the steps contemplated under Sections
13 to 15 for its identification are taken.
Any acquisition, without first complying
with Sections 13 to 15 would be incom-
petent and bad in law. (Paras 5, 6)

It was contended that non-compliance
with Sections 13 to 15 might prevent
acquisition of land under the Act con-
templated under sub-sections (3) and (4)
of Section 16 but not the acquisition
under the Land Acquisition Act of 1894,
the powers in respect to which were
expressly preserved under sub-sec. (2)
of Section 16, enabling the Government
to acquire the required land by recourse
to L. A. Act "also". The word "also" in
sub-section (2) as also in sub-sec. (3)
was relied on in support of the conten-
tion that such acquisition under the
L. A. Act was independent of the acqui-
sition powers provided under sub-sec-
tions (3) and (4) of Sec. 16 of the Act.
A close examination of the different
clauses of Sec. 16, however, would
expose the fallacy and untenability of
the contention. To begin with acqui-
sition of land is an integral part of the
resettlement scheme of the Act and all
the provisions of the Act would apply
to such acquisitions as soon as any pro-
ject is notified under Section 11 of the
Act. Section 16 providing for such ac-
quisition power, contemplates acqui-
sition of the required land for this pur-
pose either by negotiation or by re-
course to statutory compulsion under
the L. A. Act. The question of acqui-
sition of any land cannot arise unless

preliminary processes as to assessment of land required and available, affected and benefited, by the project as contemplated under Secs. 13 to 15 of the Act are finalised. Reference to L. A. Act in sub-section (2) of Section 16 is intended to adopt the mechanism of acquisition evolved thereunder. Recourse thereto for this compulsory acquisition by itself does not make the acquisition otherwise than under the Act and cannot relieve the authorities of their obligation to comply with Ss. 13 to 15 of the Act. Secondly, it is fallacious to assume that S. 16 contemplates two different modes of compulsory acquisitions i. e. one under the instant Act and the other under the L. A. Act. Sub-section (2) of Section 16 merely adopts the L. A. Act for the requirement of the land under the instant Act. Creating fiction of the purposes of the Act being a public purpose is intended to remove any possible doubts as to the validity of the contemplated acquisitions. Sub-sections (3) and (4) merely indicate the source from which the lands required are to be acquired by recourse to the provisions of the L. A. Act under S. 16 (2) of the Act. The wording of clause (c) of Section 13 (3) of the Act fortifies this view and demonstrates the fallacy of the contention. The extent of land liable to be acquired and covered by sub-sections (3) and (4) of Section 16 has to be first ascertained and area thereof identified. This can be done only on preliminary assessment and enquiry under Ss. 13 to 15 of the Act. Any assumption that sub-sec. (2) is independent or unconnected with sub-secs. (2) and (4) would prevent application of L. A. Act to the acquisition of lands covered by sub-secs. (3) and (4) of Section 16. The Act does not provide for any other mechanism of acquisition, and the fiction of acquisition being for public purpose would also be inapplicable in that case. This apart, Section 16 cannot be so interpreted as to permit option of acquiring land under the instant Act or under the L. A. Act without exposing it to the attack of being violative of Article 14 of the Constitution as it would be difficult to find out in that case, any criteria with Section to determine, when and why the one should be invoked and not the other.

(Paras 7, 8, 9, 10, 11)

The reliance on the word "also" in S. 16 (2) is equally misconceived. The word is intended to highlight the availability of one more mode of securing the required land under the Act in addition to its acquisition by negotiations provided for in sub-sec. (1) and not to emphasise any power of acquisition unconnected with Sections 13 to 15. Section 16 (2) contemplates recourse to the L. A. Act for the acquisition of the land "required" for the purposes of the Act. Such "requirement" can be ascertained only by the process as provided under Ss. 13 to 15 of the Act. Sub-sections (3) and (4) only reflect the crystallisation of this process and it is for the land so required that mechanism of the L. A. Act is intended to be adopted under S. 16 (2) of the Act. The word "also" in sub-sec. (3) does not have any significance excepting to emphasise that even land 'affected' is liable to be acquired for if needed for 'gaathan' though the Act contemplates resettlement on benefited and other zones.

(Para 13)

Thus once the project is notified under S. 11, the acquisition of the land from the benefited zone and other sources is liable to be governed by the provisions of the Act, and the powers under sub-sec. (2) of Section 16 and the mechanism of the L. A. Act cannot be invoked unless first the assessment and ascertainment as contemplated under Ss. 13 to 15 of the Act is finalised. Such acquisition is subject to the limitation indicated in sub-secs. (3) and (4) of S. 16 of the Act and Schedule thereto.

(Para 15)

(B) Maharashtra Re-settlement of Project Displaced Persons Act (41 of 1976), S. 13 (3), cls. (c) and (d) — Scope of Cl. (d) — It covers only lands acquired by negotiation and the 'Gaathan' land covered by S. 16 (3) — In view of specific cl. (c), land referred therein shall be deemed to be excluded from cl. (d), although cl. (d) is wide enough to cover such land.

(Para 12)

B. P. Abhale, V. A. Thorat, J. R. Lalit and Ulhas G Kerkar, for Petitioners; M. F. Saldhana, Asst. Govt. Pleader, for Respondents.

DESHPANDE, Ag. C. J. :— These seven petitions raise a common question of law and can, therefore, be disposed of by this common judgment. The lands

in dispute, notified for acquisition u/ss. 4 and 6 of the Land Acquisition Act, 1894 (hereinafter referred to as the L. A. Act), are all situate in village Dhandarphal (BK), Taluka Sangamner, District Ahmednagar. The petitioners in these seven petitions are the owners of those different lands. It is not in dispute that these lands are sought to be acquired for the purpose of rehabilitating the displaced persons, affected by the Upper Pravara Project in Ahmednagar District. The Government of Maharashtra has issued a Notification dt. 16th May 1978 u/s. 11 (1) of the Maharashtra Re-settlement of Project Displaced Persons Act, 1976 (hereinafter referred to as the 'Act'). The provisions of the Act are made applicable to the said Upper Pravara Project. The Notification also specifies the villages likely to fall in the affected or benefited zones of the said Project, as required under the said S. 11 (1). Dhandarphal (BK) village is one of the villages notified as being a village in the benefited zones. Ss. 4 and 6 Notifications under L. A. Act have been issued thereafter in all these cases. Before S. 6 Notification was issued, objections in writing were raised by all the petitioners asserting that proper enquiry under the Act was not made. Subsequently, even notifications and notices under sub-secs. (3) and (4) of S. 9 of the L. A. Act have been issued and the urgency clause was thereafter applied, and the petitioners were called upon to deliver possession of the respective lands u/s. 17 (1) of the L. A. Act. The validity of the said notifications, notices and the acquisition proceedings is challenged in all these petitions.

2. Mr. Abhale, Mr. Thorat, Mr. Lalit and Mr. Kerkar, the learned Advocates appearing for the petitioners raised several points in support of these petitions. It, however, appears to us to be enough to take notice of only one point as to the non-compliance with Ss. 13 to 15 of the Act. This point goes to the root of the matter and the present proceedings are liable to be quashed on that count itself.

3. It is necessary to examine the scheme of the Act to deal with this contention. The Act is a special piece of legislation providing for resettlement of "certain" persons displaced from lands required for any projects of public

utility. Apart from providing for cash grants, S. 10 of the Act contemplates resettling as many displaced persons as possible on the land (1) in the benefited zone, or 2 (a) in other villages, or 2 (b) in areas to be specified under the said section and some other lands forming part of the "land pool" as defined u/s. 2 (11). The "land pool" has to be worked out in accordance with Ss. 13 to 15 of the Act and secured by the modes indicated in S. 16. S. 13 (1) makes it clear that even the land of the 'Gaathan' affected by the project is liable to be acquired for such resettlement.

4. Which "certain" persons displaced by any such project should be resettled by recourse to the provisions of this Act is left to the decision of the Government. The Government has to notify such "project" u/s. 11 (1) of the Act and also expressly apply the provisions of the Act in relation to the said project. The Government has to specify in the said notification the villages and areas which are likely to be in the affected or benefited zones of the said project. The Act would obviously have no application to the acquisition of lands for resettlement of the persons displaced by any project not so notified. S. 12 prevents alienation of any land situated in the villages specified in the notification u/s. 11 without the prior permission of the Government. S. 13 requires the Resettlement Officer to take a survey and ascertain the extent of land from which persons would be displaced and the land available for grant to such displaced persons from the sources enumerated in Cls. (a) to (e) of Sec. 13 (3) and to draw a list of lands (1) that may be included in the benefited zone or villages or areas which may be specified under Section 10. Sections 14 and 15 further require such Resettlement Officer to make an estimate after giving reasonable opportunity to the persons affected of land required for the project and would be affected thereby and the area likely to be benefited and make first provisional and then final declaration in respect thereof. Then follows Sec. 16 indicating modes of acquisition of land required for the purposes of the Act. Section 17 then provides for the grant of land to the displaced persons. Area of land to be acquired and granted is

subject to the limitations and restrictions indicated in Section 16 and 17 and Schedules 'A' & 'B', details of which are not relevant to the point under consideration excepting to emphasize that the Act furnishes a self-contained code in the matter of resettlement.

5. The Act contemplates acquisition of the required land either by negotiation under Section 16 (1) or by compulsory acquisition under Section 16 (2) thereof. The words "any land required for carrying out the purposes of the Act" in Section 16 (1) or words to that effect in Section 16 (2) obviously refer to the land in respect of which assessment, as to the requirements of displaced persons and availability of land for the grants is made under Section 13, and specification whereof is made under Section 10 read with Section 13 (3) or Section 15. The extent of the area affected and benefited is notified under Section 15. This is further made clear under sub-secs. (3) and (4) of S. 16 indicating the sources of the land in respect of which acquisition powers under sub-sec. (2) of S. 16 are intended to be exercised. Thus, the land to be acquired under sub-sec. (2) of S. 16 cannot be ascertained till the steps contemplated u/ss. 13 to 15 for its identification are taken. Any acquisition, such as in the present cases, without first complying with Ss. 13 to 15, cannot but be held to be incompetent and bad in law.

6. Mr. Saldhana, the learned Assistant Government Pleader appearing for the respondents could not draw our attention to any material indicating that assessment of the extent of the land required and available or extent of the area affected or benefited, was ever made as required u/Ss. 13 to 15 of the Act. This point is specifically raised by the petitioners in their petitions and the hearing of the case, was adjourned earlier to enable him to produce material to that effect. The affidavits of the respondents in all these cases do not show, if and when such assessment as required u/s. 13 and provisional and final declaration as required under S. 14 or 15, were made. As seen earlier, this was obligatory. The acquisition officer cannot decide as to how much and which area of land is required for the purposes of the Act. It is impossible to identify the land covered by sub-secs.

(3) and (4) of S. 16 and liable to be acquired unless this is done. The compliance with the requirements of Ss. 13 to 15 is simply indispensable and is condition precedent for invoking the acquisition powers under the L. A. Act contemplated to be exercised u/s. 16 (2) of the Act once the Project together with affected or benefited villages are notified u/s. 11 of the Act. Any notifications u/s. 4 or S. 6 of the L. A. Act or further proceedings thereunder could not have been issued or taken without following the provisions of Ss. 13 to 15 of the Act. These proceedings are, therefore, not legal and are liable to be quashed.

7. Mr. Saldhana, however, contends, that non-compliance with Ss. 13 to 15 of the Act may prevent acquisition of land under the Act contemplated under sub-secs. (3) and (4) of S. 16 but not the acquisition under the Land Acquisition Act of 1894, the powers in respect to which are expressly preserved under sub-sec. (2) of S. 16, enabling the Government to acquire the required land by recourse to L. A. Act "talso". Mr. Saldhana strongly relied on the word "also" in sub-sec. (2) as also in sub-sec. (3) in support of his contention that such acquisition under the L. A. Act is independent of the acquisition powers provided under sub-secs. (3) and (4) of S. 16 of the Act. This contention assumes as if acquisition of land contemplated under sub-sec. (2) of S. 16 is not under the Act but is under the L. A. Act and is different from and independent of the powers of acquisition under sub-secs. (3) and (4) of the Act and that the officer has an option to acquire the required land u/s. 16 (2) or Ss. 16 (3) and 16 (4) of the Act.

8. This makes it necessary to examine contents of S. 16. It is convenient to quote the same in extenso to test the validity of this contention.

"Sec. 16. (1) The State Government may enter into an agreement with any person for the purchase or exchange, of any land required for carrying out the purposes of this Act.

(2) Subject to the provisions of this section, the State Government may also for carrying out the purposes of this Act compulsorily acquire land under the Land Acquisition Act, 1894, and the acquisition of any land for the said purposes shall be deemed to be a public purpose within the meaning of that Act.

(3) The State Government may also acquire lands included in a gaathan in the affected zone as far as practicable according to the provisions of Part I of Schedule 'A' hereto.

(4) For the purpose of resettling displaced persons on land, the State Government may, subject to any rules made "in this behalf, acquire land from holdings in the benefited zone or from any village or area specified under Section 10 as far as practicable, according to the provisions of Part II of Schedule 'A' hereto.

(5) All lands acquired under this section shall form part of the land pool."

The section is not very happily worded. A superficial reading thereof may give some apparent plausibility to the contention of Mr. Saldhana. A close examination of the different clauses, however, would expose the fallacy and untenability thereof.

9. To begin with, acquisition of land is an integral part of the resettlement scheme of this Act and all the provisions of the Act would apply to such acquisitions as soon as any project is notified u/s, 11 of the Act. S. 16 providing for such acquisition power, contemplates acquisition of the required land for this purpose either by negotiation or by recourse to statutory compulsion under the L. A. Act. The question of acquisition of any land cannot arise unless preliminary processes as to assessment of land required and available, affected and benefited, by the project as contemplated u/Ss. 13 to 15 of the Act are finalised. Reference to L. A. Act in sub-sec. (2) of S. 16 is intended to adopt the mechanism of acquisition evolved thereunder. Recourse thereto for this compulsory acquisition by itself does not make the acquisition otherwise than under the Act and cannot relieve the authorities of their obligation to comply with Ss. 13 to 15 of the Act.

10. Secondly, it is fallacious to assume that S. 16 contemplates two different modes of compulsory acquisitions i.e., one under this Act and the other under the L. A. Act. Sub-sec. (2) of S. 16 merely adopts the L. A. Act for the requirement of the land under this Act. Creating fiction of the purposes of the Act being a public purpose is intended to remove any possible

doubts as to the validity of the contemplated acquisitions. Sub-secs. (3) and (4) merely indicate the source from which the lands required are to be acquired by recourse to the provisions of the L. A. Act u/s. 16 (2) of the Act. The wording of cl. (c) of S. 13 (3) of the Act fortifies this view and demonstrates the fallacy of the contention. The extent of land liable to be acquired and covered by sub-secs. (3) and (4) of S. 16 has to be first ascertained and area thereof identified. This can be done only on preliminary assessment and enquiry u/Ss. 13 to 15 of the Act. Any assumption that sub-sec. (2) is independent or unconnected with sub-secs. (3) and (4) would prevent application of L. A. Act to the acquisition of lands covered by sub-secs. (3) and (4) of S. 16. The Act does not provide for any other mechanism of acquisition, and the fiction of acquisition being for public purpose would also be inapplicable in that case. All this goes a long way to show how contrary contentions are ill-founded.

11. This apart, S. 16 cannot be so interpreted as to permit option of acquiring land under this Act or under the L. A. Act without exposing it to the attack of being violative of Art. 14 of the Constitution, as it would be difficult to find out, in that case, any criteria with section to determine, when and why the one should be invoked and not the other.

12. Our attention was also drawn to the wording of cls. (c) and (d) of S. 13 (3) of the Act, suggesting that the basis of acquisition of land covered by cl. (c) is different from the one covered by cl. (d). The detailed description of land under cl. (c) tallies with its description under sub-sec. (4) of S. 16. This is another instance of bad drafting. It is difficult to know why this land is placed in separate cl. (c) when it is liable to be covered also by cl. (d). In the context now, the cl. (d) shall have to be interpreted to cover only lands acquired by negotiation and the "Goathan" land covered by sub-sec. (3) of S. 16 though it is wide enough to cover land referred to in cl. (c). We have already seen how express reference to the L. A. Act in cl. (c) herein fortifies our view that acquisition of lands covered by sub-sec. (4) of S. 16 can be secured only by recourse to L. A. Act.

and by no other provisions of this Act and how this rather runs counter to Mr. Saldhana's arguments.

13. The reliance on the word "also" in Sec. 16 (2) is equally misconceived. The word is intended to highlight the availability of one more mode of securing the required land under the Act in addition to its acquisition by negotiations provided for in sub-sec. (1) and not to emphasise any power of acquisition unconnected with Secs. 13 to 15. Section 16 (2) contemplates recourse to the L. A. Act for the acquisition of the land "required" for the purposes of the Act. Such "requirement" can be ascertained only by the process as provided under Secs. 13 to 15 of the Act. Sub-sections (3) and (4) only reflect the crystallisation of this process and it is for the land so required that mechanism of the L. A. Act is intended to be adopted under Sec. 16 (2) of the Act. The word 'also' in sub-section (3) does not have any significance excepting to emphasise that even land 'affected' is liable to be acquired if needed for 'gaathan' though the Act contemplates resettlement on benefited and other zones.

14. It is true that the lands in dispute are all situated in a village which is one of the villages notified as likely to be in the benefited zone under Section 11 (1) of the Act. Mr. Saldhana relies on this and contends that the lands in dispute are in either case liable to be acquired. This contention is untenable. The likelihood of a land being in the benefited zone under S. 11 (1) is not the same thing as its being found to be so after enquiry under Sec. 15 of the Act. As stated earlier, objections raised are fundamental and deserve to be upheld.

15. Thus once the project is notified under S. 11, the acquisition of the land from the benefited zone and other sources is liable to be governed by the provisions of this Act, and the powers under sub-sec. (2) of Section 16 and mechanism of the L. A. Act cannot be invoked unless first the assessment and ascertainment as contemplated under Sections 13 to 15 of the Act is finalised. Such acquisition is subject to the limitation indicated in sub-secs. (3) and (4) of Sec. 16 of the Act and Schedule thereto. Looking at from this point of

1982 Bom./20 VII G—16

view, the notifications and the land acquisition proceedings initiated and carried on by the respondents in the present cases are liable to be quashed.

16. In this view of the matter, the petitions deserve to be allowed. We accordingly allow all the seven petitions and make the Rules absolute and quash the acquisition proceedings. The petitioners will get the costs from the respondents.

Petitions allowed.

AIR 1982 BOMBAY 305

TULPULÉ, J.

Gopaldas Kishanchand Talreja, Petitioner v. Vijaysingh Bhimsingh Patil and others, Respondents.

Spl. Civil Appln. No. 4206 of 1976, D/- 3-10-1980.

(A) Maharashtra Municipalities Act (40 of 1965), Section 195 — Notice under — Validity — Structure on leased land found in dilapidated condition — Tenant of land, both owner and occupier of structure by virtue of sale by previous tenant who constructed it — Held, notice under Section 195 to tenant alone without any notice to landlord would be valid.

No doubt, in the ordinary course where nothing is known about the ownership of the structure, the notice under Section 195 would have to be served both upon the owner of the land as well as the occupier of the structure built thereon. However, where it is known, or comes to the knowledge of the Chief Officer that the owner of the premises, namely, the landlord has no concern whatsoever with the structure, in his wisdom, the Chief Officer may decide not to issue a notice to the owner but issue only to the occupier who is the owner of the structure. (Para 18)

(B) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 13 (1) (b) — "Permanent structure" — Notice served on tenant under Section 195, Maharashtra Municipalities Act, to demolish and reconstruct dilapidated temporary structure — Structure rebuilt with bricks and cement instead of with bricks and lime mortar — Held, mere use of cement did

DZ/DZ/B387/82/HR/RSK

not make structure a permanent one — Structure built in pursuance of notice amounted to restoration of premises and not to a new construction.

What Section 13 (1) (b) lays down is that the structure which is erected by the tenant must be different from the demised premises and must change the character or situation and the nature of the premises demised. Apart from the character of that work being of a permanent nature or enduring and lasting nature, there must be some addition to the premises. Mere re-erection or reconstruction of premises which had either fallen down or which were required to be pulled down, cannot be termed as such construction. (Para 28)

The tenant was served with a notice under S. 195, Maharashtra Municipalities Act, 1965 to demolish and reconstruct the temporary structure that had been built on the open plot of land which had been leased out to him. The brick and lime mortar structure which was in a dangerous state was replaced by a brick and cement structure.

Held, merely because cement was used, it could not be held that the construction was not a restoration of the former structure made of old bricks and lime mortar but an entirely and wholly new construction of a permanent nature. What the tenant had done amounted to restoration and reconstruction of the premises which were required to be pulled down in obedience of the orders of the Municipal Corporation. The petitioner would have been visited with a prosecution and fine if he had failed to comply with the provisions of Section 195 of the Maharashtra Municipalities Act, 1965. Therefore, the tenant had acted not voluntarily but in obedience of the process of law, and may be under a compulsion. Under the circumstances it could not be held that in the present case he had attracted the penalty of eviction under the provisions of Section 13 (1) (b), and the structure erected was of a permanent nature. Civil Revn. Appln. No. 114 of 1965, decided by Kantawala, J., on 12-11-1968 (Bom) Refd. (Paras 23, 25, 28)

Cases Referred : Chronological Paras

AIR 1972 Bom 273 : 74 Bom LR 220

11, 29

(1968) Civil Revn. Appln. No. 114 of 1965 D/- 12-11-1968 (Bom) 11, 21, 26
(1968) Civil Revn. Appln. No. 1160 of 1968 (Bom) 11
(1965) Civil Revn. Appln. No. 115 of 1965 (Bom) 13

N. H. Gursahani with S. H. Gurusahani and D. M. Butani, for Petitioner; R. V. Desai, for Respondent No. 1.

ORDER :— This petition is directed against the Judgment and Decree passed by the Learned Extra Assistant Judge. Jalgaon, in regular Civil Appeal No. 70 of 1974 arising out of the decision in Regular Civil Suit No. 81 of 1972 given by the Learned Joint Civil Judge, Junior Division, Jalgaon, dismissing the suit.

2. The Respondent landlord was the owner of two plots of land admeasuring 27 ft. x 11 ft. and 18 ft. x 14 ft. bearing City Survey No. 2122/A-2 and Municipal No. 340 and situated within the Jalgaon Municipal limits. The two plots were known as Plot No. 1 and Plot No. 2 and were adjacent to each other.

3. It appears, sometime prior to 1957, Plot No. 1 was released as an open plot of land to one Lalji Waghji. This Lalji Waghji had constructed a structure thereon and was running a hotel business. On the 29th June, 1957, the petitioner tenant purchased this hotel as a running business together with the shed thereon constructed by Lalji Waghji with the consent of the Respondent-landlord. The petitioner was accepted as a tenant by the Respondent.

4. Thereafter on the 1st December, 1957, it seems that the petitioner-tenant took on rent for his hotel business the adjoining plot also. On this adjoining plot he erected a structure. The rent of the plot which was let out to Lalji Waghji at first and was subsequently given to the petitioner-tenant was Rs. 35/- though for the second plot taken on lease by the petitioner, the agreed rent was Rs. 6/- only.

5. On the 8th of August, 1970 the Respondent landlord served a notice upon the petitioner tenant to quit and hand over vacant possession of the premises by 30th Aug., 1970. Out of the two grounds which were raised for demanding possession from the petitioner-tenant one was arrears of rent, namely, that the petitioner-tenant was in arrears of rent for a period from 1st January, 1970 to 30th July 1970. The second

ground was that the petitioner had erected a permanent structure on the land.

6. With regard to the arrears of rent, the petitioner-tenant paid all the amount which was due within a period of one month and, therefore, there was no question of any default having been committed by the petitioner-tenant. The only ground, therefore, which was in issue, and remains now in issue, is as to whether the petitioner-tenant has lost his right to remain in possession for having constructed and erected a permanent structure on the land.

7. It appears that on the 29th November 1971, the Chief Officer, Jalgaon Municipality, served a notice upon the petitioner-tenant requiring him to demolish the walls of the shed wherein he was conducting his hotel business on the ground that the walls had become dangerous and were in a dilapidated condition. The notice directed the petitioner to pull down those walls and construct those walls anew.

8. On the 11th January, 1972, the Respondent-landlord filed the suit against the petitioner-tenant being Regular Civil Suit No. 81 of 1972, in the Court of Joint Civil Judge, Jalgaon District, Jalgaon. As stated, the suit was based on two grounds for possession, namely, arrears of rent and the petitioner-tenant erecting a permanent structure. It was the case of the Respondent-landlord that the Petitioner-tenant erected this permanent structure without his consent in writing. That the work was actually going on when the plaint was filed and that the petitioner-tenant did not desist from finishing the work, though requested not to do so. Soon after the institution of the plaint, the Respondent got a Commissioner appointed to visit the site in suit, to draw a sketch plan and to make a report. Shri A. D. Chaudhari was appointed Commissioner, who made his report and also drew a map. The report of the Commissioner is at Ex. 76, while the map is produced at Ex. 77.

9. The petitioner tenant in his defence stated that he had taken these premises on rent which was agreed and that the premises were then open plots taken for the purpose of hotel business. On those plots a temporary structure for the purpose of the hotel was erected,

That out of these plots, Plot No. 1, admeasured 27 ft. x 11 ft. This was originally let out to Lalji Waghji and that Lalji Waghji had erected thereon a structure admeasuring 10 ft. x 11 ft., which according to the petitioner was a shed with walls built in bricks and mortar. The petitioner purchased this property from Lalji Waghji with the consent of the Respondent-landlord and since then the Respondent accepted the petitioner as a tenant. It was contended that the ownership of the sheds belonged to the Petitioner. It was contended that the walls of the shed and the roof had become dilapidated and dangerous to the occupants, and, therefore, on account of Notice issued by the Jalgaon Municipality dt. 27th Nov., 1971 the shed was demolished and was re-constructed on the same plots.

10. The learned Trial Judge dismissed the suit of the Respondent-landlord. Against that the Respondent filed an Appeal in the Court of the learned Extra Assistant Judge, Jalgaon. The learned Extra Assistant Judge allowed the Appeal of the Respondent and set aside the Judgment and Decree passed by the Trial Court and passed instead a Decree for possession in favour of the Respondent-landlord.

11. In passing this Decree, the learned Extra Assistant Judge was of the opinion that, considering the nature of the work which was being carried out and which had been carried out by the Petitioner-tenant, it was a permanent structure which had been erected and not a restoration of the original structure. He also held that what the Petitioner-tenant had done was not to re-construct the old structure "but has completely built a new one." He also found that in place of the old structure, the Petitioner-tenant has "constructed a structure covering the area of both the plots". He was of the view that the learned Trial Judge had overlooked that what the petitioner had done was not a re-construction of "the same type of structure of the same size." Reliance before him was placed on a ruling in the case of Suka Ishram Chaudhari v. Ranchhoddas reported in (1972) 74 Bom LR 220 : (AIR 1972 Bom 273) and a decision of this Court in Civil Revn. Appln. No. 114 of 1965 decided on 12th Nov., 1968 by Justice Kantawala as he then was, in

view of the fact that what was put up by the Petitioner-tenant on the site a permanent structure and since it was not a restoration of the former structure but an enlarged shed on the entire plots, he held that the ratio of the decisions in Civil Revn. Applns. Nos. 1160 of 1968 and 114 of 1965 did not apply to the facts before him. His findings and conclusions were seriously challenged before me.

12. Shri Butani, who appeared for the petitioner, contended that the principle laid down by Justice Kantawala in Civil Revn. Appln. No. 114 of 1965 was misconstrued by the learned Judge. That what was done by the Petitioner-tenant in this case was to obey the orders of the Jalgaon Municipal Council to pull down the structure and to replace it by new walls. What he was, therefore, doing was an act in obedience of the orders of the Municipal Council. It was contended by Shri Butani that there was no evidence adduced by the parties in the Courts below nor was there any material on record of the case to hold and determine as to what was the total area or extent of both the structures on the two plots. Though the plots are adjoining, dimension of the structure on the second plot is not known. If the two structures were built jointly with each other, then together they would become only one shed used for the purpose of the hotel, which the Petitioner was running. It was his submission that the learned Judge mis-read the evidence in coming to the conclusion that what was constructed by the Petitioner was the shed which was larger in extent than it was before and that it has been built upon the plots so as to suggest that the entire plots have now been built upon and there is no open plot or land left. This, he said was not borne out at all by the Commissioner's report or by the map. It was contended that it is the nature of the structure and the intention with which it is affixed together with the degree of annexure to the premises let namely the open plots of lands in this case, which will determine the character of the structure. Merely because cement and bricks were used, it could not follow that the structure must, therefore, be a permanent structure. The learned Judge, according to Shri Butani was unduly impressed by the circumstances that a foundation was dug and was seen

by the Commissioner. He, however, urged that the learned Judge's observations that the foundation was 3½ ft. deep is in no way supported by any evidence or material on record. The mere fact that the walls were built upon foundation does not ipso facto establish or prove that the structure was a permanent structure. The size of the walls, kind of material used for the erection of the walls, the possible and likely damage in case the structure is taken away from the premises let, all these circumstances when taken into account indicate that the intention of the lessee or the person who erected the structure was to erect a structure which will endure for all times and would confer a lasting advantage in respect of the premises. Only then the structure can be considered as a permanent structure. Shri Butani seriously contended that in order to attract operation of S. 13 (1) (b) of the Bombay Rent Act a permanent structure must be by way of addition to the premises let and must not be part of the premises themselves.

13. It was contended on behalf of the Respondent that the decision and principle laid down in Civil Revn. Appln. No. 115 of 1965 was in no way applicable to the facts of this case. In that case action was taken by the tenant pursuant to a notice issued by the Municipal Corporation, Poona and since the landlord in that case had statutory liability to keep the premises in tenantable repair he had not done so. What the tenant, therefore, did with the permission of the Municipal Corporation, Poona was to erect a construction after the landlord-Plaintiff in that case had neglected or refused to do so when he was called upon to do so, by the Municipal Corporation, Poona. In the present case, Shri Desai submitted that there was no notice issued to the Respondent-landlord at all. On the other hand, it was Shri Desai's submission, that the Notice served by the Municipality appears almost to have been invited by the petitioner. There is no evidence to show that the Respondent-landlord had neglected or refused to carry out any work.

14. The second submission was that the learned Judge has not considered the evidence fully and completely. On a consideration of that evidence he had

arrived at the conclusion that what was constructed by the Petitioner was a shed larger in extent and of permanent nature. If that was so, Shri Desai submitted under Art. 227 it will not be permissible to disturb that finding of fact. If that finding of fact is conclusive and is binding on that Court, then he submitted that, there is no alternative but to dismiss this Petition.

15. It would be convenient firstly to refer to the notice issued by Jalgaon Municipal Council. It does appear that the notice or direction was issued in connection with some application or reference dt. the 2nd Nov., 1971 made by the Petitioner. Shri Desai says that this is an application made by the Petitioner himself. However, what is further material is not as to who made that application but as to what that application contained. The original application or its certified copy is not placed on record. No questions were asked to the Petitioner in the witness-box in that behalf.

16. The notice says that the premises were inspected on the 23rd Nov., 1971 by the Municipal Engineer and he was of the opinion that the structure was in a dilapidated condition. The Notice also recorded the state of the structure which was built in brick with lime plaster and C. I. sheet proof that the plaster had come off at many places and mortar had also come off from the joints. The walls being broken at many places and, therefore, the walls should be pulled down and at that place new walls should be built. The notice also directed that the walls have become dilapidated and dangerous for occupants.

17. Now it is clear that this notice issued by the Municipal Council can only be considered as one u/s. 195 of the Maharashtra Municipalities Act, 1965. That Section empowers the Chief Officer where he is of the opinion that any building or other structure was in a ruinous condition or likely to fall or in any way dangerous to any person occupying, the Chief Officer may by Notice "require the owner or occupier of such building or structure to pull down, secure, remove or repair such a building or structure, "and also" 'do' one or more such things". The Chief Officer, therefore, if he is of the opinion that a structure is in a ruinous condi-

tion or in any way dangerous or about to fall, may not only direct the owner or the occupier to pull it down but may also direct him to repair and secure the structure by doing any or more of such things mentioned in the Section. The consequences of not complying with the Notice u/s. 195 is that the person not so complying with the Notice can be fined and prosecuted.

18. Now it is not in dispute in the present case that the Respondent-landlord was not served with any such notice u/s. 195 of the Maharashtra Municipalities Act, 1965. Shri Desai says and rightly contended that the Notice should also have been served upon the Respondent-landlord and if it had been so served and the Respondent had not carried out the work, then possibly the decision relied upon would have been attracted. This contention overlooks the powers of the Chief Officer and the facts which are obtaining in the present case. It is not disputed that the owner in this case was the owner of the land only. The Respondent-landlord had nothing to do with the structure which admittedly belonged to the occupier. In the ordinary course where nothing is known about the ownership of the structure, Shri Desai would be right in contending that the notice u/s. 195 should also have been served upon the owner. However, where it is known, or comes to the knowledge of the Chief Officer that the owner of the premises, namely, the landlord has no concern whatsoever with the structure, in his wisdom, the Chief Officer may decide not to issue a notice to the owner but issue only to the occupier who is the owner of the structure. In the present case, if the notice was issued to the occupier, namely, the Petitioner only, it cannot be said that there was a deliberate attempt to by-pass the Respondent-owner. In the present case since the owner of the structure was also the occupier thereof, the notice issued u/s. 195 and served on the occupier would be a perfectly valid notice.

19. The notice also clearly points out as to the condition of the premises and the nature of the structure. It shows that the walls were built in bricks and mortar and that there was C. I. sheet-roof. However, the notice unfortunate-

ly, and may be fortunately for the Petitioner-tenant, does not say as to what is the extent of the premises. It merely refers to the structure and does not relate to more than one structure. This notice is dt. 27th Nov., 1971 and it is thereafter that the present work was commenced. It does, therefore, appear that the original walls which were constructed on this structure were constructed on bricks and mortar.

20. This position is also further clarified by the Commissioner's Report. The Commissioner's report says that the old work, debris of which was lying on the premises, indicate that it was made in mortar and bricks and the old mortar was lying everywhere and some new frames of windows were also seen. The new building work or wall building work was being carried out in bricks and cement. He makes a reference also to the foundation at one place only described as S-1 to S-2 in his map. There he says that the foundation was being filled up from mortar, pieces of mortar and cement.

21. According to the evidence given by the petitioner, he was using the same material for the purpose of the construction. Presumably, he meant thereby that he was using the old bricks and also partly using the doors and windows of the former structure, though some of the window frames were new. He has specifically referred to frames, but the Commissioner did not similarly make any reference to any new door frames. He has made a reference to the door frames but has not said whether the door frames were new or old. Reliance was sought to be placed upon a photograph Ex. 69 showing the work done. This will partly support the evidence of the Petitioner in that some of the bricks which appear to have been used in the construction of the walls appear to be old bricks since mortar seems to be clinging on to them. Even the Commissioner observed lime and mortar at many places was clinging on to the bricks.

22. I have already pointed that the dimension of the plots taken together would work out to 54 x 22. What the Commissioner has not done, nor the parties seem to have insisted upon, is the drawal of the sketch map of the entire two plots in question. That would have shown to us the structure which

was constructed and the remaining open space, if there was any, which was available. The learned Judge has recorded a finding that the sketch or map drawn by the Commissioner was of the entire plot. This finding, however, cannot be supported and is incorrect. If we look to the Commissioner's report and the sketch map, the report does not say that the sketch was of the entire plot. The Commissioner's report goes to show that the length and breadth of the structure was 32 ft. along the south and line AB and 15 ft. in width along line B to S-2. There does not appear to be any construction beyond the foundation shown by the Commissioner in S-1 and S-2. No wall to the north and no wall to the west had been admittedly constructed then. The width of the structure to the west has not been shown by the Commissioner. The width of 18 ft. which I have found of the structure is to the East. Beyond the foundation shown by the Commissioner, there is a portion of the wall which is north south but except that wall there is no other structure shown. It will thus be seen that the construction which is now ready ad-measures 32' 6" x 15'. In any event it does not cover an area of 45' x 22'. The learned Judge's finding, therefore, that the construction was on the entire plot is wholly unsupported by the Commissioner's sketch as to what was the situation at the site when the work was going on. If that is so, then the finding or the conclusion of the learned Extra Assistant Judge to that effect disappears.

23. The same must also be stated about his observation and finding that the foundation of the walls was 3½ ft. deep. He says that "the Defendant-tenant had taken foundation of 3½ ft. deep and was constructing the building with cement and mortar and was making altogether a new construction". In coming to this conclusion, he relies himself on the statement of Anandsingh at Ex. 65, and that statement of Anandsingh has gone unchallenged. I have gone through the statement of Anandsingh. It nowhere says that the foundation was 3½ ft. deep. For the Respondent-landlord it was conceded that there was no such statement or piece of evidence appearing on the record. Neither the Commissioner has said in his report that the foundation was 3½ ft. deep. It is not

known from where the learned Judge obtained this impression that the foundation was 3½ ft. deep. On the other hand, the description of the foundation, the laying of it and the type of material which was thrown in the foundation indicated that the foundation cannot be considered as fit for a permanent structure. It was being filled with broken pieces of bricks, mortar and cement. Such a foundation can hardly support a permanent structure. It may be used for a temporary structure at best. The learned Judge was, therefore, wrong in coming to the conclusion both on observation of the material which was used and the nature of the construction that it was permanent merely because cement was used. Instead of lime mortar which was used for the old structure, the material which was used was cement in this case. Merely because cement is used in this case, it is difficult to hold that the construction was not a restoration of the former structure made of old bricks and lime mortar but an entirely and wholly new construction.

24. If it is held that the construction was not of such a type as to describe it of an enduring nature, even if the materials used be of sufficient durable quality and strength, then it is difficult to hold that the construction was of a permanent nature. After all the construction was intended to serve the purpose of running a hotel. No attempt to build a permanent building as such on a plot of land obtained for the purpose of running a hotel has been expressed or stated. What was formerly a brick and lime mortar structure with C. I. sheet roof is now sought to be converted into a brick and cement structure.

25. It is true that Anandsingh, Plaintiff's witness, in his evidence stated that the shed was constructed "of mud and brick walls" and there were tins on the roof and Plot No. 2 was constructed of Kud walls and there were tins on it. Now this statement of Anandsingh is not supported by Ex. 72, viz. the report based on the visual examination by the Municipal Engineer. Anandsingh admits, however, in cross-examination that the walls were old but that they were constructed on the basis of a foundation. No Kud walls had been referred to by the Municipal Engineer. Kud walls are generally not constructed

upon foundations. The Petitioner in his evidence stated that the shed "is constructed with the same bricks" and that the shed was "constructed in bricks and lime". He does not refer to any Kud walls nor was he questioned during his cross-examination of the existence of a shed with Kud walls. The learned Extra Assistant Judge seems to have proceeded on the basis that these Kud walls, made of bamboo strips were removed and replaced by solid brick walls built in bricks and cement. On behalf of the Petitioner the Municipal Engineer was examined who actually saw the shed in question on the 23rd Nov., 1971 and purasant to whose report, notice Ex. 72 was given to the Petitioner. He had not been asked any question as to the character of the walls whether they were of Kud or otherwise nor even the extent of the premises which was already existing. On the other hand he stated that the walls of the shed "were cracked and the structure was in a condition which was dangerous to human habitation." In the circumstances, it is difficult to think that what was attempted to be done pursuant to the Notice of the Municipal Council, Jalgaon, by the Petitioner was not a restoration of the premises to their former condition as was required after dismantling the walls which were in a dangerous state and re-built in bricks and cement instead of bricks and lime mortar. This amounts to restoration of the premises and not to a new construction.

26. I would now refer to the decision in Civil Revn. Appln. No. 114 of 1965. It is true that in that case the Pona Municipal Corporation had served a notice to the landlord to reconstruct and restore the portion of the kitchen which was washed away in the Panshet Dam floods. The landlord in obedience of the Notice omitted to do so. The tenant then moved the Municipal Corporation and sought permission to do so. The tenant was granted permission and the tenant reconstructed the washed out portion of the kitchen and built the structure again with walls on its foundation. The landlord sued him for possession on the ground that he had erected a permanent structure. It was held in that case that what the tenant had done was in obedience of the Notice issued by the Municipality and the same

amounted to restoration of the premises and not new construction.

27. Dealing with S. 13 (1) (b) Justice Kantawala observed that in order to obtain a decree for recovery of possession, the landlord has to establish that a tenant without his written consent erected a permanent structure on the demised premises. Such a permanent structure would not be on the demised premises. It pre-supposes that it must be in addition to or different from the original demised premises. It is this last part of the observation on which considerable reliance is placed. Shri Desai contended that these observations were not necessary for the decision in that case. I am unable to agree with this submission of Shri Desai. The Court in that case was required to consider whether in the circumstances the tenant had erected a permanent structure by contravening the provisions of S. 13 (1) (b) and thereby incurred the penalty of eviction. It was said what S. 13 (1) (b) contemplates is an addition to or different kind of structure from the original. What was being done in that case was laying down the law so far as the provisions of S. 13 (1) (b) were concerned. It was in the context of this requirement of S. 13 (1) (b), namely, whether the premises were an addition to or different from the original structure that the question as to whether premises built by the tenant came within its ambit or otherwise had to be decided.

28. It seems to me that what S. 13 (1) (b) also lays down is that the structure which is erected by the tenant must be different from the demised premises and must change the character or situation and the nature of the premises demised. Apart from the character of that work being of a permanent nature or enduring and lasting nature, there must be some addition to the premises. Mere re-erection or reconstruction of premises which had either fallen down or which were required to be pulled down, cannot be termed as such construction. What was in that case done was a mere restoration of the premises to their original condition. It may be that the material which is used for erecting a permanent construction has been used therein. But it would not mean that it is, therefore, an erection of

a permanent structure. What the Petitioner-tenant in this case has done must be held to be restoration and reconstruction of the premises which were required to be pulled down in obedience of the orders of the Municipal Corporation, Jalgaon. The Petitioner would have been visited with a prosecution and fine if he had failed to comply with the provisions of S. 195 of the Maharashtra Municipalities Act, 1965. Therefore, the Petitioner-tenant had acted not voluntarily but in obedience of the process of law, and may be under a compulsion. Under the circumstances it cannot be held that in the present case he has attracted the penalty of eviction under the provisions of S. 13 (1) (b), and the structure erected is of a permanent nature.

29. In the circumstances and the view which I have taken on the basis of the material and evidence on record it is not necessary to refer to the decision in the (1972) 74 Bom LR 220: (AIR 1972 Bom 273). It would be sufficient to point out that in that case also the walls were put up after digging a foundation of 1½ ft. deep. In the present case there is no evidence as to the depth of the foundation. The Petition, therefore, must be allowed and succeeds. Rule made absolute. There will be no order as to costs.

Petition allowed.

AIR 1982 BOMBAY 312

KANADE AND PENDSE, JJ.

Mohamad Maqbool Mohamad Khaja and others, Petitioners v. State of Maharashtra and others, Respondents.

Writ Petn. No. 431 of 1981, D/- 1-7-1981.

Maharashtra Municipalities Act (40 of 1965), Ss. 40 (3), 19A, 48A (inserted by Act 12 of 1981) — Scope and object of S. 40 (3) — Councillors cannot claim to hold office beyond term of six years — S. 48A is not ultra vires the State Legislature — Connotation of expression 'changed circumstances' in S. 48A — Power to appoint Administrator under S. 48A is not absolute and unguided — Principles of natural justice are not violated if S. 48A notification is issued without notice to Councillors. (Constitu-

DZ/DZ/B783/82/RSK

tion of India, Art. 14, Seventh Schedule, List II, Entry 5; Constitution of India, Art. 226 — Natural justice).

Sub-section (3) of S. 40 of the Act has only a limited application and a legal fiction was created by the Legislature only to overcome a possible vacuum which may occur in exceptional cases. It is not permissible for any Councillor to take resort to that sub-section to claim that he can remain in office as a matter of right beyond the extended period of six years. The term of office of the Councillor comes to an end at the expiry of five years or six years as the case may be and he ceases to hold and vacates the Office of the Councillor at the expiry of the term. The legal fiction created by sub-sec. (3) of S. 40 of the Act only enables him to carry out day to day administrative work till the meeting of the new Councillors under S. 19A of the Act is held, and does not permit to take any long term policy decisions. In these circumstances, the contention that the term of the Councillors would automatically stand extended beyond six years under sub-sec. (3) of S. 40 of the Act even in cases where general election for electing fresh Councillors is not held is without any merit. (1962) 64 Bom LR 557 Relied on; AIR 1977 Bom 244 Explained. (Para 8)

Entry 5 of List II of the Seventh Schedule to the Constitution enables the State Legislature to legislate in regard to the constitution and powers of the Municipal Corporations. Fixation of a term of the Councillor or grant of extension in such term and withdrawal of such extension are matters which are so closely connected with the constitution and powers of the local government that there can be no hesitation whatsoever in concluding that the State Legislature was perfectly competent in enacting S. 48A of the Act. (Para 12)

While enacting Section 48A of the Act, the State Government had to meet a contingency which was unprecedented and unusual. The State Government was under an erroneous impression that the Councillors can continue indefinitely in their office even after the expiry of their term because of the provisions of sub-section (3) of Section 40 of the Act. The Councillors of large number of Municipal Councils continued to hold the office even after the expiry of term of

six years by resort of sub-section (3) of Sec. 40 and in these circumstances, the Government felt it necessary to cover the cases of such Councillors also by inserting sub-section (3) of Section 40 in the sweep of Section 48A (1) of the Act.

The powers could be exercised by the State Government under Sec. 48A of the Act only in cases where the State Government has extended the term of Councillors from five years to six years and such extension is still subsisting. It could not be said that the Legislature intended to confer the power upon the Government to appoint the Administrator to prevent the elected representatives of people from taking over charge of Councils. Reading amended Section as it is, the State Legislature was perfectly competent to enact the Section. (Para 13)

The apprehension that the, "changed circumstances", is an expression which is not definite and can be attributed different meaning or variety of meanings which can fluctuate from one situation to another is not well founded. The changed circumstances do not depend upon the whims or caprice of the State Government, but are justiciable in court and are not left to the whims of the executive. (Para 15)

Under Section 48A absolute powers are not conferred upon the State Government without any guidelines. The guidelines are provided as the powers can be exercised only in changed circumstances and only in cases where the extended term of one year after the expiry of normal period of five years is still running and subsisting. Only in those and those cases that the Government can exercise the powers and that too because of the changed circumstances which lead the Government to conclude that the continuance of the Councillors during the extended term is not expedient. The guidelines are clear and specific and in cases the guidelines are violated or any order is passed which is not in consonance with the provisions of the Section, then it is always open for the aggrieved party to approach the High Court. The State Legislature was perfectly competent to enact Section 48A of the Act and it does not suffer from any infirmity and does not offend any provisions of the Constitution or the fundamental rights guaranteed by the Constitution of India.

The provisions of Section 48A of the Act are intra vires. AIR 1969 SC 1100, AIR 1975 SC 1234 and AIR 1978 SC 597, Refd. (Para 17)

When the petitioners had no right to hold the office of the Councillor after the expiry of the period of six years, the Government was not bound to give any notice to the petitioners before taking action under Section 48A of the Act. It could not be said that the principles of natural justice are violated even though the person who claims violation, had no right to remain in office.

(Para 20)

Cases Referred : Chronological Paras

AIR 1978 SC 597	14, 17
AIR 1977 Bom 244	10
AIR 1975 SC 1234 : 1975 Tax LR 1540	14
AIR 1969 SC 1100	14
(1962) 64 Bom LR 557	9

Dr. B. R. Naik with R. V. Naik, for Petitioners; C. J. Sawant, Addl. Govt. Pleader with D. P. Hegde, Asst. Govt. Pleader and Advocate General, for Respondents.

PENDSE, J.:— By this petition filed under Article 226 of the Constitution of India, the petitioners are seeking a writ of mandamus for striking down Section 48A of the Maharashtra Municipalities Act 1965 (hereinafter referred to as the "Act") as being ultra vires of the fundamental rights guaranteed under the Constitution of India and for quashing and setting aside the order dated February 5, 1981, issued by respondent No. 1 under sub-section (1) of Sec. 48A of the said Act.

2. The petitioner No. 1 is the President of Nanded Municipal Council, while the petitioners Nos. 2 to 5 are its Councillors. The Municipal Council of Nanded was established under Section 8 of the Act. Section 10 onwards of the Act provide for election of Councillors to the Municipal Councils and Section 40 (1) of the Act lays down a term of five years for the Councillors elected at the general election. The term of Councillors of the Nanded Municipal Council was to expire on December 16, 1979. Section 40 (1) of the Act enables the State Government in exceptional circumstances to extend the term not exceeding in the aggregate six years for reasons which have to be stated in the Notification to be published in the Official Gazette. In

exercise of the powers conferred under this sub-section, the State Government extended the term of the Councillors by a period of six months on December 11, 1979. A further extension of six months' duration was granted on May 3, 1980, and the term of the Councillors was to expire on November 30, 1980. In spite of the fact that the term was to expire in November, 1980, the general election to the Municipal Council was not held earlier by the State Government, but the respondent No. 2 — the Director of Municipal Administration — issued instructions only on February 3, 1981 to hold the elections of the Municipal Council. It is required to be stated at this juncture that the identical situation prevailed in about 192 Municipal Councils in the State of Maharashtra. In other words, though the extended period of six years' term was over, the Municipal Councillors in 192 Municipal Council continued to function as Councillors. With this background, the Governor of Maharashtra issued Maharashtra Ordinance No. 1 of 1981 on February 4, 1981. The Ordinance was issued as the State Legislature was not in Session and the Governor was satisfied that the circumstances exist which render it necessary to take immediate action to amend the Maharashtra Municipalities Act, 1965 and also the Bombay Provincial Municipal Corporations Act, 1949 and the City of Nagpur Corporation Act, 1948. By this Ordinance, Section 48A was inserted in the Act. The amended Section confers power upon the State Government to appoint Administrator in the Municipal Councils where the term of the Councillors stands extended under sub-section (1) or sub-section (3) of Section 40 of the Act. The Ordinance further provided that on publication of such an order by the State Government appointing an Administrator, all Councillors including the President and the Vice-President shall cease to hold and shall vacate the office as Councillors or otherwise. In pursuance of the powers conferred by the Ordinance, the State of Maharashtra Published Notification on February 5, 1981, whereby the term of the Councillors of 187 Municipal Councils was terminated and the Administrator was appointed with effect from February 6, 1981. One of the Municipal Councils covered by this Notification is the Nanded Municipal Council which

has been joined as respondent No. 3 to the petition. The petitioners challenged the said Notification by filing the present petition in this Court on Feb. 9, 1981. The petition was duly admitted on February 11, 1981. During the pendency of this petition, on March 21, 1981, the Ordinance was replaced by Maharashtra Act No. XII of 1981 with retrospective effect from February 4, 1981. The amended Section 48A of the Act was inserted in the Act having been assented by the Governor after the Legislature approved the same. Certain alteration was effected by the Legislature while enacting Section 48A of the Act by providing that the general elections shall be held within a period of one year from the date of publication of the order issued under Section 48A of the Act. The petitioners thereafter amended the petition and challenged the vires of Section 48A of the Act.

3. The principal grounds of challenge to the vires of Section 48A of the Act are that the enactment of the Section is beyond the Legislative competence of State Legislature and the same has been enacted with mala fide intention. It is also claimed that the provisions of Section 48A of the Act are required to be struck down as it violates the fundamental rights conferred under Article 14 of the Constitution of India. The petitioners also claimed that the State Government has appropriated absolute powers under Sec. 48A of the Act to suppress the concept of Local Self Government and such absolute powers are conferred without any guidelines for its exercise. It was also claimed that the principles of natural justice were violated while publishing the Notification dated February 5, 1981. The claim of the petitioners to hold the office beyond the term of six years is based on the provisions of sub-section (3) of Section 40 of the Act. The petitioners urged that they are entitled to hold the Office of the Councillors till the day immediately preceding the date of meeting to be held under Section 19A of the Act by the newly elected Councillors. It is the claim of the petitioners that S. 48A of the Act makes wide inroad upon the fundamental rights of the petitioners to hold an elected office. On these grounds, the petitioners challenged the vires of Section 48A as well as the action taken

by the Government in pursuance of the provisions of the Section by issuance of the Notification dated February 5, 1981.

4. In answer to the petition, Smt. Asha K. Shete, the Assistant Secretary, Urban Development and Public Health Department, Government of Maharashtra, has filed return sworn on April 29, 1981. By this return, it is submitted that the claim of the petitioners to hold the office beyond the term of six years is totally misconceived. The respondents' claim that the provision of sub-section (3) of Section 40 of the Act is merely a stop-gap arrangement and does not extend the term of the Councillors beyond the aggregate term of six years. According to the respondents, a peculiar situation arose whereby the term of the Councillors of a large number of Municipal Councils expired but the Councillors continued to remain in office by resort to the provisions of sub-section (3) of S. 40 of the Act and therefore, it was necessary to amend provisions of the Act to meet such unusual situation. The State of Maharashtra claims that the enactment of Section 48A of the Act was perfectly within the legislative competence of the State Legislature and the challenge that the Section confers absolute powers without any guidelines is not correct. The grounds of mala fide are denied and so also the contention that the principles of natural justice were violated before issuance of the notification. The petitioner No. 1 has filed an affidavit-in-rejoinder sworn on June 10, 1981 and reiterated the submissions made in the petition.

5. In view of these rival submissions, it is first necessary to determine the ambit and scope of Section 40 of the Act which provides for the term of office of the Councillors. It would be convenient to set out the provisions of sub-secs. (1), (2) and (3) of Section 40 of the Act to understand the controversy involved in the petition:—

"(1) Save as otherwise provided by this Act, Councillors, elected at a general election, shall hold office for a term of five years, which may be extended by the State Government in exceptional circumstances by notification in the official Gazette, to a term not exceeding in the aggregate six years for reasons which shall be stated in such notification,

(2) The term of office of such Councillors shall be deemed to commence on the date of the special meeting held under Section 19A to co-opt Councillors.

(3) Notwithstanding anything contained in sub-sections (1) and (2), the term of office of the outgoing Councillors shall be deemed to extend to and expire with the day immediately preceding the date of such meeting."

The plain reading of sub-section (1) of Section 40 of the Act makes it clear that the elected Councillors are entitled to hold office for a term of five years. The term can be extended by the State Government for one more year but such extension can be given only in exceptional circumstances and for reasons which shall be stated in the Notification to be published in the Official Gazette. In other words, there is no inherent right in the elected Councillors to remain in office beyond the period of five years. The extension of period is not a right conferred on the Municipal Councillors but the extension can be granted by the State Govt. only in exceptional circumstances. It is implied in sub-section (1) of Section 40 of the Act that in normal circumstances, general elections should be held before the expiry of the term of five years. The exceptional circumstances may arise where holding of an election is not possible. Times of war or where the area is under floods or famine are some of the circumstances where the State Govt. may exercise the power to extend the term. The power to extend the term is also circumscribed by the sub-section providing that such extension shall not be beyond the period of one year from the date of expiry of five years. Sub-section (2) of Sec. 40 of the Act provides for a starting point to determine the period of term of office of five years. The period will begin to run from the date of the special meeting held under Section 19A of the Act to co-opt the Councillors.

6. Section 10 onwards of the Act provide for holding of the general election to the Municipal Council and S. 19 (1) of the Act provides that the names of the elected Councillors shall be published in the Official Gazette. Section 19A of the Act lays down that within 25 days from the date on which the names of Councillors elected to a Council are published or, as the case may be, first

published, under sub-section (1) of Section 19, in the Official Gazette, or from the date on which the result of election of President is published under sub-section (3) of Section 51, in the Official Gazette, whichever is later, the President of the new Council shall convene a special meeting of the Councillors for co-option of Councillors. The term of the Councillors shall be deemed to commence on the date of such special meeting. In other words, though the Councillor is declared to be elected by publication of his name in the Official Gazette, his term of five years would not commence from that date but by legal fiction provided under sub-sec. (2) of Section 40, the term would begin to run from the date of the meeting convened under Section 19A of the Act. The reading of sub-sections (1) and (2) of the Act makes it crystal clear that the normal term of the Municipal Councillors is for a period of five years and could be extended by the State Government in exceptional circumstances by one more year. It is further clear that the legislature intended that the general elections should be held before the expiry of the term of five years in normal circumstances and six years in exceptional circumstances where the Government extends the term. It is implied in the provisions of Section 40 of the Act that the general elections must be held before the term of the Councillors expires. It is well recognised principle in this country that the local bodies should be manned by the elected representatives of the common man, and Section 40 of the Act was enacted obviously to advance that purpose.

7. The sub-section (2) of Section 19A of the Act provides that notwithstanding anything contained in sub-sec. (1) special meeting of the newly elected Councillors shall not be held before the expiry of the term of office of the outgoing Councillors. Such a meeting has to be normally convened within a short duration after the expiry of term of outgoing Councillors. It is possible that a meeting may be held immediately after the expiry of the term but the Legislature in its wisdom realised that in some cases there would be time-gap between date of expiry of term and holding of special meeting. In such interregnum, there would be no effective

administration of Council and to overcome such situation, the Legislature provided by sub-section (3) of Sec. 40 of the Act that notwithstanding anything contained in sub-sections (1) and (2), the term of office of outgoing Councillors shall be deemed to extend to and expire with the day immediately preceding the date of such meeting. By this sub-sec. (3), a legal fiction is created to have the continuity in administration and to avert vacuum in the functioning of Municipal Council. The outgoing Councillors, in view of fixed tenure of office, cannot hold charge on expiry of term but by a deeming provisions are allowed to function, till the special meeting of the new Councillors is held. This sub-section does not create any right in the outgoing Councillors to remain in office beyond the expiry of their term, nor such legal fiction would amount to automatic extension of term. It is necessary to emphasise that the term of the office of the Councillors is fixed by provisions of sub-section (1) of Section 40 of the Act and it could not be extended beyond the aggregate term of six years. Sub-section (3) of S. 40 of the Act does not provide for any extension but contemplates a situation where election of the new Councillors has already been held but such Councillors have not entered the office because the meeting under Section 19A of the Act is not held. The reading of the three sub-sections of S. 40 of the Act makes it clear that provisions of sub-sec. (3) of Section 40 of the Act would come into operation provided the elections of the new Councillors are held or the process of election of the new Councillors is almost over. Sub-section (3) of Sec. 40 of the Act can have no application in cases where the elections are not held. It is not permissible for the Councillors whose term has expired to claim that they can remain in office as long as the fresh elections are not held and the meeting under Section 19A of the Act is not convened.

8. Dr. Naik, the learned counsel appearing in support of the petition, submits that sub-section (3) of S. 40 of the Act automatically extends the term of the Councillors beyond the term of six years if the special meeting as contemplated under Section 19A of the Act is not held. Dr. Naik urges that the sub-sec. (3) of Sec. 40 of the Act opens with

a non obstante clause and it is indicative of the fact that the term can extend beyond six years in cases where elections are not held. It is difficult to accept this submission. The Legislature has provided for a fixed term of five years under sub-section (1) of S. 40 of the Act and which could be extended by one more year in exceptional circumstances. The fact that even the extension of one year could be only in exceptional circumstances and that too by setting out the reasons in the Notification to be published in the Official Gazette clearly indicates that the Legislature never intended that the term of the Councillors should be postponed beyond the duration of five years. The Legislature never desired to create the monopoly of the Councillors by holding the post of Municipal Councillor for indefinite time. It is difficult to conceive that by enactment of sub-sec. (3) of Section 40 of the Act, the Legislature intended that the outgoing Councillors should hold office even beyond the period of six years merely because the elections of the new Councillors are not held. On the other hand, there is intrinsic evidence in sub-section (3) of Section 40 of the Act to hold that it would come into play provided the elections of the new Councillors are already held. The acceptance of the submission of Dr. Naik would lead to a very curious situation, as the existing Councillors can continue in their office for indefinite period by taking advantage of the fact that the elections are not held even after the expiry of six years. It is impossible to accept such a construction because that would lead to the destruction of the basic and fundamental rights conferred upon the voter to elect his representative for a duration of time. Sub-section (3) of Section 40 of the Act cannot be so read as to confer a charter upon the Councillors to remain in office for all time to come. In our judgment, sub-section (3) of Section 40 of the Act has only a limited application and a legal fiction was created by the Legislature only to overcome a possible vacuum which may occur in exceptional cases. It is not permissible for any Councillor to take resort to that sub-section to claim that he can remain in office as a matter of right beyond the extended period of six years. In our judgment, the term of office of the Coun-

cillor comes to an end at the expiry of five years or six years as the case may be and he ceases to hold and vacates the Office of the Councillor at the expiry of the term. The legal fiction created by sub-section (3) of Section 40 of the Act only enables him to carry out day to day administrative work till the meeting of the new Councillors under Section 19A of the Act is held, and does not permit to take any long term policy decisions. In these circumstances, in our judgment the contention urged by Dr. Naik that the term of the Councillors would automatically stand extended beyond six years under sub-sec. (3) of Section 40 of the Act even in cases where general election for electing fresh Councillors is not held is without any merit.

9. In this connection, it would be proper to make a reference to the provisions of Section 25 of the Bombay Municipal Boroughs Act, 1925 which provide for the term of office of Councillors after general election. Sub-section (2) of Section 25 of the Act *inter alia* provides that the term of office of Councillors shall be deemed to commence on the date of the first special meeting, while the term of office of the outgoing Councillors shall be deemed to extend to and expire with the day before the date of such meeting. Sub-section (2) (b) of Section 25 of the Bombay Municipal Boroughs Act, 1925. reads as under :—

"the term of office of the outgoing councillors shall be deemed to extend to and expire with the day before the date of such meeting."

The question with regard to the interpretation to be placed on this sub-section came for consideration before the Division Bench of this Court. The provision of this sub-section and that of sub-section (3) of Section 40 of the Act are almost identical. The Division Bench in a judgment in the case of *Narayan Sitaram Kokaje v. Secretary to the Government of the State of Maharashtra* reported in (1962) 64 Bom LR 557, held that sub-sec. (2) (b) of Section 25 of the Bombay Municipal Boroughs Act, 1925, does not authorise the outgoing Councillors to function actively as Councillors even after the term of their office as provided by sub-section (1) of Section 25 of the Act has come to an

end. The sub-section is only a deeming provision which by a legal fiction extends the term of outgoing Councillors so as to preserve the conceptual continuity of the Municipality. are in entire agreement with the interpretation put by the Division Bench on the said sub-section. The view which we are taking of the provisions of sub-section (3) of Section 40 of the Act is in accordance with the decision recorded by the Division Bench. In our judgment, the object and the effect of the provisions is not to authorise the outgoing Councillors to function actively as Councillors even after the term of their office has come to an end. The sub-section merely provides for an interregnum between the term of the office of one body of the Municipal Councillors and the term of the office of the next body of the Councillors. The sub-section relates only to and covers the interregnum between the expiry of the term of the outgoing Councillors and the taking over charge of the new Councillors. In this view of the matter, the contention of the petitioners that they are entitled to continue in the office as Councillors till the next elections are held and the special meeting of the newly elected Councillors is held under S. 19A of the Act cannot be entertained. The term of the office of the petitioners having expired, they have no right whatsoever to hold the office or claim any lien thereon by resort to the provisions of sub-sec. (3) of the S. 40 of the Act. In view of this conclusion, the petitioners are not entitled to claim the relief that they should be deemed to have continued as Councillors after the expiry of the term of six years and on the date when the Notification was published by the Government of Maharashtra under S. 48A of the Act.

10. On behalf of the petitioners, reliance was placed on the judgment of the Division Bench of this Court in the case of the *Municipal Council, Malkapur v. State of Maharashtra* reported in AIR 1977 Bom 244 to submit that under sub-sec. (3) of S. 40 of the Act even though the term of the Councillors had expired, they are entitled to continue in office. In our judgment, the reliance on this decision is misplaced. The Division Bench was not considering the scope of the provisions of S. 40 of the Act. The

question which came for consideration before the Division Bench was in respect of the action taken by the Government under S. 313 of the Act by appointing an Administrator and the Division Bench had laid down the principles which must be observed before passing that order. In para 14 of the judgment, the Division Bench dealt with an objection raised on behalf of the Government that the petition itself had become infructuous in view of the subsequent enactments and events referred to in the additional affidavit. One of the circumstances relied upon on behalf of the State was that the term of the Municipal Councillor had come to an end and, therefore, it was futile to consider whether the appointment of an Administrator was in accordance with law or otherwise. The Division Bench did not accept the contention and held that an illegal order cannot be cured by mere fact that the term of the Councillors has expired. The petition filed to challenge the order of appointment of the Administrator during the subsistence of the term cannot be defeated by the mere fact that on the date of the hearing of the petition, the term has expired. While dealing with this contention, the Division Bench made an observation that though the initial term of the Councillors had expired, they are entitled to continue in office. We are unable to read anything in this observation to conclude that the Division Bench has held that the term of the Councillors automatically stands extended under sub-sec. (3) of S. 40 of the Act even in cases where the general elections to elect fresh Councillors are not held. In our judgment, the reliance upon the decision of the Division Bench in Malkapur Municipal Council's case (AIR 1977 Bom 244) is misconceived.

11. That takes us to the consideration of challenge to the vires of S. 48A of the Act. S. 48A of the Act reads as under:—

"(1) Notwithstanding anything contained in Section 40 or any other provisions of this Act, where the term of office of five years of the Councillors of any Council has expired and the State Government is of opinion that in the changed circumstances the continuance of such Councillors in office is not necessary or expedient, the State Government may, at any time, even during the period the term stands extended

under sub-sec. (1) or (3) of S. 40, by order, published in the Official Gazette, direct that —

(a) all Councillors of the Council (including the President and the Vice-President) shall, as from the date specified in the order, cease to hold and shall vacate their offices as Councillors or otherwise; and

(b) the person appointed by the State Government, from time to time, shall be the Administrator to manage the affairs of the Council, during the period from the said date up to the day preceding the date on which the first meeting of the reconstituted Council after the general election is held, where there is a quorum. Such general election shall be held within a period of one year, from the date of publication of the order issued under this sub-section in the Official Gazette.

(2) During the said period, all the powers and duties of the Council and its various authorities under this Act or any other law for the time being in force shall be exercised and performed by the Administrator.

(3) The Administrator may delegate any of his powers and duties to any officer for the time being serving under the Council.

(4) The Administrator shall receive such remuneration from the Municipal fund, as the State Government may, from time to time, by general or special order, determine."

Before we advert to the contention urged by Dr. Naik in support of the petition, it would be appropriate to refer to the statement annexed to the Ordinance issued by the Government of Maharashtra on Feb. 4, 1981 and which was subsequently replaced by the amending Act. The Statement, inter alia, mentions that the Government was under the impression that the term of the outgoing Councillors is deemed to be automatically extended even after the expiry of the normal term of five years or extended term of six years until the general election is held and the successors enter on their office. The Government further considered that such Councillors who claim to continue by automatic extension may not be able or inclined to attend to all the important matters except day to day administration of the local authority. The statement further

recites that general election cannot be held on account of some temporary difficulties and in such cases, short extension may be justified, but when it is not possible to hold the general election for a longer period for administrative or other reasons, it is not desirable to continue such Councillors indefinitely. In view of these peculiar circumstances that some of the Councillors of the Municipal Councils have continued to hold the office for 7 or 8 years, the Government felt that amendment to the Act was seriously called for and as the Legislation was not in Session, the Governor issued the Ordinance. The Ordinance, as it stood, enabled the Government to appoint Administrator who could function till the day preceding the day on which the first meeting of the reconstituted Council after the general election is held. In the amended S. 48A of the Act, it was provided that such general election shall be held within a period of one year from the date of the publication of the order issued under the sub-section appointing the Administrator.

12. The first challenge to the enactment of S. 48A of the Act is that it is beyond the legislative competence of the Maharashtra Legislature. It is urged that Entry 5 in List II of the Constn. does not authorise the State Legislature to make law enabling the State Government to dissolve the term of the existing Councillors and to appoint an Administrator. Entry 5 in List II of the Constn. reads as under:—

"Local Government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration."

The entry permits the State Legislature to provide for constitution and powers of municipal corporations. The setting up of local self-government is one of the requirements of the Constitution and the State Legislature is entitled to legislate with reference to the constitution and powers of such local government. It is not disputed by the petitioners that it is permissible for the Legislature to determine the duration of the terms of the Councillors, but what is urged is that it is not permissible for the Legislature to

provide for reduction of term already extended. The submission is that once the State Government extends the term of the Municipal Councillors beyond the normal term of five years, then it is not permissible for the State Legislature to authorise the State Government to reduce it or to curtail it before the expiry of such period. We do not find any merit in this submission. It is well-settled that the power to grant includes the power to withdraw. The State Government was conferred with the power to give extension for a period of one year in exceptional circumstances. As the power is conferred to grant extension, there is nothing illegal or illogical if the authority is further provided to withdraw such extension in changed circumstances. The grant of extension is left to the discretion of the State Government though undoubtedly such discretion is to be exercised in exceptional circumstances and for sound reasons. The State Legislature, by enactment of S. 48A of the Act, merely conferred the power on State Government to withdraw such extension in changed circumstances and, in our judgment, the State Legislature was perfectly within the compass of its Legislative competence while empowering the State Legislature to do so. Entry 5 enables the State Legislature to legislate in regard to the constitution and powers of the Municipal Corporations. Fixation of a term of the Councillor or grant of extension in such term and withdrawal of such extension are matters which are so closely connected with the constitution and powers of the local government that we have no hesitation whatsoever in concluding that the State Legislature was perfectly competent in enacting S. 48A of the Act.

13. The petitioners then submit that while enacting S. 48A of the Act, the Legislature did not merely confer the power upon the Government to appoint an Administrator by reducing the term of the Councillors in cases where the extension has been given under subsec. (1) of S. 40 of the Act, but also authorised the State Government to exercise the power in cases where subsec. (3) of S. 40 of the Act applies. In other words, the submission is that the Government could exercise powers under S. 48A of the Act and appoint an Administrator even in cases where general elections are held and fresh

Councillors are elected but have not yet taken over the charge. The basic and fundamental rights conferred on the voters, says Dr. Naik, to have representation on the local self-government through their elected representatives is sought to be defeated by insertion of S. 48A in the principal Act. It was urged that Entry 5 in List II enables the State Legislature to constitute local government and regulates the administration by elected representatives but does not permit to pass legislation which would destroy the principle of local government by local people. In our judgment, the contention is not sound because we do not read S. 48A of the Act in the manner suggested by the petitioners. It is undoubtedly true that S. 48A (1) of the Act refers to the situation where the term of office of five years has expired and the Councillors are in office in view of the extension granted by the State Government under sub-sec. (1) of S. 40 of the Act and so also to the deemed continuation under sub-sec. (3) of S. 40 of the Act. Shri Sawant, the learned Additional Government Pleader, submits and we find considerable merit in his contention that while enacting S. 48A of the Act, the State Government had to meet a contingency which was unprecedented and unusual. The State Government, says Shri Sawant, was under an erroneous impression that the Councillors can continue indefinitely in their office even after the expiry of their term because of the provisions of sub-sec. (3) of S. 40 of the Act. Shri Sawant submits that the Councillors of large number of Municipal Councils continued to hold the office even after the expiry of term of six years by resort of sub-sec. (3) of S. 40 and in these circumstances, the Government felt it necessary to cover the cases of such Councillors also by inserting sub-sec. (3) of S. 40 in the sweep of S. 48A (1) of the Act. Shri Sawant submits that the intention of the Legislature in inserting sub-sec. (3) of S. 40 in S. 48A of the Act was obviously to cover only those cases where the tenure of six years is over and the general elections are not held but Councillors are continued without any authority by resort to sub-sec. (3) of S. 40 of the Act. In our judgment, the powers could be exercised by

the State Government under S. 48A of the Act only in cases where the State Government has extended the term of Councillors from five years to six years and such extension is still subsisting. We will deal with this aspect later in greater detail, and suffice it to say here that it is neither the intention of the Legislature, nor the plain reading of S. 48A indicates that the Government could exercise the powers under the said amended Section and could appoint the Administrator even in cases where the elections are already held. The submission of Dr. Naik that by enacting this amending Section, the Government decided to by-pass the election of Municipal bodies by the citizens is not correct. We do not think that the Legislature intended to confer the power upon the Government to appoint the Administrator to prevent the elected representatives of people from taking over charge of Councils. It hardly requires to be stated that the State Government is duty bound to hold elections for the purpose of filling up of the posts of the Councillors in the Municipal Councils before the expiry of the normal term of the Councillors. It is only in exceptional circumstances where the elections could not be held that an extension could be given. It is possible that the situation may arise that even during the extended period, the elections could not be held as where the war has broken out and in such circumstances after the expiry of the term of six years, there would be a vacuum in the administration of the Municipal Council. In such situation where the term of six years is expiring and the elections could not be held for sound reasons, that the Government could well exercise the powers under S. 48A of the Act before the term of expiry of six years. We hope and trust that the State Government would exercise the powers under S. 48A of the Act only in such cases and such cases alone and in no other circumstances. Reading amended Section as it is, in our judgment, the State Legislature was perfectly competent to enact the Section under challenge and the petitioners' grievance that the enactment was beyond the legislative competence of the State Legislature deserves to be repelled. By taking into consideration

the pith and substance of the legislation and well-settled principle that entries in the List attached to the Schedule of the Constitution should be liberally construed, the challenge on the ground of legislative competency deserves to be repelled.

14. The next ground of challenge to the enactment of S. 48A of the Act is that it violates the fundamental rights guaranteed under Art. 14 of the Constn. It is now well-settled that the legislation can be struck down only on the ground of legislative competency or violation of any fundamental rights or on the ground that the legislation is opposed to the Constitutional provisions. A reference can be usefully made in this connection to a decision of the Supreme Court in the case of *Municipal Committee, Amritsar v. State of Punjab* reported in AIR 1969 SC 1100. It is also well-settled that the burden of proof is on the party who challenges the validity of the legislation on the ground that it offends the provisions of Art. 14 of the Constitution of India. Shri Justice Khanna, speaking for the Court, in a decision of the Supreme Court in the case of the *Anant Mills Co. Ltd. v. State of Gujarat* reported in AIR 1975 SC 1234 (at p. 1242) observed:—

"There is a presumption of the constitutional validity of a statutory provision. In case any party assails the validity of any provision on the ground that it is violative of Article 14 of the Constitution, it is for that party to make the necessary averments and adduce material to show discrimination violative of Article 14."

The averments in the present petition in regard to the infringement of Art. 14 of the Constn. are to be found only in para 13 (h) of the petition. The averment of the petitioners is that the State Govt. has failed to lay down any guideline for exercise of the power and as the power could be exercised arbitrarily and can fluctuate from one case to another, the legislation suffers from the vice of Art. 14 of the Constn. The reliance is placed on behalf of the petitioners on the decision of the Supreme Court in the case of *Smt. Maneka Gandhi v. Union of India* reported in AIR 1978 SC 597 and especially the observations of Shri Justice Bhagwati in para 56 of the Judgment. The

learned Judge observed that Art. 14 is a founding faith of the Constitution and the pillar on which rests securely the foundation of our democratic republic. Equality is a dynamic concept, observed the learned Judge, with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. The Supreme Court further observes that where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore, violative of Art. 14 of the Constn. The legislation must answer the test of reasonableness in order to be in conformity with Art. 14 and that implies that it must be "right and just and fair" and not arbitrary, fanciful or oppressive. It is urged that S. 48A of the Act is neither fair, nor just nor reasonable but on the contrary is oppressive and unreasonable.

15. Shri Sawant, on the other hand, urges that the averments made by the petitioners are insufficient and do not spell out the reasons to conclude that the impugned section is violative of Art. 14 of the Constn. The learned counsel further submits that S. 48A of the Act makes no discrimination between the Councillors placed in the similar situation and the challenge that the powers conferred are arbitrary, unfair and unjust is, without any substance. In our judgment, the challenge to the impugned section on the ground of violation of Art. 14 of the Constitution of India cannot be accepted. It is necessary, at this stage, to examine the true ambit and scope of S. 48A of the Act. The section provides that notwithstanding anything contained in S. 40 of the Act, the State Government may, at any time, order that the term of all the Councillors as from the date specified would come to an end and all the Councillors shall cease to hold and shall vacate their offices as Councillors. It further enables the Government to appoint an Administrator to manage the affairs of the Council till the first meeting of the reconstituted Council after the general election is held. It further casts an obligation upon the State Government to hold the general election within a period of one year from the date of the publication of the order. It is necessary first to determine in which circumstances the Government can exercise the powers under

S. 48A of the Act. The reading of S. 48A (1) of the Act makes two things clear; first that the State Government must arrive at a conclusion that in the changed circumstances, the continuance of the Councillors in office is not necessary or expedient and, secondly the normal term of five years of such Councillors has expired but the State Government has extended the term in pursuance of the powers conferred under sub-sec. (1) of S. 40 of the Act. It is obvious that the State Government cannot exercise the powers under S. 48A of the Act any time during the subsistence of the normal term of five years of the Municipal Councillors. The right to exercise the power under this Section accrues provided the extended term of one year is still subsisting. As observed hereinabove, the State Government is conferred with the power to extend the term for one year beyond the normal term of five years only in exceptional circumstances and which are also required to be recorded in writing in the notification to be published in the Official Gazette. The State Government can extend the term only for a period of one year over the normal term of five years and not beyond that. The special circumstances which prompted the Government to exercise the power of extension may not be available or may drastically change during the period of that one year itself, and only in those cases where the Government is satisfied that the changed circumstances do not make it expedient to continue the Councillors in their office that the power of S. 48A of the Act can be exercised. In other words, two circumstances must exist before resort to the provisions of S. 48A of the Act and those circumstances are: (1) the extended term of the Councillors under sub-sec. (1) of S. 40 of the Act is still running and, (2) the Government is satisfied that in the changed circumstances the continuance of the Councillors is not expedient. The expression "changed circumstances" has obviously reference to the exceptional circumstances which were prevalent when the Government decided to extend the term of the Councillors beyond the normal period of five years. The apprehension of the petitioners that the, "changed circumstances", is an expression which is not definite and can be attributed different meaning or variety of mean-

ings which can fluctuate from one situation to another is not well founded. The changed circumstances do not depend upon the whims or caprice of the State Government, but such circumstances must have reference to the circumstances which Government thought were exceptional at the time of giving extension to the Councillors. S. 40 (1) of the Act provides that exceptional circumstances which prompt the Government to give extension should be recorded in writing and must be incorporated in the Notification to be published in the Official Gazette. That clearly indicated that special circumstances are justiciable in Court and are not left to the whims of the executive. It follows that the reference to the changed circumstances in S. 48A of the Act has reference to the circumstances referred to in S. 40 (1) of the Act and the action of the Government based upon such changed circumstances would also be open to scrutiny in the Court of law. This construction would harmonise the provisions of S. 48A of the Act with that of S. 40 of the Act.

16. Dr. Naik submits that once the powers are exercised under S. 48A of the Act, it is open for the Government to postpone the elections indefinitely and continue the Administrator to manage the affairs of the Council and thereby defeat the fundamental rights of the voter to have his elected representative to manage the affairs of the local government. The submission is not accurate because S. 48 (1) (b) of the Act casts an obligation upon the Government to hold the general election within a period of one year from the publication of the order. Dr. Naik sounded an apprehension that the Legislature may amend the provision over and over again and extend the period fixed for holding the general election. It is not possible to assume that Legislature would act in such a fashion to defeat the fundamental principle on which our Republic has been founded. We hope and trust that no Legislature in this country would enact any legislation which would deprive the citizen of his right to vote and have his elected representative on the local Government. The apprehension of Dr. Naik in this connection seems to be unfounded.

17. Dr. Naik then urges that absolute powers are conferred upon the State

Government without any guidelines and there is a danger that the powers would be exercised to the detriment of the citizen and, therefore, as laid down in Smt. Maneka Gandhi's case (AIR 1978 SC 597), the absolute powers without any guidelines is itself a ground to hold that fundamental rights conferred under Art. 14 of the Constn. are infringed. We are not prepared to accept such a broad submission. In the first instance, we are not satisfied that absolute powers are conferred upon the State Government without any guidelines. As mentioned hereinabove, the guidelines are provided as the powers can be exercised only in changed circumstances and only in cases where the extended term of one year after the expiry of normal period of five years is still running and subsisting. Only in those and those cases that the Government can exercise the powers and that too because of the changed circumstances which lead the Government to conclude that the continuance of the Councillors during the extended term is not expedient. In our judgment, the guidelines are clear and specific and in cases the guidelines are violated or any order is passed which is not in consonance with the provisions of the Section, then it is always open for the aggrieved party to approach this Court. As the action of the Government in extending the term beyond the normal period of five years is justifiable, so also the action of the Government to exercise powers under S. 48A of the Act, and therefore in our judgment, the submission of the petitioners that the impugned Section suffers from the vice of Art. 14 of the Constn. is without any merit and deserves to be turned down. As both the grounds of legislative competency and of the violation of the fundamental rights under Art. 14 of the Constn. are without any substance, the challenge to the validity of S. 48A of the Act must be turned down. In our judgment, the State Legislature was perfectly competent to enact S. 48A of the Act and it does not suffer from the any infirmity and does not offend any provisions of the Constitution or the fundamental rights guaranteed by the Constitution of India. We hold that the provisions of Section 48A of the Act are *intra vires*.

18. That leaves the question as regards the validity of the Notification

issued by the State Government on Feb. 5, 1981. The petitioners claim that the Notification was issued *mala fide* by the State Government and was politically motivated. The averments in this connection are to be found in para 14 (a) of the petition. It is claimed that the impugned order was issued on the ground of political consideration, viz., that the Congress (I) party was reasonably satisfied that they would not be able to capture power in the Municipal Councils. According to the petitioners as the party in power in the State Government was not sure of the results of the Municipal elections, recourse was taken to the provisions of S. 48A of the Act to supersede the Municipal Councils. This is the only averment in regard to the alleged *mala fide* action on the part of the State Government. In para 20 of the return filed on behalf of the Government, the allegations about the *mala fides* are denied. We are not satisfied about the challenge to the notification on this count. In the first instance, the averments in the petition on this count are not, at all, satisfactory. The allegations are too vague to require any investigation. It is well-settled that when a party challenges certain action on the ground of *mala fides*, it is necessary that the details are set out in the petition itself. The petition is silent as regards the requisite averments and no details are furnished save and except a wild averment that the State Government belongs to Congress (I) Party and was not confident of the success in the election to the Municipal Councils. In our judgment, this averment is too vague to require consideration in petition under Art. 226 of the Constitution of India, and Dr Naik realising this position very rightly did not press the contention.

19. There is another aspect of the matter which cannot be overlooked. The normal term of the petitioners to hold the office of the Councillor was over on Dec. 16, 1979 and even the extended term of one year was over by Nov. 30, 1980. After the expiry of that term, the petitioners had no right to remain in the office because of the provisions of Section 40 of the Act. In spite of expiry of term, the petitioners continued to remain in office merely because the fresh general elections were not held.

It is true that the holding of the election was exclusively within the powers of the State Government and the Municipal Councillors have no control over it, but that does not enable the Councillors to claim any right to remain in office after the term expires. In more than 186 Municipal Councils, the Municipal Councillors were holding their Offices even after the extended term was over, and in such circumstances, the Legislature had to resort to amend the provisions of the Act and make a provision which would enable the State Government to appoint an Administrator. We have made it very clear that it is not open for the State Government to claim that the elections will not be held but the powers under Section 48A of the Act would be exercised even after the expiry of the term. The powers conferred under Section 48A of the Act are obviously to be used only in cases where the extended term has still not run out of its period. The Government has issued the notification in the present case because of the misconception as regards the true interpretation of the provisions of Sec. 40 of the Act and on an assumption that sub-section (3) of Section 40 enables the Councillors to remain in Office as long as the elections are not held and the special meeting is not held. We have pointed out how the assumption was erroneous and that the powers under Section 48A of the Act can be exercised only in cases where the two circumstances mentioned hereinabove are in existence. It is true that in an unusual situation which the Government has to face, the powers have been exercised even in cases where the period of six years has expired but we are not willing to hold that the exercise of the powers in such circumstances was tainted with mala fide intention. For these reasons, though the powers under Section 48A are exercised beyond the expiry of six years, in the present case, we are not inclined to strike down the notification.

20. There is one more ground of challenge to the Notification dated Feb. 5 1981 and that is that the principles of natural justice were not observed by the State Government in as much as no notice was given to the petitioners before taking action. In our judgment, the submission is devoid of any merit

and does not require detailed consideration. As we have found that the petitioners have no right to hold the office of the Councillor after the expiry of the period of six years, the Government was not bound to give any notice to the petitioners before taking action under Section 48A of the Act. We fail to appreciate the force in the submission of Dr. Naik that principles of natural justice are violated even though the person who claims violation, had no right to remain in office. In these circumstances, the submission deserves to be turned down. Even otherwise, we enquired from the learned Counsel as to what cause could have been shown if any notice was given, and Dr. Naik had no effective answer. In our judgment, neither the provisions of Section 48A of the Act, nor the Notification dated February 5, 1981, suffers from any infirmity and the petitioners are not entitled to any relief.

21. Accordingly the petition fails and the rule is discharged, but in the circumstances of the case, there will be no order as to costs.

Petition dismissed.

AIR 1982 BOMBAY 325

MADON AND SHARAD MANOHAR, JJ.

Gajanan Vasant Vjjayanikar and another, Petitioners v. Mrs. Valubai Bapu Govandhi and others, Respondents.

Spl. Civil Appl. No. 5086 of 1976, D/- 30-1-1982.

(A) Bombay Tenancy and Agricultural Lands Act (67 of 1948), Section 27 — Applicability — Applies to lands leased for cultivation of sugar-cane in view of Govt. Notification dt. 8-10-1969 issued under Section 43A (3). Judgment of Apte, J. dated 20-7-1977 in Spl. Civil Appln. No. 5076 of 1976 and 5079 of 1976, Approved. 1977 Mah LJ 768, Overruled (Para 8)

(B) Bombay Tenancy and Agricultural Lands Act (67 of 1948), Sections 29 (2) & 84 — Illegal sub-letting — Remedy of landlord — Land leased to A for sugar-cane cultivation — Sub-lease created in favour of B in violation of Section 27 — A's lease terminated by landlords for illegal sub-letting, by service of 3 months' notice as required

DZ/DZ/B781/82/HR/RSK

— Held, remedy of landlords against B, whose possession was that of a trespasser in view of illegal sub-lease by under Sec. 84 and not under Section 29 (2). Judgment dated 10-4-1956 in Spl. Civil Appln. No. 278 of 1956 (Bom), Judgment dated 10-2-1959 in Spl. Civil Appln. No. 3207 of 1958 (Bom) and (1969) 71 Bom LR 523, Rel. on.

(Paras 9, 10)

Cases Referred : Chronological Paras

1977 Mah LJ 768 3, 8
(1977) Spl. Civil Appln. Nos. 5076 and 5079 of 1976, D/- 20-7-1977 (Bom), Hari Rav Pawar v. Jijabai 3, 8
(1969) 71 Bom LR 523 : 1969 Mah LJ 753 10
(1959) Spl. Civil Appln. No. 3207 of 1958, D/- 10-2-1959 (Bom), Smt. Anjalibai v. Shankar Bala Patil 10
(1956) Spl. Civil Appln. No. 278 of 1956, D/- 10-4-1956 (Bom), Shiddappa Bhimanna Ullaoidi v. Mallappa Mennappa Badachi 10

K. J. Abhyankar with Y. S. Jahagirdar, for Petitioners; Bhimrao N. Naik. for Respondent No. 1.

MADON, J.:— This Petition under Article 227 of the Constitution of India challenges an order made by the Maharashtra Revenue Tribunal by which the tribunal held that the application filed by the Petitioners and Respondents numbers 2 and 3 under section (84?) (Bombay Act No. LXVII of 1948) (hereinafter for the sake of brevity referred to as "the said Act"), was not maintainable.

2. The Petitioners and Respondents Nos. 2 and 3 are owners of half portion of a plot of land bearing Revision Survey Nos. 91 and 92 situate in Kagal Taluka in the District of Kolhapur. It will be convenient to refer hereinafter to the Petitioners and Respondents numbers 2 and 3 as "the landlords". In 1953 the landlord leased the said plot of land to one Shankar Krishna Bondre whose heirs and legal representatives are Respondents Nos. 5 (a), 5 (c) and 5 (d). It is not disputed that the said lease was for the purpose of cultivation of sugarcane. By a writing dated October 24, 1969, the said Bondre created a sub-lease in respect of the said plot of land in favour of the First Respondent, Valubai for a period of ten years for a consideration of Rs. 4,000/-. It is the case of the landlords that on coming to learn about the sub-lease they gave a notice

of three months terminating the said lease in favour of the said Bondre. In the said notice the ground for termination was mentioned as the creation of the said sublease in favour of the First Respondent without the consent of the landlords. This notice was addressed both to the said Bondre as also to the First Respondent. Thereafter the landlords filed an application under Sec. 84 of the said Act against the First Respondent. The said application was numbered as Tenancy Case No. 9 of 1971 and was heard by the Assistant Collector, Karvir Division, Kolhapur. The said Assistant Collector sent the papers to the Tenancy Aval Karkun, Kagal, for recording evidence, both oral and documentary, which the said Aval Karkun did and forwarded his report to the said Assistant Collector. Before the said Assistant Collector it was contended by the First Respondent that she was in possession of the plot of land on the basis of the said writing dated October 24, 1969 and, therefore, it could not be said that her possession was illegal or invalid. It was further urged that the legality of the First Respondent's tenancy was yet to be decided and, therefore, the landlords should seek redress under Sections 14 and 29 of the said Act. The said Assistant Collector held that the said writing dated October 24, 1969 was executed without the consent of the landlord and, therefore, the possession of the First Respondent was a wrongful possession and that of a trespasser, and he allowed the said application and passed an order of summary eviction from the said land against the First Respondent. The First Respondent thereupon approached the Maharashtra Revenue Tribunal in revision. Before the Tribunal four contentions were taken on behalf of the First Respondent, namely, (1) the application under Section 84 was not maintainable and the only remedy available to the landlords was to proceed under sub-section (2) of Sec. 29, (2) the said Bondre was a necessary party to the proceedings, (3) as the said plot of land was leased to the said Bondre for the purpose of cultivation of sugarcane, Section 27 of the said Act was not attracted, and, therefore, the landlords could not file an application under Section 84 on the ground that the said plot of land had been sublet by the said Bondre to the First Respondent, and (4) the said

Bondre had become a deemed purchaser on April 1, 1957, and the question of unlawful subletting by the said Bondre, therefore, did not arise. The Tribunal held that by reason of the provisions of Section 43A of the said Act Sec. 27 did not apply to the plot of land in question inasmuch as the said plot was leased for the purpose of cultivation of sugar-cane and, therefore, the application filed by the landlords under Section 84 was not maintainable and that the proper remedy for the landlords was to proceed under Section 29 (2) of the said Act. It is against this order of the Tribunal that the present Petition under Article 227 of the Constitution has been filed by the Petitioners.

3. The other co-owners not having joined the Petitioner in filing this Petition, they have been made Respondents Nos. 2 and 3 to the Petition. The original Fourth Respondent was a Member of the Maharashtra Revenue Tribunal whose name on an application by Mr. Abhyankar, learned advocate for the Petitioners has been deleted from the record. This Petition reached hearing before Pendse, J., on October 23, 1980. At the hearing of this Petition the attention of the learned Judge was drawn to two unreported decision of this High Court, both being by learned single Judges, the first being the judgment of Vaidya, J., delivered on December 11, 1975 in Spl. Civil Appln. No. 1782 of 1972 with Spl. Civil Appln. No. 345 of 1972* — Hiralal Vithaldas Gujarathi v. Kondaji Keru Girmee, in which Vaidya, J., held that Section 27 of the said Act did not apply to lands which had been leased for cultivation of sugar-cane. The second decision is that of Apte, J., in Spl. Civil Appln. No. 5076 of 1976 with Spl. Civil Appln. No. 5079 of 1976, Hari Rau Pawar v. Jijabai, decided on July 20, 1977, in which the learned Judge held that Section 27 applied to lands leased for cultivation of sugar-cane. In view of this conflict, Pendse, J., by his order dated October 23, 1980 referred the matter to a Division Bench. While this matter was pending, the Petitioners applied to the Court to bring on record the heirs and legal representatives of the said Bondre who had in the meantime died Bondre's heirs and legal representatives were thereafter added as

*Since Reported in 1977 Mah LJ 768.

Respondents Nos. 5 (a), 5 (c) and 5 (d) to the Petition.

4. The question of applicability of Section 27 of the said Act to the plot of land in question arises by reason of the provisions of Section 43A of the said Act. The relevant provisions of the said Section 43A are as follows :

"43A. Some of the provisions not to apply to leases of land obtained by industrial or commercial undertakings, certain co-operative societies or for cultivation of sugarcane or fruits or flowers,

(1) The provisions of Sections 4B, 8, 9, 9A, 9B, 9C, 10, 10A, 14, 16, 17, 17A, 17B, 18, 27, 31 to 31D (both inclusive), 32 to 32R (both inclusive), 33A, 33B, 33C, 43, 63, 63A, 64 and 65, shall not apply to:—

(a) xx xx xx xx

(b) leases of land granted to any bodies or persons other than those mentioned in clause (a) for the cultivation of sugar-cane or the growing of fruits or flowers or for the breeding of livestock;

(c) xx xx xx xx

(2) xx xx xx xx

(3) Notwithstanding anything contained in sub-sections (1) and (2), it shall be lawful for the State Government to direct, by notification in the official Gazette, that the leases of lands, as the case may be, to which the provisions of sub-sections (1) and (2) apply, shall be subject to such conditions as may be specified in the notification, in respect of —

(a) the duration of the lease;

(b) the improvements to be made on the land and the formation of co-operative farming societies for the purpose and financial assistance to such societies;

(c) the payment of land revenue, irrigation cess, local fund cess and any other charges payable to the State Government or any local authority. or

(d) any other matter referred to in sections mentioned in sub-sec. (1)."

It is not disputed that the plot of land in question falls under Cl. (b) of Section 43A (1).

5. It will be noticed that amongst the list of sections which by sub-section (1) of Section 43A of the said Act do not apply to leases of lands granted for the cultivation of sugar-cane are Ss. 14 and 27. It should further be noted that

under sub-section (3) of the said S. 43A it is open to the State Government to direct by a notification in the Official Gazette that the leases of lands, as the case may be, to which the provisions inter alia of sub-section (1) apply are to be subject to such conditions as may be specified in the said notification in respect of the four classes of matters set out in clauses (a) to (d) of sub-section (3). Clause (d) speaks of "any other matter referred to in sections mentioned in sub-section (1)", which would include any of the matters referred to in any of the sections specified in sub-section (1) including Sections 14 and 27, as not being applicable to the leases of lands of the classes mentioned in Clauses (a) to (c) of sub-section (1). So far as the leases of lands for the cultivation of sugar-cane are concerned, the Government of Maharashtra has issued a notification dated February 14, 1958, under sub-section (3) of Sec. 43A. The said notification was amended by another notification dated October 8, 1969. The relevant provisions of the said notification as so amended are as follows :

"In exercise of the powers conferred by sub-section (3) of Section 43A of the Bombay Tenancy and Agricultural Lands Act, 1948 (Bom. LXVII of 1948), the Government of Bombay hereby directs that the leases of land referred to in Cl. (b) of sub-section (1) of the said Section 43A and to which the provisions of sub-section (1) of the said Sec. 43A apply shall be subject to the following conditions, namely:—

Conditions as to the duration and termination of lease :

xx xx xx xx

3. If a lessee commits any of the defaults mentioned in clause (a) of sub-section (1) of Sec. 14 in relation to such lease of land, the lease may be terminated by the lessor by giving the lessee three months' notice in writing stating therein the reasons for such termination.

xx xx xx xx

Thus under the said notification a lease for cultivation of sugar-cane can be terminated by the lessor by giving the lessee three months' notice in writing stating therein the reason for such termination if the lessee commits any of the defaults mentioned in clause (a) of sub-section (1) of Section 14. Section 14 (1) provides as follows :

14. Termination of tenancy for default of tenant.

(1) Notwithstanding any law, agreement or usage, or the decree or order of Court, the tenancy of any land shall not be terminated — (a) unless the tenant:—

(i) has failed to pay the rent for any revenue year before the 31st day of May thereof;

(ii) has done any act which is destructive or permanently injurious to the land;

(iii) has sub-divided, sub-let or assigned the land in contravention of Section 27;

(iv) has failed to cultivate it personally; or

(v) has used such land for a purpose other than agriculture or allied pursuits; and

(b) unless the landlord has given three months' notice in writing informing the tenant of his decision to terminate the tenancy and the ground for such termination, and within that period the tenant has failed to remedy the breach for which the tenancy is liable to be terminated."

6. As it is the case of the landlords that the said Bondre had sublet the said plot of land in contravention of the provisions of Section 27 of the said Act, it now becomes necessary to refer to the said Section 27. Under the said Sec. 27, "Save as otherwise provided in S. 32-F, no sub-division or subletting of the land held by a tenant or assignment of any interest therein shall be valid". The section then sets out the cases in which it is permissible for the lessee either to sub-divide or sublet the land leased or to assign any interest therein. It is not disputed that were Section 27 to apply, the sub-lease in favour of the First Respondent by Bondre would be invalid. Since the Tribunal has held, by its order which is challenged before us, that the proper remedy for the landlords was to proceed under Section 29 (2) and not under Section 84, it will be convenient also to set out the said statutory provisions. Section 29 is headed "Procedure of taking possession", and sub-section provides as follows :

"(2) Save as otherwise provided in sub-section (3A), no landlord shall obtain possession of any land or dwelling house held by a tenant except under an

order of the Mamlatdar. For obtaining such order he shall make an application in the prescribed form and within a period of two years from the date on which the right to obtain possession of the land or dwelling house, as the case may be, is deemed to have accrued to him."

Section 84 is in the following terms:

"84. Summary eviction.

Any person unauthorisedly occupying or wrongfully in possession of any land:

(a) the transfer or acquisition of which either by the act of parties or by the operation of law is invalid under the provisions of this Act.

(b) the management of which has been assumed under the said provisions, or

(c) to the use and occupation of which he is not entitled under the said provisions and the said provisions do not provide for the eviction of such persons, may be summarily evicted by the Collector."

7. Mr. Abhyankar, learned advocate for the Petitioners, has submitted before us that the subletting of the said plot of land by Bondre to the First Respondent was in contravention of Sec. 27 of the said Act and that, therefore, under the said Government notification a right accrued to the landlord to terminate the tenancy of the said Bondre and that such tenancy had been validly terminated by him. He further submitted that by reason of the provisions of Section 27 the sub-tenancy created by the said Bondre in favour of the first Respondent was invalid and created no right, title or interest in favour of the First Respondent and the First Respondent was, therefore, a trespasser upon the said plot of land and could, therefore, be summarily evicted by the Collector under Section 84. Mr. Naik, learned advocate for Respondent No. 1, on the other hand, raised four contentions before us, namely, (1) that the tenancy of the said Bondre had not been determined, (2) that the said Bondre was a necessary party, (3) Section 27 had no application to a lease of land granted for cultivation of sugar-cane, and (4) that the application made by the landlords under Sec. 84 was not maintainable and that the proper remedy of the landlords was to proceed under S. 29 (2). Turning now to the first point raised by

Mr. Naik, it does not appear from the record that the First Respondent had at any time contended either before the Assistant Collector or before the Tribunal that the tenancy of Bondre had not been terminated. In fact, it is the admitted position that the First Respondent had received the said notice of termination dated June 30, 1970. The fact that such a notice had been sent to both the said Bondre and the First Respondent is mentioned in the report made by the Tenancy Aval Karkun. The Tribunal also, while setting out the undisputed facts, has stated that the said Bondre was a tenant of the said plot of land from 1953 to 1969, which could only be on the basis that after 1969 the tenancy of the said Bondre had been terminated. There is, therefore, no substance in the contention that Bondre's tenancy had not been terminated by the landlords.

8. The questions whether Section 27 of the said Act applies to the plot of land in question and the section under which the remedy of the landlords lay are interlinked and require to be considered together. By the express terms of Section 43A, Sections 14 and 27 are not to apply to leases of lands granted for the cultivation of sugar-cane. However, in the notification which the State Government is empowered to issue under sub-section (3) the State Government can direct that these leases should be subject to such conditions as may be specified in the notification in respect of inter alia matters referred to in the sections mentioned in sub-section (1). Therefore, while issuing a notification under Section 43A (3) the State Government can direct that leases of lands for cultivation of sugar-cane were to be subject to the conditions specified by it in respect of matters referred to in Ss. 14 and 27 which are two of the sections which by the opening words of sub-section (1) of Section 43A do not apply to the lands and leases specified in the said sub-section (1). It is necessary to bear in mind that under the said sub-section (3) what the State Government is empowered to do is not to direct that certain sections which, though made inapplicable to these lands and leases by Section 43A (1), will none the less apply to these lands and leases or any of them. What it is empowered to do is to direct that these lands and leases shall be sub-

ject to certain conditions specified in the said notification in respect of the matters specified in clauses (a) to (d) of sub-section (3). So far as the Government notification in question is concerned, what the Government has done is to inter alia specify the conditions subject to which a lessor can terminate a lease, namely, when the lessee commits any of the defaults mentioned in cl. (a) of sub-section (1) of Section 14. The termination is to be by three months' notice in writing stating therein the reason for such termination. The subject-matter of Section 14 is termination of tenancy for default by tenant, one of such defaults being subdivision or subletting or assignment of lands in contravention of Section 27. What the Government has done is instead of reproducing the matters set out in S. 14 (1) (a) it has stated shortly in the said notification that, "If a lessee commits any of the defaults mentioned in clause (a) of sub-section (1) of Section 14 the lease may be terminated by the lessor", but the effect of these words is to incorporate in the said notification the conditions upon which a lease can be terminated under Section 14 (1) (a). The Government has thus in substance reproduced in para 3 of the said notification the provisions of Section 14 (1) (a). It is pertinent to notice that the said notification refers only to clause (a) of Section 14 (1) and not to clause (b) of Section 14 (1) which gives to the tenant an opportunity to remedy the breach complained of within the three months' period of notice. As we have seen, one of the defaults specified in Section 14 (1) (a) is subdivision, subletting or assignment of lands in contravention of S. 27, and if the effect of reference to S. 14 (1) (a) has the effect of incorporating, by a reference in the said notification, the provisions of Section 14 (1) (a), then necessarily the provisions of Section 27 must also be deemed to have been incorporated in the said notification, because had the provisions of S. 14 (1) (a) been reproduced in the said notification, then while setting out the provisions of sub-clause (iii) of Cl. (a) the Government would have been required to set out also the circumstances in which a subdivision, subletting or assignment would be in contravention of Section 27, which would be when a subdivision, subletting or assignment would be in-

valid under Section 27. Vaidya, J., in his judgment in Special Civil Application No. 1782 of 1972 with Special Civil Application No. 345 of 1972, referred to earlier, held that if the Government wanted Section 27 to apply to lands leased for cultivation of sugar-cane, it would have specifically said so and that in the absence of any such specific reference it would not be proper for the Court to apply Section 27 just because the Government had referred to Section 14 (1) (a). Apte, J., on the other hand, in the said Special Civil Application No. 5076 of 1976 with Special Appln. No. 5079 of 1976, also referred to earlier, came to the conclusion that Section 14 (1) (a) having been referred to and since sub-clause (iii) of clause (a) mentioned Section 27, it was unnecessary to make any reference to S. 27 in the Government notification in question. With respect, we find ourselves unable to accept the view which found favour with Vaidya, J. We have already pointed out that the effect of the reference to Section 14 (1) (a) in Cl. 3 of the said Government notification is to incorporate in the said notification the provisions of Section 14 (1) (a) and the incorporation of the provisions of Section 14 (1) (a) (iii) in the said notification has the effect of incorporating in the said notification the provisions of S. 27. Were the view which found favour with Vaidya, J., correct, the result would be that even though the lessee of a land leased for cultivation of sugar-cane had subdivided, sublet or assigned the land in contravention of Section 27, the landlord would have no right to terminate lease even though such subdivision, subletting or assignment were invalid and would have thus no remedy in respect of these defaults. It can never have been the intention of the State Government to make these defaults the grounds for termination of tenancy without even providing for a locus poenitentiae for the tenant, which clause (b) of Section 14 does, and none the less leave the landlord without a remedy; and we are unable to ascribe such intention to the Government.

9. This, therefore, takes us to the question as to the proper remedy of a landlord in a case where there is an illegal subletting. The sub-tenancy in favour of the First Respondent being

invalid under Section 27 of the said Act, by reason of its being in contravention of the provisions of that section, the First Respondent did not and could not acquire any right, title or interest to the plot of land in question. Her possession of the said plot was, therefore, wholly unauthorized and that of a trespasser. The question is whether the landlords should have proceeded under Sec. 29 (2) as contended for by Mr. Naik and as held by the Tribunal, or should have proceeded under S. 84, as they have in fact done. Under Section 29 (2) save as otherwise provided in sub-section (3A) of S. 29, a landlord cannot obtain possession of any land or dwelling house held by a tenant except under an order of the Mamlatdar. Admittedly, sub-section (3A) has no application to the present case. The question to consider, therefore, is whether in the present case the landlords could have obtained possession of their plot of land by making an application to the Mamlatdar under S. 29 (2). Such an application, however, is to be made where the land is held by a tenant. Clause (6C) of Section 2 defines the expression "to hold land" as an owner or tenant as follows:

"(6C) 'to hold land' as an owner or tenant shall, for the purposes of Clause (2D) of this section and Secs. 32 (1B), 32A, 32B and 63, mean to be lawfully in actual possession of land as an owner or tenant, as the case may be;"

That definition, however, applies only when the expression defined is used in the sections mentioned in the said clause (6C) and not in other sections. Section 29 is not amongst the sections mentioned in clause (6C). Clause (6C) therefore, cannot be of any use in interpreting the expression "held by a tenant" in Section 29 (2). We must, therefore, turn to the definition of the expression "to hold land" in Cl. (12) of Section 2 of the Maharashtra Land Revenue Code, 1966 (Maharashtra No. XLI of 1966), which is as follows :

"(12) 'to hold land' or 'to be a landholder or holder of land' means to be lawfully in possession of land, whether such possession is actual or not".

Now the plot of land was not in the actual possession of tenant Bondre but it was in the possession of the First Respondent. Unlike in the case of clause (6C) of Section 2, where the possession

of the tenant has to be actual possession, under Cl. (12) of Section 2 of the Maharashtra Land Revenue Code the possession may be either actual or constructive. It was contended by Mr. Naik that the said Bondre was constructively in possession of the said plot of land though the First Respondent, his sub-tenant. The sub-tenancy being, however, invalid and creating no right, title or interest in favour of the First Respondent, the First Respondent cannot be said to be in possession of the said plot of land on behalf of the tenant, the said Bondre, because by the express words of the said S. 27 the sub-tenancy and consequently the agreement upon which the transaction of sub-tenancy was founded must both be held to be invalid, and there cannot therefore, be said to be either any privity of contract or privity of estate between the said Bondre and the First Respondent.

10. What the landlords were seeking to do is to obtain possession of their land on which a trespasser was squatting without any right or title in law. Bondre was neither in actual nor in constructive possession of the said plot of land. He had left the said land, it appears, for good and had no interest left in the said plot of land. In this connection, it is significant that though the heirs and legal representatives of the said Bondre have been joined as Respondents Nos. 5 (a), 5 (c) and 5 (d) to this petition, they have not appeared before the Court at any stage of the proceedings. It should further be borne in mind that the tenancy of Bondre had already been validly terminated before the landlords' said application was filed. The question, therefore, of obtaining possession of land from a tenant who has continued in possession after the termination of his tenancy did not arise in the present case. What the landlords had to do in the present case was to obtain possession of their plot of land from the trespasser who was squatting on it. To such a case Section 29 (2) of the said Act cannot be applied. The only section which can apply is Section 84. In Spl. Civil Appln. No. 278 of 1956 — Shiddappa Bhimanna Ullaoidi v. Mallappa Mennappa Badachi decided by Gajendragadkar, J. (as he then was), and Gokhale, J., on April 10, 1956 (Bom) (Unrep.) it was decided that an applica-

tion under Section 29 of the said Act could not be against a trespasser and that the only provision that could be invoked was that contained in Sec. 84. This position was reiterated by another Division Bench of this Court consisting of Mudholkar and Patel, JJ., in Spl. Civil Appln. No. 3207 of 1958 — Smt. Anjalibai v. Shankar Bala Patil, decided on February 10, 1959 (Unrep.). The ratio of these two cases was again re-emphasized by another Division Bench consisting of Patel and Wagle, JJ., in Mallasha Sayabanna Mangonda v. Khadir Ajam Aherwadi, (1969) 71 Bom LR 523, in which Section 84 again came up for interpretation. In that case the Court further held that the expression "the said provisions" in Cl. (c) of Section 84 did not mean merely the provisions relating to transfers but they could only mean the provisions of the said Act and that if it is shown that the occupant is not entitled under any of the provisions of the said Act to occupy or use the land and if there is no provision for eviction of such persons, S. 84 would apply. The only provision of the said Act upon which Mr. Naik has relied as providing the proper remedy for eviction is S. 29 (2) which, as we have already held earlier, is wholly inapplicable. The use and occupation of this plot of land by the First Respondent is obviously contrary to the provisions of the said Act, and there being no remedy provided under any of the provisions of the said Act, the only section under which the landlords could have proceeded was S. 84.

11. This brings us to the last question whether the tenant Bondre was a necessary party to the proceedings before the Assistant Collector. This contention raised on behalf of the First Respondent overlooks the real nature of the proceedings. It overlooks the facts that the said Bondre has left the land, handing over possession thereof to the First Respondent; that his tenancy had been determined; that even though the sub-lease period of ten years has expired, he has not claimed to come back into possession of the plot of land purported to be sub-leased by him; and that the person in actual possession today is a rank trespasser without the least colour or authority of law, namely, the First Respondent. Such a trespasser cannot contend as against the true owner of the property

that the person entitled to possession of the said plot of land is not the owner but his tenant. In the words of S. 84 of the said Act, the First Respondent was a person unauthorizedly occupying and wrongfully in possession of the said plot of land to the use and occupation of which she was not entitled under the provisions of the said Act, and she can, therefore, be summarily evicted by the Assistant Collector, irrespective of the fact whether the said Bondre was a party to the proceedings or not.

12. In the result, this Special Civil Application succeeds and is allowed and the rule issued therein is made absolute by setting aside the impugned order of the Maharashtra Revenue Tribunal, Kolhapur, and restoring the order of summary eviction passed by the Assistant Collector, Karvir Division, Kolhapur. Respondent No. 1 will pay to the Petitioners the costs of this Special Civil Application. The other Respondents will bear and pay their own costs.

Application allowed.

AIR 1982 BOMBAY 332

MASODKAR AND BHARUCHA, JJ.

Shri Govardhandhari Devasthan, Korpagaon, Appellant v. Collector of Ahmednagar and others, Respondents.

F. A. No. 468 of 1975, D/- 1-3-1982.

(A) Land Acquisition Act (1 of 1894), Sec. 23 — Compensation — Deductions — Acquisition of land held as restricted tenure — Compensation paid only to extent of two-thirds of market price, remaining one-third deducted on basis of restricted tenure — Held, deduction on basis of restricted tenure was impermissible and claimants were entitled to entire compensation. AIR 1982 Bom 225 Rel. on. (Para 9)

(B) Land Acquisition Act (1 of 1894), Sections 31 and 32 — Applicability — Acquisition of lands belonging to public trust governed by Bombay Public Trusts Act — Trustees not competent to alienate property except with previous sanction of Charity Commissioner — Procedure under Sections 31 and 32 has to be followed — Procedure under Section 31 (1) can be avoided by issuing notice under Section 56B of said Trusts Act to Charity Commissioner, who acting under Section 36 of that Act, can give

EZ/EZ/B996/82/HR/RSK

sanction for alienation by laying down conditions similar to those enacted in Sec. 32. (Bombay Public Trusts Act (29 of 1950), Section 56B read with Sec. 36).

Trustees qua property are persons who are not, ordinarily, possessed of the capacity to alienate property held under trust. Therefore, for the purpose of working out the provisions of getting statutory satisfaction in the matter of payment of compensation, the Collector is obliged, to follow the procedure as is required by Sections 31 and 32 of the Land Acquisition Act. (Para 24)

As incapacity to alienate arises, notwithstanding the instrument of trust, by the provisions of Section 36 of the Bombay Public Trusts Act, the Collector for the purpose of making proper orders should, in the case of acquisition of properties belonging to public trusts, give notice to the Charity Commissioner as it would be in keeping with the principles underlying Section 56B of that Act. The making of the award for the purpose of compensation and its payment clearly is a legal proceeding of civil character giving rise to civil consequences and in view of the provisions of Section 36 of the Bombay Public Trusts Act under which the Charity Commissioner can give the sanction for the purpose of alienation of the given property by putting conditions which may be similar as are enacted by S. 32 of the Land Acquisition Act the statutory satisfaction by payment of compensation money can be worked out. Therefore, if validly a notice is given under Section 56B of the Bombay Public Trusts Act by the Collector in the compensation proceedings and, acting upon the provisions under Section 36 by laying down the conditions for the purpose of alienation of the given property, the Charity Commissioner permits the trustees to act in consonance with the principles underlying Section 32 of the L. A. Act, then substantially the procedure required by Section 31 (1) of the L. A. Act would not be required to be followed, for then the case would be answered by showing that the trustees possessed the capacity to alienate the property in keeping with the provisions of Section 36 of the Bombay Public Trusts Act. In all other cases, where either because the notice is not given or because there was no valid sanction in favour of the trustees even otherwise capable to alienate the property, the Collector

will have to have recourse to the provisions of Sections 31 and 32 of the L. A. Act. In such case also, when the matter goes to the Court under sub-section (2) of Section 31, the Court is bound to give notice, as is required by Section 56B of the Bombay Public Trusts Act, to the Charity Commissioner. (1910) 14 Cal WN 1024; (1912) ILR 39 Cal 33, AIR 1928 Cal 402, (1904) 31 Ind App 203, (1906) ILR 29 Mad 117 and AIR 1935 Mad 215, Rel. on; AIR 1915 Bom 143, Discussed and Rel. on. (Para 25)

Held, neither of the above procedures had been followed in the instant case, on acquisition of lands belonging to a public trust governed by the Bombay Public Trusts Act. The Collector had consigned the compensation in the Government Treasury with a rider that cash allowance should be paid to the trustees upon recommendation by the Tahsildar routed through the Collector. Such a direction on the face of it was ultra vires the provisions of Section 31 (1) of the L. A. Act and had to be treated as non est. For all purposes, the Collector was bound to deposit the amount of compensation in the Court to which a reference under Section 18 would be submitted. In no other manner could he get a statutory discharge by payment of compensation with regard to the property belonging to the Public Trust. (Paras 18, 26)

Cases Referred : Chronological Paras

AIR 1982 Bom 225	9
AIR 1935 Mad 215	21
AIR 1928 Cal 402	20
AIR 1915 Bom 143	21, 22, 23
(1912) ILR 39 Cal 33 : 13 Cal LJ 597	20
(1910) 14 Cal WN 1024 : 11 Cal LJ 533	20
(1906) ILR 29 Mad 117	21
(1904) 31 Ind App 203 : ILR 32 Cal 129	20

V. D. Govilkar, for Appellants; M. R. Kotwal, Govt. Pleader, for Respondent No. 1; Mrs. C. D. Shenoy, Asstt. Govt. Pleader, for the Charity Commissioner.

MASODKAR, J.:— This appeal and the suo motu notice issued to the Charity Commissioner have reference to the compensation proceedings under the provisions of the Land Acquisition Act, 1894 with regards to the lands belonging to the public trust, being Shri Govardhandhari Devasthan, Kopargaon, bearing survey No. 238 (13 acres) and survey No. 31 (6 acres and 36 gunthas). Section 4 notification was issued on January 9, 1969. The Special Land Acquisition Officer, Ghod Project, Ahmednagar, made an

award under Section 11 of the L. A. Act, under which compensation as against survey No. 238, being Rs. 72,152/-, was directed to be credited into the Government Treasury with a rider that proposal for payment of cash allowance be submitted to the Commissioner, Poona Division, Poona through the Collector, Ahmednagar, by the Tahsildar, Kopargaon. Thus, he virtually seized the amount in favour of the Government and put the same in the custody of the Tahsildar for the purpose of permitting payment of cash allowance to the trustee. He determined the compensation for survey No. 31 at Rs. 25,392/-, being the two-thirds value of the market price. This determination under Section 11 of the L. A. Act, in this manner, was subjected to reference under Section 18 of the L. A. Act by the trustees and the reference was tried by the Civil Judge, Senior Division, Ahmednagar.

2. By the impugned judgment under appeal at the behest of the trustees, the learned trial Judge rejected the reference, firstly holding that the two-thirds market price paid for survey No. 31 was proper in view of the Government Resolutions with regard to restricted tenures. With regard to the compensation awarded in respect of the other land, it was found, on the basis of the evidence, that the compensation was adequate, the rate being Rs. 4,800/- per acre. It does not appear that any notice as required by Section 56B of the Bombay Public Trusts Act, 1950 was issued to the Charity Commissioner, nor does it appear that the direction with regard to the holding of the compensation money in favour of the Government was properly considered in the light of the law applicable to such matters.

3. When the appeal came up for hearing, because of the admitted position that the lands belonged to the public trust and that the original claimants and the appellants before us were the trustees thereof, we thought it fit to issue a suo motu notice under Section 56B of the Bombay Public Trusts Act, 1950 to the Charity Commissioner. A faint submission was made on behalf of the Collector objecting to such issuance of the notice, but, as the decision in the present appeal would show, such an objection is without any merit. In fact, if the compensation is payable to the persons who are the trustees of the trust governed by the provisions of the Bombay Public Trusts

Act, 1950, the Special Land Acquisition Officer could not have consigned the compensation money to the Government Treasury, nor could have conferred authority by giving a direction for the purpose of cash allowance payable upon the recommendation of the Tahsildar routed through the Collector. As we see, Section 31 of the L. A. Act enjoined that in such matters, he had to follow the procedure indicated by sub-section (2) of Section 31 by deposit of the compensation with the Court competent to hear the reference under Section 18 of the L. A. Act. The appeal, admittedly, arises out of the proceedings under Section 18 itself and we do not find any impediment in exercise of our jurisdiction in dealing with the direction with regard to the converted property of the public trust as a result of the land acquisition. Only because as a result of the acquisition the corpus is transformed into cash compensation from that of the lands, it does not cease to be the trust property, nor does it cease to be governed by the provisions of the Bombay Public Trusts Act and the original instrument of trust. Thus, we overrule the objection of the learned Government Pleader with regard to the issuance of the notice and hearing the matter in the presence of the Charity Commissioner.

4. This takes us to the debated questions in the appeal and the notice.

5. On behalf of the appellants, Mr. Govilkar contended that the compensation awarded at the rate of Rs. 4,800/- per acre is inadequate and the value should have been worked out on per sq. ft. basis. Secondly, he contended that the compensation could not have been deducted to the extent of one-third of the price on the basis of restricted tenure with regard to survey No. 31 and paid only to the extent of two-thirds. According to him, the trustees are entitled to the entire compensation.

6. As against this, the learned Government Pleader supported the award of compensation, as is made by the impugned judgment, and, in his view, the direction in the award was simply to protect the property of the trust.

7. As for the Charity Commissioner, Mrs. Shenoy, the learned Assistant Government Pleader, on the other hand, contended that the direction in the award was contrary to law and was given without even notice to the Charity Commis-

sioner. She contended that the true position is that the trustees being the persons not competent to alienate the property, the monies should have been deposited with the civil Court under Section 31 (2) to be dealt with under Sec. 32 of the L. A. Act. Several provisions of the Bombay Public Trusts Act, 1950 were brought to our notice with regard to the incapacity of the trustees to deal with the property. Reliance was placed on certain decisions by the learned Counsel in this regard, to which we will make reference during the course of the judgment.

8. Turning first to the contention of Mr. Govilkar, as far as the evidence is concerned, it does not admit of doubt that the property acquired is agricultural lands and as such would be valued on that basis. The evidence of Rangnath and Khanderao can hardly be relied upon to hold that they had agreed to purchase the property on the sq. ft. basis. Similarly, the evidence tendered with regard to the lease deeds in respect of 24 gunthas out of survey No. 226 and 1 acre and 20 gunthas out of survey No. 238, which, admittedly, were made after a period of about 20 months from the date of Section 4 notification, does not bear any scrutiny for the purpose of fair valuation. The only evidence that has been rightly accepted by the learned trial Judge is that of Dr. John, who purchased the property on July 27, 1967 from Yeshwant Pawar. The sale deed at Ex. 85 shows that Rs. 41,000/- were paid for 8 acres and 33 gunthas. There is nothing to doubt the transaction evidenced by that sale deed. The transaction being a comparable one, the view taken by the learned trial Judge that the compensation works out fairly to Rs. 4,800/- per acre will have to be affirmed.

9. As far as the deduction introduced as against the compensation for survey No. 31 and the payment only of the two-thirds to the claimants are concerned, we find that the said deduction is impermissible, particularly in view of our decision in First Appeal No. 567 of 1976 (State of Maharashtra v. Ganpatrao Amritrao Deshpande), decided on Feb. 23, 1982 (reported in AIR 1982 Bom 225). We have found that in the land acquisition proceedings, what is determinable is the market price and there is hardly any scope for introducing arbitrary deductions on the basis of restricted tenures. Only because survey No. 31 was originally

Kazi inam land was regranted to the Devasthan in a new tenure and it was that of restricted character in the matter of alienation, it does not follow that the market price of this land would be less than Rs. 4,800/- per acre. The non-payment of one-third of the compensation and its deduction by Special Land Acquisition Officer on that count will have to be set aside.

10. Turning to the remaining submissions, which arise mainly upon the submissions of Mrs. Shenoy appearing for the Charity Commissioner, it is necessary to look into the provisions of the Bombay Public Trusts Act, 1950 and the provisions of the L. A. Act and particularly of Sections 31 and 32 thereof so as to find out the validity of the direction contained in the land acquisition award made by the Special Land Acquisition Officer.

11. Admittedly, the property belongs to the Devasthan, which is a public trust registered under the provisions of the Bombay Public Trusts Act, 1950. Under that Act, Section 19 permits inquiry and Section 22B requires registration of the trust property in the register to be maintained by the Charity Commissioner. Section 22C deals with particulars of immovable property of such trust. Section 30 provides that the particulars of the property so entered are deemed to be known to any person acquiring any immovable property belonging to a public trust. Section 36 further puts an embargo on the entitlement of the trustees to sell, exchange, gift or lease out any immovable property belonging to the public trust without the previous sanction of the Charity Commissioner, notwithstanding anything contained in the instrument of trust in that regard. The Charity Commissioner is enabled to accord sanction upon such conditions as he may think fit to impose, regard being had to the interest, benefit or protection of the trust. The term "trust" by itself is not defined, though there is a definition of "public trust", as is available in S. 2 (13) of the Bombay Public Trusts Act, 1950. The Indian Trusts Act, 1882 defines the term "trust" as being an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another, or of another and the owner.

12. These provisions indicate that the Bombay Public Trusts Act is a self-contained statute with regard to the matters of public trust and its property and whatever may be the instrument of trust conferring the competency upon the trustees, its alienation, which is the subject-matter of Section 36, cannot be validly effected without the previous sanction of the statutory authority, that is, the Charity Commissioner. Thus, in the case of trustees of a public trust governed by the provisions of the Bombay Public Trusts Act, 1950, they do not possess unqualified power to alienate the trust property and, on the other hand, it is made statutorily contingent upon the previous sanction being accorded by the Charity Commissioner upon such conditions as may be necessary for the protection and furtherance of the trust.

13. The concept of trust, juridically, is well-settled. When the property is vested in a trust and thereunder the ownership and vesting is conferred upon the trustees, in law a peculiar relation arises between the holder of such property and his capacity to deal with the same. The trust creates a sort of duplicate ownership. The trust property, in law, is owned not only by the trustees but also by the beneficiaries and the relation between them is governed by the obligation annexed to the ownership which enjoins upon the trustee to apply and use the same in the fulfilment and discharge of that obligation for the benefit of the other. That is why the trust ownership is qualified by the annexed obligations and is not an absolute ownership known to law. (See Halsbury's Laws of England, Volume 33, page 87, and Salmond on Jurisprudence, 9th Edition, page 349). When there arises such a dual or duplicate ownership in the matter of the property, the resultant is the trust, the trustee's ownership being a matter of form rather than of substance, it being nominal rather than real. In legal theory no doubt, the position of the trustee is that of an owner subjected to the obligation by the instrument of trust to apply and use the property vested in him for the purposes and for the benefit of the real owner. Between the trustee and the beneficiary, in substance, the property belongs to the beneficiary, though for its application and use it vests in the trustee. However, qua third person, fiction of ownership continues to prevail in favour of the trustee. The

trustee, thus, gets the right and entitlement to represent the beneficiary in dealings with the world at large. In such matters of dealings, the question of his capacity to alienate or otherwise deal with the trust property depends upon the intent of the instrument of trust and purposes thereof.

14. The provisions enacted by S. 36 of the Bombay Public Trusts Act, 1950 are in the nature of statutory rider over the power of the trustee to alienate the trust property. In the light of this statutory rider, when the property belongs to the trust, the question of necessity must arise whether the trustee has the power to alienate the land. Such question will have to be first answered by looking to the nature of the trust as well as the instrument thereof and the statutory conditions like the one available in S. 36 of the Bombay Public Trusts Act. Juridically the trust being of conditional ownership and by its very nature being limited, the trustee is not the absolute or full owner of the trust property; in the sense he is not free to deal with it as he likes nor can he dispose of the same at his sweet will. Both these incidents, that is, the capacity to enjoy and capacity to alienate, are eclipsed because of the trust and the confidence reposed for the benefit of the beneficiaries. In case the instrument of trust indicates that the trust is created without any fetter with regard to disposition of the property, the question is different, but in case the capacity to alienate is fettered, then, notwithstanding the vesting of the property, the trustee could not be equated with the owner of the property. Ordinarily, we think that looking to the juridical character of the trust qua the property, the trustee is a person who cannot be said to be free to alienate the property at his sweet will and for any purpose.

15. The provisions of S. 36 of the Bombay Public Trusts Act, 1950 abundantly make it clear that in spite of capacity in favour of the trustee to alienate the property by sale, exchange or gift or leasing it out for a period exceeding 10 years or 3 years, as the case may be, those provisions statutorily fetter the authority of the trustee in the matter of dealing with the property belonging to the public trust and no such alienation, as is spoken to in that section, can be validly made without the previous sanction of the Charity Commissioner. It is

not enough that the instrument of trust permits sale, exchange or gift or leases for the given period of immovable property. It is further to be shown for a valid alienation that there had been the previous sanction by the Charity Commissioner of such alienation. It is significant that the purpose in enacting the provisions of S. 36 is primarily to protect the trust itself; and the conditions imposed are required to be in the interest and benefit of such trust. The provisions are thus made in public interest and their rider will have to be kept in view while administering or dealing with the property of the trust.

16. Having said so, we must turn to the relevant provisions of the L. A. Act, 1894. It is not necessary to have the feedback of all the provisions. Suffice it to say, after S. 9 notices are served, the Collector has to make an award after holding an inquiry. By that award, he makes an offer with regard to the compensation as against the immovable property. Upon making such award, S. 31 enjoins the Collector to tender payment of the compensation to the persons interested and entitled thereto and he is required to pay it to them unless prevented by one or more of the contingencies mentioned in sub-sec. (2). The contingencies contemplated by sub-sec. (2) of S. 31 are four in number, being the persons interested do not consent to receive it, or such persons are not competent to alienate the land which is the subject-matter of acquisition, or there be any dispute as to the title to receive the compensation, or there is any dispute with regard to the apportionment of the compensation money. In all such matters, the Collector has to deposit the amount of the compensation in the Court competent to decide references u/s. 18 of the L. A. Act. With regard to the class of persons who have no power to alienate the immovable property under acquisition, sub-sec. (1) of S. 32 provides how the Court has to deal with the deposited money. Thereunder cls. (a) and (b) indicate how the Court will deal, by making an order, with the said deposit.

17. The critical phrase with which we are concerned covers the class of persons who are not competent to alienate the land. It raises, indeed, a question of fact to be determined on the basis of the material available to the Collector and thereafter to the Court u/s. 32 of

1982 Bom./22 VII G-17A

the L. A. Act, but if the matters are clear, in that the class of persons are not competent to alienate the land, then the Collector has no other option but to follow the provisions of S. 31 of the L. A. Act by depositing the compensation money in the Court. The provisions of Ss. 31 and 32 in this regard further the statutory policy and are enacted in public interest. Every acquisition results in extinguishing the title of the owners of the property and the law enjoins that the person whose property is being so acquired is entitled to statutory compensation, as is provided by the provisions of the L. A. Act. Unless such compensation, is awarded and paid, there is no statutory extinction of the title. It is to have statutory discharge by payment of compensation as against the title-holder that the provisions of S. 31 enjoin upon the Collector to tender payment of compensation in the manner provided by sub-sec. (1) of S. 31.

18. It is well settled that if the entitlement as well as the liability are prescribed by law and the procedure, mode and manner for working out the same are also prescribed, then the statutory authority can act only in the manner so provided by the statute, any other manner being impermissible to be followed. We do not find in the text of the L. A. Act any authority in the Collector to consign the compensation in the Government Treasury, as is done in the present case, with a rider that cash allowance should be paid to the trustees upon recommendation by the Tahsildar routed through the Collector. Such a direction on the face of it is ultra vires the provisions of S. 31 (1) of the L. A. Act and must be treated as non est. For all purposes, the Collector is bound, in the case of class of persons who are not competent to alienate the land, to deposit the amount of compensation in the Court to which a reference u/s. 18 would be submitted. In no other manner he can get a statutory discharge by payment of compensation with regard to the property belonging to such class of persons.

19. The juridical character of the ownership of the trustees being a qualified one and fettered by the terms of the trust, prima facie, we think that when the property belongs to the trust, the trustees would be the persons of that

class which falls within the provisions of sub-sec. (2) described by the terms "if there be no person competent to alienate the land". Though, ordinarily, the trustees would fall in this class and for statutory satisfaction in the matter of payment of compensation the Collector would be enjoined to follow the procedure required to be followed by sub-sec. (1) of S. 31, cases may arise where the Collector could be satisfied that the trustees have full authority to alienate the land. The law of trusts is not averse to clothe the trustees in all cases with the competency to alienate the land. It gives rise to finding the facts in each case with regard to the competency of the trustees to alienate the land. If the fetters are irremovable and the competency is qualified, either by the terms of the instrument of trust or by reason of the necessary intentment of the obligations flowing therefrom, then the legal procedure required to be followed is indicated by sub-sec. (1) of S. 31. It is obvious that for the purposes of compensation deposit, once the trust property is transformed into the compensation money, the Court is made the custodia legis and it is by the order of the Court, as is required to be done u/s. 32, the monies are further to be applied either by investing in the purchase of other lands to be held in the similar title and subject to the similar conditions, or, if such a purchase cannot be effected forthwith, then by putting the same in the Government or other securities as the Court may think fit. It is the Court which has to direct the payment of the interest of other proceeds arising from such investments to the person or persons who would, for the time being, be entitled to possession of the immovable property which is acquired under the provisions of the L. A. Act. The deposit has to remain so invested until the same is applied in the purchase of a similar property or in payment to the beneficiaries who become absolutely entitled thereto. This scheme clearly is intended to protect the initial trust and further its object. As far as possible, basically, the property in trust has to be protected and administered as such. The result of compulsive acquisition is to transform the property into that of compensation money, but, because of the provisions of S. 32, it has to be invested, as far as possible, in acquiring similar corpus which was the subject of the trust. Once such corpus is acquired,

S. 32 and the scheme thereunder stands fully satisfied. In case the obligations are fulfilled by payments to the beneficiaries, the scheme comes to an end. The statutory scheme of S. 32, thus, in the matters of trust is of prime importance and is to further the public interest when obviously it relates to the property of the public trust.

20. Now, we may turn to the decisions which are relevant for the purpose of determining the controversy. S. 32 of the L. A. Act came for construction in the context of the widow's estate in the case of *Mrinalini Dasi v. Abinash Chandra Dutt*, (1910) 14 Cal WN 1024, and the Calcutta High Court found that when the property was the widow's estate, the matter was governed by S. 32 and the person who had taken away the money of compensation could be compelled to refund the money into Court for the purpose of investment and the Court had authority to give directions for the proper investment of the money in the interest of the reversioners in accordance with the rules of justice, equity and good conscience in the absence of any statutory power. The provision was applied because Hindu widows had no authority to alienate the property. It is significant to observe that in that case, the principle underlying S. 32 was stated to be the one intended to protect the interest in property of the reversionary heirs whose land was taken in compulsive acquisition for public purpose. The same High Court in the case of *Kamini Debi v. Promotha Nath Mookerjee*, (1912) ILR 39 Cal 33, applied the provisions of S. 32 to debuttar property in the hands of shebait following the principle laid down by *Mrinalini Dasi's* case, holding that the land dedicated to an idol or to religious and charitable purposes is land belonging to the shebait or trustee who had no power to alienate the same and that compensation money was required to be invested in approved security and that the provisions of S. 32 of the L. A. Act were attracted. In a different context before the same High Court in the case of *K. C. Banerjee, Official Receiver, In re*, AIR 1928 Cal 402, the question arose u/s. 32 as to the character of the compensation money paid for acquisition of the property to a person not competent to alienate the same. The facts in that case were that a portion of immovable property belonging to debuttar estate of certain idols was acquired

under the L. A. Act and the compensation was deposited with the Calcutta Improvement Tribunal u/s. 31 of the Act. After referring to the earlier judgments and also to the judgment of the Privy Council in Jagadindra Nath Roy v. Hemanta Kumari Devi, (1904) 31 Ind App 203, to the effect that although an idol may be regarded as a juridical person capable of holding properties, it is only true in an ideal sense and the matter of fact is that the possession and management of the dedicated properties belonged to shebait, the Court observed that the compensation money represented the estate of an incompetent person but partook of the nature of real property and did not lose its character as such only because it had been transformed in shape. The money in deposit remained the debuttar property.

21. In the Madras High Court too the same principle appears to have been stated and applied. In the case of Shiva Rao v. Nagappa, (1906) ILR 29 Mad 117, the Madras High Court was considering the case of a family charity. It held that the properties set apart for charities are prima facie inalienable, and where such properties are acquired under the L. A. Act, the award made thereunder may direct the investment of the compensation money in Government securities. It is not clear from that judgment as to whether the investment was directed by the Court or not. The case of Special Deputy Collector, Ramnad v. Rajah of Ramnad, AIR 1935 Mad 215, related to the acquisition of an impartible estate and the holder of such estate was found to be not the absolute owner of the same and by reason of that, the Court held that the provisions of Ss. 31 and 32 of the L. A. Act, prima facie, were attracted. The Court observed that in the ordinary sense of the words available in Ss. 31 and 32, the holder of such impartible estate was incompetent to alienate the lands and the compensation money could not be paid over to him but was required to be converted into other land to form part of the impartible estate. After noticing the judgment of this Court rendered in the case of Assistant Collector of Kaira v. Vithaldas Vallavadas, AIR 1915 Bom 143, the Madras High Court found it difficult to follow the distinction and stated the law to be that if person is entitled to land which by reason of some enactment he cannot alienate, he is incompetent to alienate it. It may

be stated that after considering the judgment of this Court in Vithaldas Vallavadas's case, the Madras High Court found that that decision did not afford real parallel to the case that was for decision before it.

22. We do not find that there is any substantial departure from the principle which is basic to Ss. 31 and 32 of the L. A. Act available in the decision of this Court in Vithaldas Vallavadas's case (supra). That case arose in appeal, which was raised by the Assistant Collector of Kaira against an order made by the Land Acquisition Court u/s. 18 of the L. A. Act. The property in that case was governed by the provisions of S. 3 of the Bhagdari and Narvadari Tenures Act, which provided that it was not lawful to alienate any portion of any bhag or share in any Bhagdari or Narvadari village other than a recognised sub-division of such bhag or share. The submission in that case was that the holders of such land were incompetent to alienate the land. The trial Court rejected the said contention by pointing out that S. 32 of the L. A. Act applied to cases where the possessor of the land had a limited interest in it, e. g., a tenant for life, guardian, trustee, widow, administrator, etc. but not to persons called narvadar holding a portion of land of a narva. After considering the provisions of S. 32, which uses the phrase "if it appears that the land belonged to any person who had no power to alienate the same", both the learned Judges (Bachelor, J. and Hayword, J.) found that the section contemplates an absolute disability to alienate in the person to whom the land belonged and that the disability of the narvadar was not absolute. On the other hand, it was found that the navadar could alienate any portion of the holding in certain circumstances, provided, for instance, he joined with it another parcel so that the whole subject of alienation was a recognised sub-division. Hayword, J. made it clear by pointing out that the case was not one of disability attached to the holder of the land but a sort of disability attached to the land.

23. Suffice it to say that the judgment in Vithaldas Vallavadas's case (AIR 1915 Bom 143) recognises the principle that if there be the holder under disability to alienate the land, then the provisions of S. 32 are attracted. On the interpretation

of the provisions of the Tenures Act (Bombay Act V of 1862), the Court found that the disability was only contingent with regard to certain circumstances and not absolute. In other words, circumstances not being present, the property was capable of being alienated; the impediment was in the matter of working out the alienation and not operative upon the capacity to alienate the property.

24. All the above decisions, in our view, highlight the principles underlying the provisions of Ss. 31 and 32 of the L. A. Act, 1894 with regard to property taken in acquisition in the hands of person having limited power to deal with it and further having no capacity to alienate the same. Trustees qua property are the persons who are not, ordinarily, possessed of such capacity. Therefore, for the purpose of working out the provisions of getting statutory satisfaction in the matter of payment of compensation, the Collector is bound, nay obliged, to follow the procedure as is required by Ss. 31 and 32 of the L. A. Act.

25. At this stage, a mention may be made of the provisions of S. 56B of the Bombay Public Trusts Act, 1950, read with the provisions of S. 36 thereof. We have already indicated that notwithstanding anything contained in the instrument of trust, the trustees of the property belonging to the public trust cannot validly alienate the same except with the previous sanction of the Charity Commissioner laying down the conditions in keeping and in furtherance of the trust. The transformation of the corpus in the shape of compensation money does not affect the character of the trust nor the character of the property. The principles underlying the provisions of S. 32 of the L. A. Act require that, as far as possible, the compensation money should be utilised for restoring the corpus in the original form, being a similar immovable property, and, in case of failure, by investment in Government or public securities till such property is available. As incapacity to alienate arises, notwithstanding the instrument of trust, by the provisions of S. 36 of the Bombay Public Trusts Act, we think that in keeping with the principles underlying S. 56B of that Act, the Collector for the purpose of making proper orders should, in the case of acquisition of properties belonging to public trusts, give notice to the Charity Com-

missioner. No doubt, S. 56B speaks of the notice being given by the Court, meaning any civil Court of competent jurisdiction in the State of Maharashtra (sub-sec. (3)), but the principle underlying S. 56B is that the Charity Commissioner, in whom the power to supervise the charities has been conferred by the statute, has to be heard whenever the matter arises affecting a public, religious or charitable trust in any legal proceedings. The making of the award for the purpose of compensation and its payment clearly is a legal proceeding of civil character giving rise to civil consequences and in view of the provisions of S. 36 of the Bombay Public Trusts Act under which the Charity Commissioner can give the sanction for the purpose of alienation of the given property by putting conditions which may be similar as are enacted by Section 32 of the L. A. Act, we think that the statutory satisfaction by payment of compensation money can be worked out. Therefore, if validly a notice is given u/s. 56B of the Bombay Public Trusts Act by the Collector in the compensation proceedings and, acting upon the provisions u/s. 36 by laying down the conditions for the purpose of alienation of the given property, the Charity Commissioner permits the trustees to act in consonance with the principles underlying S. 32 of the L. A. Act, then substantially the procedure required by S. 31 (1) of the L. A. Act would not be required to be followed, for then the case would be answered by showing that the trustees possessed the capacity to alienate the property in keeping with the provisions of S. 36 of the Bombay Public Trusts Act. In all other cases, where, either because the notice is not given or because there was no valid sanction in favour of the trustees even otherwise capable to alienate the property, the Collector will have to have recourse to the provisions of Ss. 31 and 32 of the L. A. Act. In such case also, when the matter goes to the Court under sub-sec. (2) of S. 31, the Court is bound to give notice, as is required by S. 56B of the Bombay Public Trusts Act, to the Charity Commissioner.

26. Neither of these procedures has been followed in the present case and quite an anomalous and unsustainable deduction with regard to the compensation money has been made. The said part of the award is, thus, liable to be set aside.

27. On the basis of the above discussion, we make the following order:—

The compensation in respect of Survey No. 238, being the sum of Rupees 72,152/- along with interest at 4 per cent per annum, is payable to the trustees in the manner indicated above and so also the unpaid compensation of Rs. 12,696/- along with 4 per cent interest as against survey No. 31. The interest is payable from the date of taking possession till the money is paid by deposit in the trial Court. The trustees represented by Mr. Govilkar have undertaken that, with the previous sanction of the Charity Commissioner and upon such conditions as the Charity Commissioner may impose with regard to the investment of the said money, they will, upon receipt of the same, invest the same, firstly, for the purpose of acquiring a similar property and/or, if that be not possible, invest the same in Government or public securities. In our view, this undertaking satisfies the requirements of both S. 36 of the Bombay Public Trusts Act and S. 32 of the L. A. Act. The monies so payable are directed to be deposited within four weeks in the trial Court. The appeal to this extent is allowed. There would be no order as to costs in the appeal.

28. In the suo motu notice issued to the Charity Commissioner, we quantify the Counsel's fees at Rs. 700/- payable by the Collector, the first respondent herein.

Appeal partly allowed.

AIR 1982 BOMBAY 341

C. S. DHARMADHIKARI AND

S. J. DESHPANDE, JJ.

Dr. Abdur Rahim Undre, Appellant v. Smt. Padma Abdur Rahim Undre, Respondent.

Letters Patent Appeal No. 99 of 1981, D/- 30-1-1982.*

(A) Muslim Law — Nikah Fasid — Presence of two witnesses of Mohammadan faith cannot ipso facto convert a civil marriage into a Nikah Fasid.

No civil marriage validly performed and solemnized, according to any law in force can be treated as a religious marriage.

*Against judgment of A. N. Mody, J. reported in 1982 Mah LJ 243.

FZ/FZ/C417/82/RSK

age, by introducing elements of formalities of personal law. The presence of two witnesses of Mohammedan faith, cannot ipso facto convert any civil marriage into any other form of marriage much less a 'Nikah Fasid': AIR 1930 PC 31 Rel. on.

(Para 10)

In the instant case when the marriage was solemnized in England as per the procedure laid down by the British Marriage Act, the defendant wife was a Hindu. Hence it was not possible to say that the said marriage could concurrently be treated as Nikah Fasid within the meaning of Muslim Law. In that case even a secular and monogamous marriage solemnized as per provisions of Special Marriage Act, 1954 would have to be termed as 'Nikah Fasid' and a secular and monogamous marriage between the two muslims or between muslim husband and non-muslim wife would become impossible even if they desire to solemnise such a secular and monogamous marriage.

(Para 11)

(B) Foreign Marriage Act (33 of 1969), S. 18 — Scope — Words "any other marriage solemnized in a foreign country" — Include all marriages solemnized in a foreign country either before or after coming into force of the Act. (Interpretation of Statutes — Form prescribed under statute).

The Foreign Marriage Act is a complete Code in itself. S. 18 was intended to cover all foreign marriages. Expression used in S. 18 (1) viz. "to any other marriage solemnized in the foreign country" must take in its import all other marriages which are not covered by the first part of S. 18 (1). The word 'solemnized' indicates that it applies to the marriages which are solemnized even prior to coming into force of the Act. This is further clear from S. 17 which deals with registration of foreign marriages solemnized under other laws. S. 12 (2) lays down that no marriage shall be registered under S. 17 unless at the time of registration it satisfies the conditions in S. 4. Then by sub-sec. (6) of S. 17 it is declared that the marriage registered under this section shall as from the date of registration be deemed to have been solemnized under the Act. If the form prescribed under the Rules is read with S. 17 of the Act, it is further clear that it takes in its import even the marriage already solemnized. Form prescribed under the Rules can be used as an aid to construction on the basis of principles of *contempore expositio* which is a well settled rule of interpretation.

tation of a statute. AIR 1981 SC 1922, Ref.; 1982 Mah LJ 243, Affirmed. (Para 14)

(C) Foreign Marriage Act (33 of 1969), S. 18 — Expression "grant relief in respect of such marriage" — Means relief which a Court can grant in matrimonial matter — Voluntary and unilateral act of giving talaq to wife is not covered by the expression.

The expression "grant relief" used in sub-sections (2), (3) and (4) of S. 18 will have to be read harmoniously, as every sub-section throws light on another. The said expression will have to be understood to have the same meaning in all the sub-sections. So understood the expression "grant of relief in respect of such marriage" must mean a relief which could be granted by a court in respect of matrimonial matters. This expression cannot take in its import a voluntary and unilateral act of a husband of giving talaq to his wife which does not require any intervention of the Court. (Para 15)

Thus, the words "grant of relief" as used in S. 18 (4) obviously means grant of relief by an independent court, tribunal or authority which is available qua a foreign marriage obviously to both the parties. It cannot take in its import a unilateral voluntary act of husband of dissolving a marriage by oral talaq. For such a unilateral act it is not necessary for husband to approach any court, tribunal or authority. Moreover such a unilateral right of divorce is only conferred upon a husband by Mohammedan law and not on wife. Sub-sec. (4) contemplates grant of relief at the instance of both the parties. A relief contemplated is a relief which could be granted by a court of law or independent tribunal or authority. Such a relief should be available qua particular marriage. Relief must take in its import obviously the grounds on which such a relief could be granted by an independent tribunal or authority. It cannot be forgotten that under the Mohammedan law defendant-wife who is a Hindu has no remedy to seek matrimonial relief. If the wife wants to seek a matrimonial relief qua foreign marriage which took place in the year 1966 as per the provisions of British Marriage Act, she has no remedy available under the Mohammedan law. So far as she is concerned, law available is obviously Foreign Marriage Act. (Para 16)

(D) Foreign Marriage Act (33 of 1969), S. 18 — Provision cannot be said to be retrospective in nature or one affecting any vested right. (Muslim Law —

Marriage — Husband has no vested right to marry more than one wife).

(Paras 31, 32)

It is not correct to say that a Mohammedan husband has a vested right to marry more than one wife viz. to have four wives at a time. It cannot also be said that anybody has got a vested right in the matter of divorce. To say the least dissolution of marriage is not a part and parcel of the contract of marriage. Nobody has got any vested right in the matter of dissolution of marriage. So far as the polygamy is concerned, the provision of Mohammedan law is only permissive or optional in nature and not obligatory. It only lays down a ceiling on wives and does not lay down that every Mohammedan should have four wives as a matter of right. It is in a form of an exception. Therefore it cannot be said that Chapter IV or S. 18 of Foreign Marriage Act which deals with matrimonial reliefs in respect of foreign marriages has affected any vested right retrospectively. The said chapter deals with the events taking effect in future though based on an earlier incident viz. foreign marriage. Only because it takes into consideration earlier event of marriage, it cannot be said that the provision is retrospective in nature or affects any vested right. It is well settled that vested right is a right which has come into operation and is not a potential right. Mere right to take advantage of a provision of law is not an accrued right. A statute cannot also be said to be retrospective, "because a part of the requisites for its action is drawn from a time antecedent to its passing". AIR 1964 SC 464 and AIR 1980 SC 101, Ref.

(Para 19)

(E) Foreign Marriage Act (33 of 1969), S. 18 — Marriage solemnised under British Marriage Act, 1949, between Muslim husband and Hindu wife in 1966 — Marriage is governed by Special Marriage Act, 1954, and not by personal law of the husband (Mohammedan Law). (Special Marriage Act (1954), S. 1). (Private International Law — Marriage — Rights under). (Interpretation of Statutes — Ambiguity — Interpretation consistent with Part IV of Constitution is to be preferred).

In the present case the marriage took place in England on 5th of May 1966. Therefore, it was a foreign marriage within the meaning of Foreign Marriage Act, 1969. The said marriage was solemnized under the British Marriage Act, 1949 and there is no statutory law in the field which provides for grant of matrimonial

reliefs as contemplated by S. 18 (4) of the Act. Therefore, the marriage between a plaintiff male muslim and the defendant a Hindu wife which took place in England was governed by Chapter IV of the Foreign Marriage Act, 1969.

(Para 20)

Once it is held that the marriage which took place in England in 1966 was secular in the form and content and also monogamous and such a secular law is also available in India in the form of Special Marriage Act, 1954 then even the lex domicilli in case of such secular marriage will be the Special Marriage Act and not the Personal Law of the husband. This is more as when one of the parties belongs to different religion and is not a Muslim. After all there should be harmony between different personal laws so that the parties can live together.

(Para 22)

In this context it is also pertinent to note that between 1954 to 1969 two Indian citizens domiciled in India could have married under Special Marriage Act even outside India. A marriage which is monogamous in form continues to be so, whereas original religious marriage can be converted into a secular marriage. However, a secular marriage cannot be converted into religious marriage. Therefore if there is in the field an Indian enactment which is applicable to all the citizens of India irrespective of their religion, then so far as secular marriages are concerned the said law will become lex-domicilli of India for the purposes of matrimonial reliefs. Such an interpretation will be in tune with Article 44 as well as the preamble of the Constitution.

(Para 23)

If two interpretations are reasonably possible regarding the provisions of law, then the law will have to be interpreted and applied in the perspective of Part IV of the Constitution, which deals with directive principles of the State policy and benefit of reasonable doubt of law and fact, if there be such doubt must go to the weaker section, in the present case to women.

(Para 24)

(F) Muslim Law — Divorce — Unilateral talaq — Whether violates Articles 14 and 44 of the Constitution. (Question left open).

(Para 25)

(G) Muslim Law — Conversion to — Essentials — Burden of proof where conversion is denied.

The real test of conversion to Moham-medan religion is of professing Moham-medan religion. For conversion there should be a declaration of one's belief and

the said declaration should be in such a way that it should be known to those whom it may interest. If a public declaration is made by a person that he has ceased to belong to one religion and is accepting another religion, he will be taken as professing the other religion. AIR 1965 SC 1179, Rel. on.

(Para 27)

There should be a change of heart and honest conviction in the tenets of new religion in lieu of tenets of the original religion. If a ceremony of conversion is gone into conscientiously after such an honest conviction, then alone there is a conversion of faith or it can be said that a person is professing another religion. In case of conversion from one religion to another a strict proof is required and it cannot be easily inferred. More so when a person converted denies even the factum of conversion. As to whether there is in fact a conversion or not must depend on facts and circumstances of each case and no general rule can be laid down in that behalf. ILR (1948) 2 Cal 119, Rel. on.

(Para 28)

(H) Civil P. C. (5 of 1908), S. 151, O. 39, R. 1 — Suit for declaration that marriage stood dissolved by talaq and for injunction restraining the defendant from entering the matrimonial house — Court finding that marriage was subsisting in law but had broken down beyond repairs — Another suit relating to ownership of flat also pending in the Court — Held this was a fit case for granting a conditional injunction to the effect that flat should be partitioned and wife restrained from entering portion reserved for the plaintiff and that the plaintiff should pay defendant maintenance of Rs. 1000 p.m. till fixation of maintenance in proper proceedings. 1982 Mah LJ 243, Reversed.

(Paras 41, 42)

Cases Referred : Chronological Paras

AIR 1981 SC 1415 :	1981 Cri LJ 1016	30
AIR 1981 SC 1922 :	1981 Tax LR 1448	14
AIR 1980 SC 101 :	1980 Mah LJ 58	19
AIR 1980 SC 1730 :	1980 Cri LJ 1249	25
AIR 1978 SC 474 :	1978 Lab IC 518	24
AIR 1976 Kant 200		24
1972 Ker LT 512 :	1972 Ker LJ 645	25
AIR 1971 Ker 261 :	1970 Ker LT 477	25
1971 Ker LT 663 :	1971 Ker LJ 754	25
1970 Ker LT 4 :	1969 Ker LR 1075	25
AIR 1965 SC 1179		27
AIR 1964 SC 464 :	1964 (1) Cri LJ 310	19
AIR 1958 Bom 296		27
AIR 1949 Cal 436 :	ILR (1945) 2 Cal 405	28
ILR (1948) 2 Cal 119 :	52 Cal WN 142	28

AIR 1935 Bom 5 : 36 Bom LR 1021 21, 22
 AIR 1930 PC 31 10
 (1906) ILR 30 Bom 537 : 8 Bom LR 35 25
 (1897) ILR 25 Cal 537 : 25 Ind App 34 (PC) 28

N. A. Mody with S. H. Karim, for Appellant; Suresh Parekh and Smt. Nanavati with Y. E. Mooman, for Respondent.

DHARMADHIKARI, J.:— The appellant-plaintiff Dr. Abdur Rahim Undre married Smt. Padma, respondent-defendant in the United Kingdom on 6th May 1966. At the time of marriage plaintiff Abdur Rahim was a Mohammedan whereas respondent Padma was a Hindu. Both of them were Indian citizens. Their domicile was India. Both of them held Indian passports. On 6th of May 1966 the plaintiff and the defendant went to the office of Registrar of Marriages at Weymouth. Before that a necessary notice of intention to marry was already given. Thereafter on 6th of May 1966 the parties went through the marriage ceremony before the Registrar and the said marriage was duly registered. The marriage certificate relating to this marriage duly authenticated and certified copy is also on record. From this certificate it appears that the marriage took place under the British Marriage Act, 1949. After this marriage birth of Shabnam took place on 18th of May 1967. of Shama on 19-11-1968. Thereafter on 4th April 1969 the plaintiff and the defendant with their children returned to India. After their return on 14th of November 1969 Suhail, a boy was born. It is the case of the appellant-plaintiff that on 29th December 1969 conversion of the defendant Padma took place and she was converted to Muslim religion. On the same day a Nikah ceremony was also performed. Thereafter on 21st of November 1973 Sabir, a boy was born. Thereafter relations between the parties became strained and hence the plaintiff further alleged that he gave talaq to the defendant Padma on 20-4-1978. This talaq was given in the absence of defendant Padma. However, an oral intimation about it was given to her in paradise apartment on the same night. It is the case of the appellant that he was forced to give divorce in view of the extreme cruelty meted out to him by Smt. Padma. She had been carrying on a sustained and deliberate campaign of defaming him which resulted in causing acute mental tension as well as interference with his professional duties. He also alleged that due to the ill-treatment meted out by Smt. Padma and her indifferent attitude towards him

and the members of his family, the marriage relationship had broken down beyond the scope of reconciliation and in these circumstances he dissolved the marriage by giving unilateral talaq on 20-4-1978. After this divorce he told the respondent-defendant not to enter his residential premises. However, the respondent went to the said flat, broke it open and took away several things, articles, jewellery etc. about which the appellant had to lodge a police complaint. It is the case of the plaintiff that he was in exclusive possession and occupation of the flat at Nepean Sea Road. He also contended that the four children were living with him and were under his care and custody. As according to plaintiff he became apprehensive that the defendant was likely to enter upon and remain in the said flat with the help of hirelings and would also go to the extent of forcibly removing the children from his custody, he was constrained to file the present suit for a permanent injunction against the defendant. The suit was filed on 24th of April 1978. On the same day an ex parte injunction was granted by the Court against the defendant. On 22nd of June, 1978 the said ex parte injunction was confirmed. Therefore, the respondent filed an appeal against the said order on 21st of July 1978 bearing A.O. No. 251 of 1978. Desai, J. vide order dated 29th August 1978 confirmed the order passed by the trial Court on certain terms. After the judgment in A.O. the plaint was amended and the plaintiff also sought a declaration from the Court that the defendant was not his wife. While amending the plaint the plaintiff alleged that on 29-12-1969 the respondent-defendant had embraced Islam and went through the Nikah ceremony at 303. Abdul Rahman Street at his father's residence and that on 20th April 1978 he gave her talaq and thus dissolved marriage relationship. He alternatively contended that even assuming that the defendant was not a Muslim and was a Hindu as contended by her, still Muslim personal law was applicable to their relationship and the plaintiff was entitled to dissolve the marriage by giving talaq as per Mohammedan Law. Thus the suit filed by the plaintiff was one for declaration as well as for injunction.

2. The defendant denied various allegations made in the plaint and also filed a counter-claim. According to her the court had no jurisdiction to entertain and try the suit and the suit filed was misconceived and bad in

law. She also contended that the plaintiff had not come to court with clean hands. According to her the marriage in England was under civil law of England. She also contended that the flat in Paradise Apartment was secured out of their joint contribution and the said flat is also her matrimonial home. Therefore she is entitled to stay therein in her own right as wife as well as joint owner. She denied the factum of conversion or Nikah, and contended that the averments made in that behalf were wholly false. She also denied the factum of divorce or talaq. She maintained that all through she was a Hindu and continues to be a Hindu even today. According to her the marriage is not yet dissolved in accordance with law and, therefore, the plaintiff is not entitled to any declaration in that behalf. She denied the allegation regarding cruelty or that the children were under protection and custody of the plaintiff. She also denied that she had any intention to forcibly remove the children with the help of hirelings. She also denied that she had ever broken open the flat or had illegally entered into the same. In the counter-claim she claimed that the flat is of joint ownership. The plaintiff filed his say in reply to the counter-claim denying the allegations made therein. In view of the pleadings of the parties, the learned Judge of the Civil Civil Court, Bombay framed the following issues :

"1. Whether this Hon'ble Court has jurisdiction to try and entertain this suit in respect of prayer (b) of the plaint as alleged in para 1 of written statement?

2. Which law will apply to the parties as regard marriage and divorce?

3. Does the plaintiff prove that the defendant embraced Islam on 29-12-1969 and was a Muslim thereafter?

4. Does the plaintiff prove that the defendant went through a Nikah ceremony with him on 29-12-1969?

5. Whether the plaintiff proves that the defendant has been duly divorced as alleged by the plaintiff?

6. Is it proved that the premises of flat No. 12-A, Paradise Apartments is the Matrimonial home of the parties?

7. If so, does the defendant further prove that she continues to be entitled to the user of the aforesaid premises for her residence?

8. Whether the plaintiff is entitled to any reliefs as prayed for and if so, what?

9. Is the counter-claim correctly valued for the purposes of jurisdiction and court-fee?

10. Does the defendant prove that the marriage between her and the plaintiff performed on 6-5-1966 in England under the Civil Marriages Act, is still subsisting?

11. Does the defendant prove that the Talaknama is antedated and fabricated?

12. Is the defendant entitled to the declarations or any of them as prayed in clauses (b) and (c) of the prayers?

13. Is the defendant entitled to the orders of injunction as prayed in cls. (f), (g), (h), (i) and (j), of prayers in the counter-claim?

14. Whether the defendant is entitled to any relief and if so what?

3. In support of his case the plaintiff examined as many as 11 witnesses, including himself whereas the defendant examined herself and two other witnesses. The parties also produced documentary evidence before the trial court. After appreciating all the evidence on record both oral and documentary the trial court came to the conclusion that the Special Marriage Act read with Foreign Marriage Act or English Law will apply to the parties as regards the marriage and divorce. He also found that the plaintiff has failed to prove that the defendant embraced Islam on 29th Dec. 1969 or was a Muslim thereafter. He also held that the plaintiff failed to prove that the defendant went through Nikah ceremony with him on 29-12-1969 as alleged. He also found that the plaintiff has failed to prove that the defendant has been duly divorced as alleged by him. So far as the flat in Paradise Apartment is concerned, the learned Judge came to the conclusion that the said flat is a matrimonial home of the defendant and the defendant is entitled to the user of the said premises for her residence. So far as the marriage in England is concerned, the learned Judge came to the conclusion that the marriage between the parties on 6th of May, 1966 in England was under the civil law or Civil Marriage Act and is still subsisting. As a necessary consequence of these findings he (we?) dismissed the suit filed by the plaintiff.

4. Being aggrieved by the findings as well as the judgment and the decree passed by the City Civil Court, the plaintiff filed an appeal before this Court bearing First Appeal No. 307 of 1980. The said appeal was heard by Mody, J.

Mody, J. disposed of the appeal on a pure question of law by holding that the marriage in the present case was governed by the provisions of Foreign Marriage Act, 1969, and therefore in case of such a marriage the divorce can be obtained by husband only in accordance with the provisions of the said Act and not otherwise. He also came to the conclusion that the plaintiff is also not entitled to equitable relief in the nature of injunction having regard to the facts and circumstances of the case. Therefore, the learned single Judge dismissed the appeal filed by the plaintiff.

5. Being aggrieved by this appellate judgment dated 9th of July, 1981 the plaintiff filed the present Letters Patent Appeal. The said appeal was admitted on 22nd of July, 1981 but no stay was granted. Against the interim order refusing the stay, the appellant filed a special leave petition before the Supreme Court. The Supreme Court refused to grant special leave vide order dated 31st of July, 1981 but asked this court to dispose of the appeal within one month. Thereafter on 4th August, 1981 the defendant wife came to live in the Paradise Apartment. When the appeal came up for hearing, a grievance was made before us that the learned single Judge committed an error in not deciding all the issues involved in the appeal, including the controversy based on facts viz. the alleged conversion, Nikah as well as talaq. Therefore, the parties filed before us on 3rd of November, 1981 a joint purshis agreeing that all the questions and issues of facts and law, including that of jurisdiction whether decided by the first appellate court or not should be decided by this Court in this Letters Patent Appeal. In view of this joint purshis, we have permitted the learned counsel appearing for both the sides to argue all the questions of law and facts. We have heard the learned counsel on all the issues in detail.

6. Shri Mody, learned counsel appearing for the appellant contended before us that the learned Judge of the first appellate court committed an error in coming to the conclusion that the marriage between the parties is governed by the Foreign Marriage Act of 1969. According to Shri Mody the said Act is not retrospective and, therefore, the provisions of S. 18 (1) of the Foreign Marriage Act are not applicable to the marriage which took place in the year 1966. He contended that the law applicable to the said marriage is the personal law viz. Muslim

Law and according to the Muslim Law the plaintiff husband was authorised to give talaq to his wife without intervention of court. He also contended that in any case S. 18 of the Foreign Marriage Act does not preclude the operation of the Mohemmedan Law concurrently and, therefore, it was open to the plaintiff to give divorce to his wife as per his personal law. He also contended that even if it is held that the marriage between the parties which took place in the year 1966 in England was performed according to the British Marriage Act, still on their return to India, as the parties were Indian citizens, they were governed by the law of domicile, which is the personal law of the husband viz., Mohammedan Law and, therefore, it was open to the plaintiff to give divorce to his wife according to the provisions of Mohammedan Law.

7. Shri Mody, then, contended that the learned Judge of the City Civil Court committed an error in coming to the conclusion that the plaintiff has failed to prove conversion of the defendant as well as the subsequent Nikah. According to Shri Mody the said finding is wholly perverse and is liable to be set aside. In the alternative it was contended by Shri Mody that the marriage which took place in England was Nikah Fasid within the meaning of Mohammedan Law. From the evidence of the defendant itself it is quite clear that two Mohammedan witnesses were present at the time of the said marriage and in this view of the matter the said Nikah Fasid could have been dissolved by the plaintiff by giving talaq to his wife in accordance with the provisions of Mohammedan Law. In any case according to Shri Mody from the evidence placed on record it is quite obvious that the marriage between the plaintiff and the defendant had already broken down beyond any scope of reconciliation. The defendant had gone to the extent of making wild allegations against the plaintiff letter Exh. C. In these circumstances their living together under the same roof was wholly impossible and therefore the plaintiff was entitled to an injunction as claimed by him qua the flat in the Paradise Apartment.

8. On the other hand it is contended by Shri Parikh, learned counsel appearing for the respondent-wife that the marriage in England was performed according to the British Marriage Act, 1949. The said marriage was a monogamous one and secular in nature. To such a marriage the Special Marriage Act 1954

alone is applicable. Therefore, the marriage performed under the secular law of England cannot be dissolved under the personal law of the parties. According to Shri Parikh so far as secular marriages are concerned *lex domicile* in India is a Special Marriage Act and not personal law of the parties. He then contended that all through the defendant continued to be Hindu and was never converted. According to him the evidence adduced by the plaintiff to prove conversion is wholly false and the learned Judge of the trial court was quite justified in coming to the conclusion that the plaintiff has failed to prove either conversion or *Nikah*. Shri Parikh then contended that provisions of Mohammedan Law which provide for a unilateral *talaq* is no more good law as it is violative of Art. 14 of the Constitution of India. So far as the provisions of Foreign Marriage Act are concerned, according to Shri Parikh the marriage between the plaintiff and the defendant which took place in the year 1966 is also covered by the provisions of S. 18 (1) of the Foreign Marriage Act. The question of giving retrospective effect to the provisions of Foreign Marriage Act does not arise as divorce is not a part and parcel or incident of marriage. Nobody can claim any vested right in matters of divorce etc. Even according to the plaintiff divorce in this case took place after coming into force of the Foreign Marriage Act, 1969 and, therefore, the said marriage could have been dissolved as per the procedure prescribed by the Foreign Marriage Act and not otherwise. Therefore according to the learned counsel the marriage of the defendant with the plaintiff which took place in 1966 in England is still subsisting.

9. So far as the flat in the Paradise Apartment is concerned, it is contended by Shri Parikh that a separate suit is pending between the parties in the High Court wherein the question of title qua the said flat is involved. In the said suit the plaintiff has prayed for a declaration as well as injunction, hence the plaintiff is not entitled to any relief in that behalf, in this suit, more so when it is the case of the defendant that the flat was purchased out of the joint funds of the plaintiff and the defendant and, the defendant has also claimed joint ownership in the said flat. In any case, as long as relationship of husband and wife, is subsisting the defendant is entitled to live in her matrimonial home

and, therefore, no injunction can be granted which will result in throwing her out of the said matrimonial home. Therefore, in substance it is contended by Shri Parikh that the judgment and decree passed by the City Civil Court as well as the single Judge in First Appeal is wholly justified and the plaintiff is not entitled to any reliefs.

10. So far as the marriage dated 6th May, 1966, solemnized in England is concerned parties are not at issue. The defendant herself has given evidence that marriage was solemnized and plaintiff also admitted in his evidence that required ceremony and formalities were completed and he accepted the defendant as his wife in the presence of witnesses. Therefore, it must be held that marriage dated 6th of May, 1966 was performed in England according to the British Marriage Act, 1949. This position is also clear from the entry of marriage made pursuant to the provisions of Marriage Act, 1949. However, among the persons who attended the aforesaid marriage, there were two adult Mohammedans, one Dr. Amin and the other Dr. Khan, who were also physically present. At the time of solemnization of the said marriage defendant was admittedly a Hindu by religion, Mr. Mody has contended that the said marriage should be treated as '*Nikah Fasid*' irregular marriage according to Mohammedan Law. It is not possible for us to accept this contention. No civil marriage validly performed and solemnized, according to any law in force can be treated as a religious marriage, by introducing elements of formalities of personal law. The presence of two witnesses of Mohammedan faith, cannot ipso facto convert any civil marriage into any other form of marriage much less a '*Nikah Fasid*'. As held by the Privy Council in AIR 1930 PC 31, *Engene Berthiaume v. Dame Anne Marie Yvonne Dastous* :

"If a marriage is good by the law of the country where it is effected it is good all over the world no matter whether the proceedings or the ceremony which constituted the marriage according to the law of place would not constitute marriage in the country of domicile of one or the other spouses."

The character of marriage remains unaffected by such external factors. Because, a civil marriage validly performed, has an overriding effect on all other religious forms of marriages.

11. When the parties have solemnized a legal and valid marriage as per British

Marriage Act, it is difficult to hold that the said marriage should also be treated as Nikah Fasid. When the parties with open eyes have chosen a specific form of marriage, it cannot be held that they concurrently also intended to enter into another form of marriage. To impute such an intention is contrary to well established principles of justice, equity and good conscience. This is more so, when the plaintiff himself does not say in his evidence that it was an irregular marriage within the meaning of Mohammedan Law or he intended to solemnize marriage according to the provisions of Mohammedan Law. In this context Shri Parekh has placed reliance upon the Rules 32, 33, 35, 36 and 37 of Dicey & Mories Conflict of Laws. Rule 32 deals with the formal validity of the marriage. Rule 33 lays down that the capacity to marry is governed by the law of each party's antenuptial domicile. As per Rule 35, the marriage celebrated in a form which is monogamous under the law of the place of celebration is monogamous marriage, whatever the personal law of the parties at the time of marriage or at any subsequent time. As per Rule 36 even the marriage celebrated in England in Muslim Mosques is also monogamous. Then comes Rule 37 which declares that a man or woman whose personal law does not permit polygamy has no capacity to contract a valid polygamous marriage. Admittedly at the time of the said marriage the defendant was a Hindu and therefore it is also doubtful whether a Nikah Fasid as per the Mohammedan Law was really possible. It was not disputed by Shri Mody that the marriage in England was a monogamous one. If this is so, how can a marriage be monogamous and polygamous at the same time. Therefore, having regard to the facts and circumstances of the present case it is not possible for us to accept the contention of Shri Mody that the marriage solemnized as per the procedure laid down by the British Marriage Act could concurrently be treated as Nikah Fasid within the meaning of Mohammedan Law. If such a contention is accepted then even a secular and monogamous marriage solemnised as per provisions of Special Marriage Act, 1954 could be termed as 'Nikah Fasid' and a secular and monogamous marriage between the two muslim or between two muslim husband and non-muslim wife will become impossible even if they desire to solemnise such a secular and monogamous marriage.

12. Shri Mody, learned counsel appearing for the appellant husband then contended that the view taken by the learned single Judge that the present marriage is governed by the Foreign Marriage Act is wholly illegal and unjustified. It is contended by Shri Mody that the Foreign Marriage Act, 1969 is not retrospective in its operation and therefore cannot govern the marriage which took place prior to 1969. He also contended that under the Mohammedan Law husband had some vested rights. The Foreign Marriage Act cannot be interpreted to mean that the said vested rights have been taken away retrospectively. According to Shri Mody under the Mohammedan Law a husband has a vested right to have four wives, he has a vested right to give a unilateral talaq and hence the provisions of the Foreign Marriage Act cannot be interpreted in such a way so as to affect these vested rights. Shri Mody also contended that in the context of the subject matter Mohammedan Law is a Special Act, whereas the Foreign Marriage Act is a general enactment. Mohammedan Law does not apply to all foreign marriages but applies to those foreign marriages only where the parties are Mohammedans. He also contended that if it is held that the provisions of the Foreign Marriage Act apply retrospectively, then disastrous effect are likely to follow because in that case the marriage already performed even before coming into force of the Foreign Marriage Act is likely to be subject to penalties prescribed by Chapter V of the said Act. Therefore, according to the learned counsel the provisions of the Foreign Marriage Act will be applicable only to those marriages which are solemnised after coming into force of the Foreign Marriage Act. Shri Mody also contended that even otherwise in view of the provisions of S. 18 (4) of the Act the provisions of S. 18 (1) will not apply to the present case as the Mohammedan Law provides for a grant of relief in respect of such marriage.

13. The Special Marriage Act or Foreign Marriage Act do not require continuance of the original religion as a condition for getting relief of divorce. Section 18 (1) of the Foreign Marriage Act provides for statutory rule. Sec. 18 (4) is in the nature of proviso or exception and therefore will have to be strictly construed. The very wording of subsec. (4) of S. 18 clearly indicates that it intends to take out something from Sec-

tion 18 (1). Therefore it can only take out some thing which is included in Section 18 (1).

14. For properly appreciating the controversy raised before us it will be worthwhile if a detailed reference is made to various provisions of the Foreign Marriage Act, 1969, hereinafter referred to as the said Act. It was enacted to make a provision relating to the marriage of citizens of India outside India. The expression "foreign country" is defined by S. 2 (c) to mean a country or a place outside India. Chapter II deals with solemnisation of foreign marriages. Chapter III deals with registration of foreign marriages solemnised under other laws. Then, by sub-sec. (6) of S. 17 it is laid down that the marriage registered under S. 17 shall as from the date of registration be deemed to have been solemnised under the Act. Then comes Chapter IV which deals with matrimonial reliefs in respect of foreign marriages. Section 18 in the said Chapter reads as under :

"18 (1) Subject to the other provisions contained in this section the provisions of Chapters IV, V, VI and VII of the Special Marriage Act, 1954, shall apply in relation to marriages solemnised under this Act and to any other marriage solemnised in a foreign country between parties of whom one at least is a citizen of India as they apply in relation to marriages solemnised under that Act :

Explanation : In its application to the marriages referred to in this sub-section. S. 24 of the Special Marriage Act, 1954 shall be subject to the following modifications, namely :

(i) the reference in sub-sec. (1) thereof to clauses (a), (b), (c) and (d) of S. 4 of that Act shall be construed as a reference to clauses (a), (b), (c) and (d) respectively of S. 4 of this Act, and

(ii) nothing contained in S. 24 aforesaid shall apply to any marriage—

(a) which is not solemnized under this Act; or

(b) which is deemed to be solemnized under this Act by reason of the provisions contained in S. 17 :

Provided that the registration of any such marriage as is referred to in sub-clause (b) may be declared to be of no effect if the registration was in contravention of sub-sec. (2) of S. 17.

(2) Every petition for relief under Chapter V or Chapter VI of the Special Marriage Act, 1954, as made applicable to the marriages referred to in sub-sec-

tion (1), shall be presented to the district court within the local limits of whose ordinary civil jurisdiction—

(a) the respondent is residing at the time of the presentation of the petition; or

(b) the husband and wife last resided together; or

(c) the petitioner is residing at the time of the presentation of the petition, provided that the respondent is at that time residing outside India.

Explanation— In this section, "district court" has the same meaning as in the Special Marriage Act, 1954.

(3) Nothing contained in this section shall authorise any court—

(a) to make any decree of dissolution of marriage, except where;

(i) the parties to the marriage are domiciled in India at the time of the presentation of the petition; or

(ii) the petitioner, being the wife, was domiciled in India immediately before the marriage and has been residing in India for a period of not less than three years immediately preceding the presentation of the petition;

(b) to make any decree annulling avoidable marriage, except where—

(i) the parties to the marriage are domiciled in India at the time of the presentation of the petition; or

(ii) the marriage was solemnised under this Act and the petitioner, being the wife, has been ordinarily resident in India for a period of three years immediately preceding the presentation of the petition;

(c) to make any decree of nullity of marriage in respect of a void marriage, except where;

(i) either of the parties, to the marriage is domiciled in India at the time of the presentation of the petition, or

(ii) the marriage was solemnized under this Act and the petitioner is residing in India at the time of the presentation of the petition;

(d) to grant any other relief under Chapter V or Chapter VI of the Special Marriage Act, 1954, except where the petitioner is residing in India at the time of the presentation of the petition.

(4) Nothing contained in sub-sec. (1) shall authorise any court to grant any relief under this Act in relation to any marriage in a foreign country not solemnized under it, if the grant of relief in respect of such marriage (whether on any of the grounds specified in the Spe-

cial Marriage Act, 1954 or otherwise) is provided for under any other law for the time being in force."

Section 18 (1) takes in its import the marriage solemnized under the Act and any other marriage solemnized in the foreign country between the parties of whom one at least is a citizen of India. Thus, from the bare reading of S. 18 (1) it is quite clear that it applies to all other marriages solemnized in a foreign country between the parties of whom one at least is a citizen of India. For properly appreciating the intention behind the said legislation it will be worthwhile if a reference is made to the 23rd report of the Law Commission which deals with the foreign marriage. It appears from the said report that the object of the legislation was to regulate marriages performed outside India when either of the parties thereto is a citizen of India, thereby filling a gap in the Special Marriage Act, which is limited in its application to the marriages between Indian citizens. After analysing different types of marriages which could be entered into abroad by the parties, one or both of whom are Indian citizens, para 3 of the report explains that the object of the legislation is not only to provide for solemnization of the marriages but also to enable the parties thereto to obtain proper matrimonial relief, such as, dissolution of marriage and so forth. The report also makes a reference to the rules of private international law on the subject so as to ensure as far as possible that the validity of the marriage can be recognised in other countries besides India. Then come paras 13 and 18 of the report which read as under :

"13. As already stated, we do not have in this country what may be called a *lex loci* dealing generally with matrimonial jurisdiction and if suitable provisions are not made in this behalf in respect of marriages solemnized under the proposed legislation, there will be a lacuna in the law. We have, therefore to depart in this respect from the English and Australian Acts.

In our opinion the proposed law should contain an express provision regarding matrimonial causes. Further, it has been brought to our notice that difficulties are experienced by citizens of India who choose to marry abroad not under our laws but under foreign laws, in obtaining the appropriate matrimonial relief in our country in case the marriage unfortunately turns out to be a failure. In a

recent case the Rajasthan High Court has held that where a person domiciled in India has contracted a marriage in England with an English woman (presumably under the English Law) he can obtain a divorce under the Special Marriage Act, 1954 on the ground that that Act is the general law of divorce in force in this country. Without entering into any discussion as to its correctness we think that the decision emphasises the need for making it clear by a statutory provision. We are, therefore, of the opinion that the provision about matrimonial reliefs to be included in the proposed legislation should also apply to a marriage performed in a foreign country under a foreign law where one of the parties to the marriage is a citizen of India. At the same time, care has to be taken to ensure that a marriage in a foreign country between parties, only one of whom is a citizen of India, not solemnized under the provisions of the proposed law, is not held to be void on the ground that it contravenes one or the other of the conditions for valid marriage under this law, that is to say, if any such marriage is to be challenged on the ground that it is *ab initio* void, the ordinary rule relation to choice of law should apply rather than the provisions in the new law. Subject to this reservation, any other matrimonial relief available to a party who is married under this law should also be available to a citizen of India marrying a foreigner abroad under a foreign law."

18. (a) Our recommendation being that we should on the several topics mentioned above draw from the provisions of the Special Marriage Act, 1954, the question naturally arises as to how that could best be done. The proposed legislation can be framed in any one of the following four modes :

(i) We may draft a separate and self-contained Act. This will deal both with marriage and with matrimonial causes, not by referring to the Chapters in the Special Marriage Act and the Christian Marriage Bill, but by enacting the provisions therein full.

(ii) We may draft a separate Act without making it self-contained and incorporate therein by reference the provisions relating to marriage in Chapters IV, V, VI and VII of the Special Marriage Act, 1954. This will be shorter than No. (i) above.

(iii) We may insert a new Chapter in the Special Marriage Act; the Chapter

itself would not be self-contained, but would refer back to the provisions in other Chapters relating to marriage as well as matrimonial causes.

(iv) A fourth course would be to amend S. 1 (2) and S. 4 (e) of the Special Marriage Act, so as to allow marriage in the Special Marriage from where one party is a citizen of India. This would be shorter than No. (iii) above. Consequential amendments may be required to other sections also. After careful consideration, we have reached the conclusion that course No. (ii) above is the best. The usual objection to referential legislation — that it often leads to ambiguity — will not apply in this case. For the purposes of matrimonial relief, there is hardly any difference between a foreign marriage solemnized under the proposed law and a marriage solemnized in India under the Special Marriage Act, 1954. This device has the additional advantage of avoiding unnecessary repetition of a major portion of the Special Marriage Act, 1954, in the proposed law."

The Statement of Objects and Reasons attached to the Bill also throws light upon the intention behind this legislation. The Statement of Objects and Reasons reads as under :

"This Bill seeks to implement the twenty-third report of the Law Commission on the law relating to foreign marriages. There is, at present considerable uncertainty as to the law on the subject, as the existing legislation touches only the fringes of the subject and the matter is governed by principles of private international law which are by no means well-settled, and which cannot readily be applied to a country such as ours in which different marriage laws apply to different communities. The Special Marriage Act, 1954 sought to remove the uncertainty to some extent by providing that marriages abroad between citizens of India who are domiciled in India might be solemnized under it.

In the course of the debate in relation to that Act in Parliament, it was urged that a provision should also be made for marriages abroad where one of the parties alone is an Indian citizen. In this context, an assurance was given that Government would, after careful consideration introduce comprehensive legislation on the subject of foreign marriages. The present bill is the outcome of that assurance.

2. The Bill is modelled on the Special Marriage Act, 1954 and the existing

English and Australian Legislation on the subject of foreign marriages subject to certain important modifications rendered necessary by the peculiar conditions obtaining in our country."

Then the Statement of Objects and Reasons dealing with S. 18 of the Act reads as under :

"Clause 18 : Sub-clause (1) applies the provisions of Chapters IV to VII of the Special Marriage Act so as to —

(i) Define the consequences of a marriage under the proposed law; and

(ii) provide for matrimonial relief, Read with sub-clause (4), it covers also foreign marriages under other laws for which matrimonial relief is not available in India under any other law. Sub-cl. (2) is intended to define the district court which will have jurisdiction for granting relief and sub-clause (3) embodies the recognised principles of private international law as to jurisdiction of Indian courts to grant matrimonial relief.

While providing for matrimonial relief in respect of foreign marriages under other laws, care has been taken to ensure that:—

(a) the validity of such marriages is not affected by the provisions of the proposed law; and

(b) even where such marriage is registered under this law its validity is not affected by the said provisions, the only relief available in such a case being cancellation of registration."

Therefore, from the Law Commission's report as well the Statement of Objects and Reasons it is quite clear that the Foreign Marriage Act was intended as a piece of comprehensive legislation on the subject relating to foreign marriages. Hence it is a complete Code in itself. S. 18 was intended to cover all foreign marriages.. Expression used in S. 18 (1) viz. "to any other marriage solemnized in the foreign country" must take in its import all other marriages which are not covered by the first part of S. 18 (1). The word 'solemnized' indicates that it applies to the marriages which are solemnized even prior to coming into force of the Act. This is further clear from the provisions of S. 17 of the Act which deal with registration of foreign marriages solemnized under other laws. S. 12 (2) lays down that no marriage shall be registered under S. 17 unless at the time of registration it satisfies the conditions mentioned in S. 4. Then by sub-section (6) of S. 17 it is declared that the marriages register-

ed under this section shall as from the date of registration be deemed to have been solemnized under the Act. If the form prescribed under the Rules is read with S. 17 of the Act, it is further clear that it takes in its import even the marriages already solemnized. Form prescribed under the Rules can be used as an aid to construction on the basis of principles of *contemporeo expositio* which is a well settled rule of interpretation of a statute. (See *K. P. Verghese v. I.-T. Officer, Ernakulam*, AIR 1981 SC 1922). The expression "any other marriage solemnized in a foreign country" therefore must take in its import all the marriages solemnized in a foreign country either before or after coming into force of the enactment. Looking to the words of the section and giving them their plain and natural meaning we find it impossible to hold that the foreign marriages solemnized prior to the coming into force of Foreign Marriage Act, 1969 are not covered by S. 18 (1) of the Act. To accept such a contention one has to read into the section additional words "after the date of this Act", after the word solemnized. If such a construction is not put up, the intention of the legislature in enacting a comprehensive legislation on the subject of foreign marriages will be frustrated.

15. It is also not possible for us to accept the contention of Shri Mody that in view of the provisions of sub-sec. (4) of S. 18 nothing contained in sub-sec. (1) of S. 18 will apply to the present case. In this context it was contended by Shri Mody that the Mohammedan law is a law for the time being in force which provides for grant of relief in respect of marriages within the contemplation of sub-sec. (4) of S. 18. According to Shri Mody, the learned single Judge committed an error in construing the said provision. The learned Judge in para 10 of his judgment has held as under:

"10. To summarise, Section 18 of the Act applies to all marriages solemnized in a foreign country whether under the Act or registered under the Act or otherwise and one of the party to which is an Indian citizen. The consequences of such a marriage and reliefs in respect thereof will be governed by Section 18 (1) read with the relevant provisions of the Special Marriage Act in all cases except where any Indian Law, statutorily or otherwise provides for grant of relief. No law which is non-statutory presently comes to my mind which provides for grant of reliefs, that is a right to apply

to some authority. There being no such provision in the Muslim law, so far as a husband is concerned, in case of a foreign marriage a divorce can be obtained by a husband only in accordance with the provisions of the said Act not otherwise.

11. Mr. Bhatt's contention that the Shariat Act is such an Act as is contemplated by S. 18 (4), cannot be accepted. The Shariat Act was enacted to provide for governance of Muslims by law as laid down in Shariat Act in preference over customary law. The Shariat Act, therefore, makes personal law applicable uniformly to all Muslims notwithstanding any custom or usage to the contrary. The Shariat Act does not contain any rules of law governing Muslims and less so provides for grant of any relief, in respect of a marriage. The Shariat Act or the Shariat Act read with Muslim personal law cannot be said to be the law in force contemplated by Section 18 (4) of the Foreign Marriage Act".

We are in general agreement with these observations of the learned single Judge for more than one reason. Chapter IV deals with the matrimonial reliefs which could be granted by the Court. Sub-section (2) of S. 18 deals with the procedure of filing of a petition for relief. Then in sub-s. (3) read with sub-cl. (d) it is laid down that nothing contained in this section shall authorise any court to grant any other relief under Chapter IV or Chapter VI of the Special Marriage Act, 1954 except where the petitioner is residing in India at the time of the presentation of the petition. The word "relief" is used in sub-sections (2), (3) and (4) of S. 18. Similarly expression 'grant relief' is also used in sub-sections (3) and (4) of S. 18. All these provisions of S. 18, will have to be read harmoniously, as every sub-section throws light on another. The said expression will have to be understood to have the same meaning in all the sub-sections. So understood in our opinion the expression "grant of relief in respect of such marriage" must mean a relief which could be granted by a court in respect of matrimonial matters. This expression cannot take in its import a voluntary and unilateral act of a husband of giving talaq to his wife which does not require any intervention of the court.

16. The provisions of the Act as well as Section 18 will have to be construed harmoniously so as to discover the true intention of the legislature and to make

law effective and not to frustrate legislative intent in that behalf. While interpreting the words and expressions used in Section 18 it is necessary to have regard to the subject-matter of the statute and the object which it is intended to achieve. While construing the words and expressions, the context in which the words occur, the object of the statute in which the provisions is included and the policy underlying the statute assume importance. The words and expressions will have to be construed in the light of their context rather than their etymological sense or their popular meaning apart from the context. It is a sound and indeed a well known principle of construction that the meaning of words and expression used in an Act must take their colour from the context in which they appear. If two interpretations are reasonably possible any construction will have to be avoided which would reduce the legislation to a futility because Parliament is presumed to legislate only for the purpose of bringing about effective result. When the material words are capable of bearing two constructions the well settled principle is to construe such words in tune with the rule laid down in Haydon's case which has now attained the status of classic. The words will have to be construed in the light as to what was the common law before the enactment of the Act, what was the mischief and defect for which the common law did not provide and what remedy the Parliament has provided to cure the said defect. A construction will have to be placed which will suppress the mischief and advance remedy. If the construction suggested by Shri Mody is accepted it will reduce the legislation to futility. From the bare reading of sub-section (4) it is clear that the said section is dealing with the authority of the Court to grant relief under the Act in relation to any marriage in a foreign country not solemnized under the Act, if grant of relief in respect of such marriage is provided for under any law for the time being in force. Therefore, the relief contemplated is in relation to a marriage and not regarding general relationship of husband and wife. The expression "whether on any of the grounds specified in the Special Marriage Act, 1954, or otherwise" makes this intention further clear. The words "or otherwise" are referable to grounds. Prohibition is imposed upon a court to grant a relief under sub-sec. (1) of Section 18 if grant of relief in respect of

such foreign marriage is provided for under any other law for the time being in force. Thus the words "grant of relief" as used in S. 18 (4) obviously means grant of relief by an independent court, tribunal or authority which is available qua a foreign marriage obviously to both the parties. It cannot take in its import a unilateral voluntary act of husband of dissolving a marriage by oral talaq. For such a unilateral act it is not necessary for husband to approach any court, tribunal or authority. However, it was contended by Shri Mody that in a given case a declaratory suit could be filed before a Civil Court claiming a declaration that the marriage stands dissolved and such a suit is also covered by sub-section (4) of S. 18. It is not possible for us to accept this contention. In a declaratory suit only a declaration is sought for, regarding a thing which has already become effective on its own force and such a declaratory relief cannot be equated with a grant of relief in relation to any marriage which is provided for under a law for the time being in force. Moreover such a unilateral right of divorce is only conferred upon a husband by Mohammedan law and not on wife. Sub-sec. (4) contemplates grant of relief at the instance of both the parties. A relief contemplated is a relief which could be granted by a court of law or independent tribunal or authority. Such a relief should be available qua particular marriage. Relief must take in its import obviously the grounds on which such a relief could be granted by an independent tribunal or authority. It cannot be forgotten that under the Mohammedan law defendant-wife who is a Hindu has no remedy to seek matrimonial relief. If the wife wants to seek a matrimonial relief qua foreign marriage which took place in the year 1966 as per the provisions of British Marriage Act, she has no remedy available under the Mohammedan Law. So far as she is concerned, law available is obviously Foreign Marriage Act. This position becomes further clear from S. 29 of the Foreign Marriage Act by which the provisions of Special Marriage Act, 1954 stand amended. This is further clear from the statements of Objects and Reasons as well as the Law Commission's report. Therefore, it is not possible for us to accept the contention of Shri Mody that in view of the provisions of sub-section (4) of S. 18, S. 18 (1) of the Foreign Marriage Act is not applicable to the present case. In

our view the view taken by the learned single Judge is the only view possible, and therefore, we agree with the findings recorded by the learned single Judge in that behalf.

17. Chapter V which deals with the penalties is obviously prospective. It applies to any person whose marriage is solemnized or deemed to be solemnized under the Act. S. 17 deals with registration of foreign marriages solemnized under other laws and sub-sec. (2) of S. 17 lays down that no marriage shall be registered under this section unless at the time of registration it fulfils the condition mentioned in Section 4. From the phraseology used in sub-sec. 17 (2) it is quite clear that conditions mentioned in S. 4. should be satisfied at the time of registration and not at the time of marriage itself. Chapter IV which deals with matrimonial reliefs, in respect of foreign marriages is in terms made retrospective, otherwise it was not necessary to use the words or expression "any other marriage solemnized in a foreign country between the parties of whom one at least is a citizen of India."

18. In S. 18 (1) the words used are "other marriage solemnized" which must mean solemnized at any time. Whenever legislature wanted that certain provisions of the Act should apply to the marriage which are solemnized under the Act, the legislature has used the expression "may be solemnized", "is solemnized", "to be solemnized" etc. Such an expression is not used in S. 18 (1). As already observed S. 17 takes in its import the marriages already solemnized in accordance with the law of the country concerned. Therefore, in our opinion Chapter IV of the Foreign Marriage Act will apply to the present marriage, which is admittedly a foreign marriage.

19. It is also not correct to say that a Mohammedan husband has a vested right to marry more than one wife viz. to have four wives at a time. It cannot also be said that anybody has got a vested right in the matter of divorce. To say the least dissolution of marriage is not a part and parcel of the contract of marriage. Nobody has got any vested right in the matter of dissolution of marriage. So far as the polygamy is concerned, the provision of Mohammedan law is only permissive or optional in nature and not obligatory. It only lays down a ceiling on wives and does not lay down that every Mohammedan should have four wives as

a matter of right. It is in a form of an exception. Therefore it cannot be said that Chapter IV or S. 18 which deals with matrimonial reliefs in respect of foreign marriages has affected any vested right of the appellant retrospectively. The said chapter deals with the events taking effect in future though based on an earlier incident viz. foreign marriage. Only because it takes into consideration earlier event of marriage, it cannot be said that the provision is retrospective in nature or affects any vested right. It is well settled that vested right is a right which has come into operation and is not a potential right. Mere right to take advantage of a provision of law is not an accrued right. A statute cannot also be said to be retrospective, "because a part of the requisites for its action is drawn from a time antecedent to its passing" (see AIR 1964 SC 464, Sajjansinghi v. State of Punjab and 1980 Mah LJ 58: (AIR 1980 SC 101), Zohrabai v. Arjuna).

20. As already held in the present case the marriage took place in England on 5th of May 1966. Therefore, it was a foreign marriage within the meaning of Foreign Marriage Act, 1969. The said marriage was solemnized under the British Marriage Act, 1949 and there is no statutory law in the field which provides for grant of matrimonial reliefs as contemplated by S. 18 (4) of the Act. Therefore, in our opinion the learned single Judge was right in coming to the conclusion that the marriage between the plaintiff and the defendant which took place on 5th of May, 1966 in England is governed by Chapter IV of the Foreign Marriage Act, 1969.

21. Once it is held that the relationship of the parties flowing from the marriage solemnized in England in 1966 is covered by the Foreign Marriage Act, 1969, in fact it is not necessary to deal with any other contention raised by Shri Mody. It is also not necessary to consider the decision of this Court in Khambatta v. Khambatta, (1934) 36 Bom LR 1021: (AIR 1935 Bom 5). Even otherwise in our opinion even *lex domicilli* so far as secular marriage of this type is concerned will be Special Marriage Act, 1954 and not Mohammedan Law. It cannot be disputed that the marriage which was solemnized as per the provisions of the British Marriage Act, in 1966 in England was secular in form and content. It was a monogamous marriage. On the date of the marriage the defendant was a Hindu. Therefore, the marriage which took place in

England was inter-religious marriage. In support of his contention Shri Parikh, learned counsel appearing for the defendant has placed reliance upon certain observations in 'Muslim Law of India by Dr. Taher Mohammad, 1980 edition, at pages 59 and 91. He has also placed reliance upon S. 2 (6) page 13, and S. 199 page 188 of Tyabji's Muslim Law (1968 Edition) and has contended that even the Muslim Law stands modified in view of the Special Marriage Act as well as the Constitution of India.

22. The legal system prevailing prior to Special Marriage Act clearly indicates that the Special Marriage Act of 1872 was not applicable to Indian Muslims, nor Indian Divorce Act was applicable if neither party was a Christian. Muslim law applied to marriages between male muslims and jewess or Christian female known as Kitabiya. The Special Marriage Act 1954 applies to all citizens irrespective of religion. Till 1969 it applied to all the Indian citizens marrying in foreign countries, if they chose to marry under the Act. To some extent there was a choice open and the parties could have married under the secular system of marriage which provided for a monogamous form of marriage namely: union for life to the exclusion of others, and dissoluble only by a judicial authority. Admittedly the marriage which was solemnized in May 1966 in England under the British Marriage Act, 1949, was monogamous and secular in nature. Therefore it will have to be seen as to whether there is any Indian law available in the field which can apply to such monogamous secular marriage. No such law was available till the Special Marriage Act, 1954 was enacted. It appears to be well-settled principle of law that in the absence of anything to the contrary the rights under the marriage are to be governed by the law of domicilli. In the present case both the plaintiff and the defendant are Indian citizens. They came to India in 1969 and are living in India thereafter. Therefore it was contended by Shri Mody relying upon the decision of this Court in *Khambatta v. Khambatta*, (1934) 36 Bom LR 1021: (AIR 1935 Bom 5) that so far as *lex domicilli* is concerned, the present marriage will be governed by the personal law of the husband viz. Mohammedan law. In our view this is not the correct position today. Once it is held that the marriage which took place in England in 1966 was secular in the form and content and also monogamous and such a secular

law is also available in India in the form of Special Marriage Act, 1954 then in our view even the *lex domicilli* in case of such secular marriage will be the Special Marriage Act and not the Personal Law of the husband. This is more so when one of the parties belonged to different religion and is not a muslim. After all there should be harmony between different personal laws so that the parties can live together.

23. It can safely be said that Special Marriage Act is in reality an Indian Marriage Act, which applies to all Indian Communities irrespective of caste, creed or religion. The concept of marriage under the said Act, is monogamous, that is union for life, dissoluble by judicial authorities. Under the said law all modern matrimonial reliefs are made available to both the spouses in the event of break down of marriage on an application to the Court of competent jurisdiction. Even the religious marriages can be registered under the said Act. On such registration the religious marriage can be converted into secular marriage. In this context it is also pertinent to note that between 1954 to 1969 two Indian citizens domiciled in India could have married under Special Marriage Act—even outside India. A marriage which is monogamous in form continues to be so, whereas original religious marriage can be converted into a secular marriage. However, a secular marriage cannot be converted into religious marriage. Therefore if there is in the field an Indian enactment which is applicable to all the citizens of India irrespective of their religion, then so far as secular marriages are concerned the said law will become *lex domicilli* of India for the purposes of matrimonial reliefs. Such an interpretation will be in tune with Article 44 as well as the preamble of the Constitution. It cannot also be forgotten that the establishment of a secular society is the aim and goal of Indian Constitution. Therefore in the area and field which is secular or non-religious laws will have to be common for all citizens of India, and that is what has been done, though to limited extent by enacting Special Marriage Act. The said Act at least leaves a choice open which is available to all the citizens of India irrespective of their caste, creed or religion. In Mohammedan Law Marriage is a Civil Contract. Hence so far as relationship flowing from contract of marriage is concerned, including its dissolution, the area and field is secular in nature.

24. In this context it will have to be remembered that if two interpretations are reasonably possible regarding the provisions of law, then the law will have to be interpreted and applied in the perspective of Part IV of the Constitution, which deals with directive principles of the State policy and benefit of reasonable doubt of law and fact, if there be such doubt must go to the weaker section, in the present case to women (See AIR 1978 SC 474). In this context a reference also could usefully be made to the decision of Karnataka High Court in AIR 1976 Kant 200, Raj Mohammad v. Saheeda, wherein E. S. Vyankataramayya J. (as he then was), has observed that our notions of law will have to be altered in such a way as to bring them in conformity with modern social conditions.

25. Shri Parikh learned counsel appearing for the respondent-wife has also raised a contention that the provisions of the Mohammedan law read with Sheriyat Act are violative of Article 14 of the Constitution. Such a contention is specifically raised by respondent in the memorandum of cross-objection. Shri Parikh further contended that full equality between sexes is hardly possible in a legal system which permits polygamy and unilateral talaq and the social system which tolerates it. He contended that in some of the Muslim countries polygamy has been prohibited and divorce is also regulated by statute. However denial of equality and social justice still continues in India and that too in spite of the directive principles of the State policy, which also includes Article 44. Because of the system of unilateral talaq a muslim wife continues to be in a position of legal inferiority and insecurity. He also contended that the trend in modern times is in favour of territorial laws in preference to contractual laws and Art. 44 is in tune with the said trend. In support of his contention he has placed reliance upon decisions of V. R. Krishna Iyer J. (as he then was) in 1970 Ker. LT 4, Shahulameedu v. Subaida Beevi, 1970 Ker LT 477 : (AIR 1971 Ker. 261) Yusuf Rawthan v. Sowramma; 1971 Ker LT 663 Aboo Backer Haji v. Mamu Koya and the judgment of Khalid J. in 1972 Ker LT 512, Mohammad Haneefa v. Puthumal Beevi. Shri Parikh also contended that the continuance of various personal laws which discriminate between men and women violates the fundamental rights and even the Preamble of the Constitution which promises equality of status to all

citizens. It is also against the spirit of national integration and secularism. He has placed strong reliance upon the following observations of V. Khalid J. in Mohd. Haneefa v. Pathumal Beevi viz.: "Should Muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity. The question is whether the conscience of the leaders of public opinion of the community will also be disturbed." We respectfully share the feelings expressed by Khalid J. Shri Parikh has also drawn our attention to the observations of the Supreme Court in AIR 1980 SC 1730, Fuzlunbi v. K. Khader Vali, para 20 which reads as under:

"20. Before we bid farewell to Fuzlunbi it is necessary to mention that Chief Justice Baharul Islam, in an elaborate judgment replete with quotes from the Holy Quoran, has exposed the error of early English authors and judges who dealt with talaq in Muslim law as good even if pronounced at whim or in tantrum, and argued against the diehard view of Batchelor, J. (1906) ILR 30 Bom 537 (539) that this view 'is good in law, though bad in theology'. May be, when the point directly arises, the question will have to be considered by this court, but enough unto the day the evil thereof and we do not express our opinion on this question as it does not call for a decision in the present case."

However, in the view which we have taken it is not necessary to decide this challenge based on Article 14 of the Constitution, and the same is kept open.

26. The next contention which requires consideration in this appeal is to find out as to whether the plaintiff has proved that the defendant-wife was converted to Islam and thereafter a Nikah ceremony took place.

27. It is a well known principle of civil law that a person born into or following one religion continues to belong to such religion subject to conversion to another religion. Conversion to another religion basically requires change of faith. To say the least it is a matter of conviction. According to Mulla's Principle of Mohammedan Law any person who professes Mohammedan religion that is, he acknowledges that there is but one God and that Mohammad is his prophate is a Mohammedan. Such a person

may be a Mohammedan by birth or he may be a Mohammedan by conversion. It is not necessary that he should observe any particular rites or ceremony to be an orthodox believer in that religion; no Court can test or gauge sincerity of religious belief. It is sufficient if he professes Mohammedan religion in the sense that he accepts prophetic grant of Mohammedan (Section 19, Chapter 2, page 19 of Mulla's Principles of Mohammedan Law). Thus the real test is of professing Mohammedan religion. As to what is the true import of the term 'profess' fell for consideration of the Supreme Court in *Punjabrao v. D. P. Meshram*, AIR 1965 SC 1179. In para 13 of the said decision the Supreme Court has observed as under:

"13. What cl. (3) of the Constitution (Scheduled Castes) Order, 1950 contemplates is that for a person to be treated as one belonging to a Scheduled Caste within the meaning of that Order he must be one who professes either Hindu or Sikh religion. The High Court, following its earlier decision in *Narayan Waktu v. Punjabrao*, AIR 1958 Bom 296 has said that the meaning of the phrase "professes a religion" in the aforementioned provision is "to enter publicly into a religious state" and that for this purpose a mere declaration by a person that he has ceased to belong to a particular religion and embraced another religion would not be sufficient. The meanings of the word "profess" have been given thus in Webster's New World Dictionary: "to avow publicly; to make an open declaration of;..... to declare one's belief in: as to profess Christ. To accept into a religious order". The meanings given in the Shorter Oxford Dictionary are more or less the same. It seems to us that the meaning "to declare one's belief in: as to profess Christ" is one which we have to bear in mind while construing the aforesaid order because it is this which bears upon religious belief and consequently also upon a change in religious belief. It would thus follow that a declaration of one's belief must necessarily mean a declaration in such a way that it would be known to those whom it may interest. Therefore if a public declaration is made by a person that he has ceased to belong to his old religion and has accepted another religion he will be taken as professing the other religion. In the face of such an open declaration it would be idle to enquire further as to whether the conversion to another reli-

gion was efficacious. The word 'profess' in the Presidential Order appears to have been used in the sense of an open declaration or practice by a person of the Hindu (or the Sikh) religion. Where, therefore, a person says, on the contrary that he has ceased to be a Hindu he cannot derive any benefit from that order." Thus it appears that for a conversion there should be a declaration of one's belief and the said declaration should be in such a way that it should be known to those whom it may interest. If a public declaration is made by a person that he has ceased to belong to one religion and is accepting another religion, he will be taken as professing the other religion.

28. In *Rakeya Bibi v. Anil Kumar Mukherjee*, ILR 1948 (2) Cal 119, Calcutta High Court had an occasion to consider this aspect of the matter in the context of conversion to Islam. Having held that the plaintiff in that case offered herself for conversion and went through the necessary formalities, the Calcutta High Court observed as under:

"The question, however, still remains whether her conversion was a bona fide one or a mere device adopted for the purpose of avoiding the marriage. Mr. Das, who appeared for her, contended on the authority of certain observations made by Ormond J. in the case of *Ayesh Bibi v. Subodh Chandra Chakrabarti*, (ILR (1945) 2 Cal 405): (AIR 1949 Cal 436) that the question of bona fides was wholly irrelevant and, further that no court could determine the bona fides or otherwise of a person's change of faith. We entirely dissent from those propositions. It may be that a court cannot test or gauge the sincerity of religious belief; or that, where there is no question of the genuineness of a person's belief in a certain religion, a court cannot measure its depth or determine whether it is an intelligent conviction or an ignorant and superficial fancy. But a court can and does find the true intention of men lying behind their acts and one certainly find from the circumstances of a case whether a pretended conversion was really a means to some further end. We can see no reason to hold that it is in the nature of things impossible for a court of law to determine whether a conversion was bona fide. Nor can we agree that the question of bona fides is immaterial. In the case of *Skinner v. Skinner* ((1897) ILR 25 Cal 537) the Privy Council, while refer-

ring to the possibility that a change of religion on the part of both the spouses might have the effect of altering rights incidental to the marriage, was careful to add the qualification that such change must be made "honestly" and "without any intent to commit a fraud upon the law." Indeed, it seems to us to be elementary that if a conversion is not inspired by religious feeling and undergone for its own sake, but is resorted to merely with the object of creating a ground for some claim of right, a court of law cannot recognise it as a good basis for such claim but must hold that no lawful foundation of the claim has been proved. Where conversion gives a legal right, to go through a mock conversion and set it up as a basis of that right is to commit a fraud upon the law. We are clearly of opinion that where a party puts forward his conversion to a new faith as creating a right in his favour to the prejudice of another, it is proper and necessary for a court of law to enquire and find whether the conversion was a bona fide one."

Thus in case of a conversion there should be a change of heart and honest conviction in the tenets of new religion in lieu of tenets of the original religion. If a ceremony of conversion is gone into conscientiously after such an honest conviction, then alone there is a conversion of faith or it can be said that a person is professing another religion. In case of conversion from one religion to another a strict proof is required and it cannot be easily inferred. More so when a person converted denies even the factum of conversion. As to whether there is in fact a conversion or not must depend on facts and circumstances of each case and no general rule can be laid down in that behalf.

29. To prove factum of conversion apart from himself the plaintiff has examined P.W. 3 Qazi Mohammad Ali Paloba, (PW 4) Alli M. Shama (PW 5), Abdul Kadar Divekar, (P.W. 6), Yusuf Khan, (P.W. 7) Dr. Bailur, (P.W. 9) Mrs. Parhat Qazi, (PW 10) Hussein Beg and (P.W. 11) Zafar Ali Mirjee. The plaintiff is also relying upon the documentary evidence viz., certain letters as well as the diary of the defendant and an entry in a register maintained by Quazi.

30. The trial court has considered in detail all this evidence and has come to the conclusion that the plaintiff has fail-

ed to prove the factum of conversion. The trial court has given good reasons for coming to this conclusion. As we are in general agreement with the views of the trial court it is not necessary to reproduce the whole evidence over again. (See AIR 1981 SC 1415, Ayodhya Dube v. Ram Sumer Singh). According to the learned Judge the following surrounding circumstances make the story of conversion highly impossible: (1) the first and the foremost circumstance is that the plaintiff as originally filed was totally silent about the alleged conversion; (2) there is no reference to the date of any marriage nor any details are given; (3) the plaintiff admitted in his evidence that he knew that there was a mosque in England and he had also Muslim friends there; therefore it would not have been difficult for him to have arranged for Nikah and conversion ceremonies while the parties were in England and one wonders as to why the plaintiff should wait till their return to India and no explanation is given by the plaintiff for this; (4) it is not pointed out that there was any pressing occasion or pressure which necessitated the conversion of the defendant and the subsequent Nikah; (5) if the father of the plaintiff was an orthodox, then the plaintiff ordinarily would have insisted on the defendant's conversion and would not have allowed his children to be born and brought up without the defendant's conversion to Islam; (6) though the plaintiff speaks about conversion, it is not his case that either his parents or his friends or anybody else had desired that Nikah also should be performed.

31. One is at a loss to understand as to what was the object or purpose or even propriety in performing the second marriage with the same wife over again after about three and half years. No written invitations were issued about the so-called Nikah ceremony. The learned Judge in para 48 of his judgment has observed that the manner in which the ceremonies are stated to have taken place did not appear to him as natural. No Nikahnama is produced. There is no record of conversion. There are no photographs of the ceremonies viz. conversion or Nikah. The entry dated 29-12-1969 is practically at the end of the register and had not seen light of the day till it was produced in court and therefore in substance it is held by the learned Judge that it is doubtful. In our view these circumstances are relevant in appreciating the evidence both oral and documentary

while deciding the issues of conversion and Nikah. The learned Judge of the trial court has considered the oral evidence in the light of these surrounding circumstances and in our view rightly, therefore, it is not possible for us to accept the contention of Shri Mody that the finding recorded by the learned Judge in that behalf is perverse. Apart from these circumstances, in our opinion there are certain other circumstances which made the story of conversion doubtful.

32. The Bombay Registration of Marriages Act, 1953 provides for registration of marriages. This Act came into force in the year 1954 and, therefore, the alleged Nikah which took place in 1969 should have been normally registered under the Bombay Registration Act. Absence of such a registration throws serious doubt on the factum of Nikah. It is pertinent to note that compulsory registration of marriages was recommended by the United Nations so as to have effective check on bigamous marriages. Apart from this registration also supplies reliable proof of marriages and ensures legitimacy etc. Such a provision is also helpful to prevent fake conversion to Islam to evade prohibition of bigamy under other laws.

33. Apart from the fact that there were no written wedding invitations, there is also no signed document in respect of Meher. No document bearing signatures of the parties and witnesses such as Nikahnama, is forthcoming. Apart from this subsequent events viz. opening of a joint account in the Bank in the name of Padma, entry in the ration card, birth certificates, telephone application, insurance policies all show that in all these documents the defendant wife is described as Padma. This clearly negatives the story of conversion. Apart from this the circumstance that none of the defendant's personal lady friends or relatives were invited to the conversion ceremony or Nikah speaks for itself. At the time when the alleged conversion and Nikah took place the last child of the defendant was a sucking child of less than two months' old. Therefore, it appears to be a bit improbable that with a sucking child in her arm the defendant will decide to enter into Islam. According to the plaintiff himself reason for conversion was orthodoxy of his parents and none else. Hence, the oral and documentary evidence produced by the plaintiff to prove the factum of con-

version will have to be considered in this background.

34. The main witness to the conversion ceremony is Qazi Paloba. It is the case of the plaintiff that this witness has acted as Qazi and has conducted the conversion and Nikah ceremony. Qazi Paloba has filed an affidavit dated 12th June 1978 wherein he speaks about the certificate dated 5th May 1978, which is a certificate of marriage. In this affidavit he has not stated anything about conversion. So far as the factum of conversion is concerned, P.W. 3 Qazi Mohammed Ali Paloba has stated as under:

"Whenever the parties come for Nikah I asked them their names. If I find that the party is non-muslim, I ask that person whether he or she was willing to embrace Islam willingly. If that person consents then I make him or her recite Kalma. This is my invariable practice in cases of non-Muslims coming for Nikah". But for saying this he does not speak about the factum of conversion or the fact that in fact the defendant wife was asked to recite any Kalma or he had even asked her name. Thus his evidence is not direct evidence of conversion. Then he speaks about Nikah ceremony. However, in para 4 of his deposition he has stated that he does not remember whether he had prepared at that time Nikahnama form in respect of the present Nikah. He admitted that he belonged to Konkani Jamat, which seems to be Jamat of the plaintiff. He is not aware of the existence of the Bombay Marriage Registration Act. He does not recollect what name was told to him by the defendant, nor he is in a position to say definitely as to whether he had asked the defendant whether she was prepared to embrace Islam religion. In para 7 of his deposition he stated that he cannot remember the place where Nikah took place and in the register the place of Nikah is not entered. He has admitted that so far as the register is concerned, some pages towards the end of the register are blank. He also admitted that he does not maintain any record about converting a person to Islam and he does not hold any Sanad of Qazi. He also did not remember time or the date on which Nikah of the plaintiff was performed. He then admitted that general practice is to keep a record. He also admitted that he takes signatures of both parties after preparing Nikahnama. His attention was drawn to one of such Nikahnama Ex. 8 which related to other

marriage. He also admitted in para 13 of his deposition that the column is provided for Nikah form where the Qazi makes entries such as whether bride is a widowed woman or is a divorcee etc. He also admitted that if bride or bridegroom had been converted to Islam before Nikah, he writes in the column serial number of the certificate issued by Nake Masjid about his or her conversion. He then admitted in para 17 of his deposition that the presence of Vakil is necessary at the time of Nikah to give consent of the bride besides fixing Meher etc. This witness was not in a position to remember anything about Nikah of Zubeda, sister of the plaintiff which took place in the year 1978, though he has tried to depose about Nikah which took place in the year 1969 about 10 years back. In this context it is also pertinent to note that Shri Abdul Aziz Murghey (P.W. 2), who is Naib Qazi of Bombay since the last 25 years and who is examined by the plaintiff to prove Talaqnama has stated in his deposition that his office maintains Nikahnama register which is in the nature of form. He also stated that as a rule he obtains signatures of both the parties to Nikah on the Nikahnama and normally parties do sign Nikahnama. Thus it appears that Nikahnama is normally written. Therefore the learned Judge was quite right in discarding the evidence of Qazi Paloba. This is more so when there is no written record about the conversion and he does not speak about having made the defendant recite Kalma.

35. The other evidence on record viz. the evidence of (P.Ws. 4, 5, 6, 7 and 9) is at the most in the nature of corroboration to the evidence of Qazi (P.W. 3). Therefore if the main evidence of Qazi itself cannot be believed or is of little assistance for proving the factum of conversion and Nikah, then on the basis of other evidence on record it is not possible to record a conclusive finding in that behalf. Ali Shamshi (P.W. 4) is the friend of the plaintiff. So far as his examination-in-chief is concerned, his affidavit dated 9-5-1978 was produced on record and he was tendered for cross-examination. He has stated in his deposition that he had gone alone to attend the marriage. He then stated that in fact Nikah was performed by Qazi in the evening and he does not remember the exact time. He also admitted that he is secretary of the Konkani Ambulance Society and director of Konkani Mercantile Bank

and it appears that the plaintiff is also associated with the said institutions. According to him it was Qazi Paloba who had conducted the conversion ceremony as well as the Nikah ceremony. Though he has stated that before Nikah, conversion ceremony had taken place, it was not possible for him to give the details. He also stated that as far as he remembers the plaintiff had not told him any time about his intention to divorce the defendant. Thus the evidence of this witness is also vague. Abdul Kadar Divekar (P.W. 5) is another witness who is also a friend of the plaintiff. According to him the defendant was made to recite Kalma at the time of conversion. He also stated that he had acted as Vakil at the time of Nikah. He then stated about the subsequent conduct of the defendant and has stated that she was behaving like a Muslim lady meaning thereby that she used to say "Salam", "Khuda Hafiz" etc. In para 13 of his evidence he stated that he may have signed on Nikahnama in both of his marriages. Then in para 14 he stated that as far as he remembers, at the time of Nikah of the plaintiff and the defendant a Nikahnama was written and he had signed over it. He then stated that as far as his memory goes he had signed over only one Nikahnama form at that time. However, so far as the plaintiff is concerned in para 129 of his deposition he stated that he does not remember if he has signed on the Nikahnama at the time of Nikah. Qazi Paloba stated in his deposition that he does not remember whether he had prepared at that time any Nikahnama. Then in para 12 of the deposition Divekar has stated that as 10 years have passed, he does not remember all the details of the ceremony. This witness is alleged to have acted as a Vakil. However in para 15 of his deposition he had admitted that he has not acted as Vakil in any other Nikah except this. He also admitted that at the time of Nikah often bride and bridegroom are made to stay in separate room. He further admitted that ordinarily Vakil is a person from blood relation of bride. He also could not say whether it is a rule that the bride has to give consent or Vakil has to act on her behalf. It was also not possible for him to say as to who actually fixed Meher at the time of Nikah between the plaintiff and the defendant. Thus it is doubtful as to whether he had acted as a Vakil at all. To say the least his evidence is also beautifully vague. Yusuf Khan (P.W. 6)

is a relative of the plaintiff. He also speaks about the conversion and Nikah ceremony which were conducted by Qazi Paloba as well as the subsequent conduct of the defendant. In para 14 of his deposition he has stated that he does not remember whether he had signed over the Nikahnama on 29-12-1969. Then in para 18 he stated that he could not bear what exactly was spoken by Qazi and by the defendant between themselves as he was sitting at a distance and they were talking in a soft voice. Therefore his evidence is to some extent based on his own guess-work. In para 19 of his deposition he admitted that in the marriage of Zubeda Nikahnama was made. He also stated that he could not say whether the Qazi who officiated at the Nikah of the plaintiff and defendant was the same Qazi who officiated at the Nikah of Zubeda. It was then suggested to him that he had an influence over Qazi Paloba as he was Assistant Commissioner of Police (CID) and by using the said influence he had obtained certificate from Qazi. This suggestion was denied by the witness. Thus the evidence of this witness is also of little assistance. The evidence of other witness viz. P. W. 7 Dr. Baillur is also stereo-type. In para 7 he has stated that he was not aware of disputes between the plaintiff and defendant till filing of the suit. It was not possible for him to give details about the marriage ceremony of Farhad, the sister of the plaintiff, which was a recent one and he had attended the said marriage. This witness is a close friend of the plaintiff. P.W. 9 Farhad is the sister of the plaintiff. At the time of alleged conversion and Nikah she was about 14 or 15 years of age. Initially in the examination-in-chief she stated that she does not remember as to whether the plaintiff and the defendant were married again according to Muslim rites after their coming to India. Thereafter Interpreter was called and then the questions were again asked to her in Urdu. This witness has studied up to B.A. standard and therefore it cannot be said that earlier she could not understand the question. She has admitted that the marriage photographs were taken at the time of her marriage. She also stated that she does not know what customs the defendant wife was following prior to 29-12-1969 but according to her after that date she was following Muslim customs. She also stated in para 2 of her deposition that even prior to the conversion and Nikah ceremonies she

herself and members of her family used to know the defendant as Pervin. From her evidence it is clear the photographs were being taken at the time of marriages. Admittedly no photographs were taken when the marriage of the plaintiff and defendant took place in England. On record, there are one or two photographs of the father of the plaintiff. Therefore the absence of photograph at such an important function when both the plaintiff and the defendant are not only educated but were leading a modern life is a circumstance which is relevant for deciding the theory of conversion and subsequent Nikah. So far as the plaintiff's evidence is concerned, it is obviously an interested testimony. To say the least the other evidence on record can only render corroboration to the evidence of Qazi Paloba who had conducted the conversion as well as Nikah ceremonies. Once his evidence is disbelieved, then obviously the other evidence is not of much assistance to prove the factum of conversion. We have also on record the earlier affidavits filed by plaintiff and his father. These affidavits were filed in the year 1978. The evidence of the defendant is obviously negative. However, it is pertinent to note that since very beginning she is denying the factum of conversion and Nikah. Nothing has been suggested as to why she should decide to get herself converted to Islam and have a Nikah ceremony. It is no doubt true that she had made certain incorrect statements in her deposition. But that part of the evidence is not relevant for deciding the question of conversion and Nikah. According to her there was no conversion and Nikah and the whole story is false. Further we do not find any good or compelling reason so that the defendant should decide to get herself converted to Islam. Her case of denial gets substantial corroboration in subsequent events namely the opinion of Bank account, entries in birth register and ration card wherein her name is still shown as Padma. Therefore, to us the whole story of conversion and subsequent Nikah sounds most improbable. If the said case of the plaintiff is tested on the touchstone of probabilities, it will have to be held that the plaintiff has failed to prove conversion or Nikah. Therefore, if cumulative effect of all this evidence is considered together with the surrounding circumstances, it cannot be said that the view taken by the trial Court is not the correct view of the evidence.

36. So far as the evidence relating to the subsequent conduct of the defendant

is concerned, viz., her observing Muslim festival or her adopting certain modes of behaviour, which are consistent with Muslim form of behaviour, in our view that cannot change the complexion. After all the defendant wife had chosen to marry a Muslim husband. Her children were also Muslim. Most of the relatives and friends of the husband with whom the defendant had to associate and keep relations were Muslim and therefore it is but natural that she had adopted certain norms of behaviour which were consistent with Muslim culture. It is not disputed by Shri Mody that from this alone an inference of conversion cannot be drawn. On the other hand the other documentary evidence on record, namely the entry in the ration card, recitals in the application for telephone, entries in the birth certificates pertaining to birth of Sabir clearly indicates that there was no conversion. The learned Judge of the trial court has considered this aspect of the matter in paras 60 to 73 of his judgment and has rightly come to the conclusion that her said conduct does not lead to inference that she was converted to Islam or was professing Muslim religion. Even otherwise the alleged conversion was motivated by orthodoxy of plaintiff's parents and was not with noble sentiments. It does not show honest conviction or change of heart of faith in Muslim religion.

37. Once such a finding is recorded, then so-called talaq loses all its efficacy and, therefore, we do not propose to deal with the said evidence. Once it is held that the marriage between the defendant and the plaintiff solemnized in England in 1966 is governed by the Foreign Marriage Act, then obviously it cannot stand dissolved by unilateral talaq. It is rather surprising that though the marriage solemnized in England in 1966 was subsisting, the plaintiff has put up a story of second marriage in Nikah form with the same wife in December 1969. Even if it is assumed that the subsequent Nikah is established, earlier monogamous and secular marriage of 1966 cannot get merged in subsequent Nikah. In our opinion the marriage which took place in England in 1966 under British Marriage Act, 1949 is still subsisting as it has not been lawfully dissolved till today. Therefore we generally agree with the appreciation of the evidence as well as the findings recorded by the learned trial Judge in this behalf.

38. In the view which we have taken it is not necessary to make any detailed reference to various decisions cited at the Bar either for the plaintiff or the defendant.

39. However, it is contended by Shri Mody that even if it is held that the marriage of the plaintiff with the defendant is still subsisting then also this is a fit case where injunction should be granted in favour of the plaintiff restraining the defendant from entering into the premises in Paradise Apartment. According to Shri Mody from the tenor of the evidence on record it is clear that their living together in the same house is an impossibility. The defendant had gone to the extent of making false allegations against the plaintiff vide her letter Exhibit C. According to Shri Mody, learned trial Judge was not right in coming to the conclusion that the said letter was written by her in a feat of anger or it could be explained as abuses from an angry woman. According to Shri Mody, the wife who has gone to the extent of making such false allegations against her husband should not be permitted to live in the same house. Further the plaintiff husband had got a reasonable apprehension of danger to his life and to his reputation from her if she continues to live with him under the same roof. Shri Mody has also submitted that an injunction could be granted in favour of the plaintiff subject to certain terms and conditions and she could also be granted reasonable maintenance. According to Shri Mody in law wife has no specific right against her husband to be provided with any particular house nor she has a right to live in a particular portion of the house. He also contended that in the present case there is ample evidence on record to show that the defendant wife is motivated by desires of revenge, which is amply clear from the entries in her diary, as well as her letter Exh. C and therefore this is a fit case wherein an injunction should be granted in favour of the plaintiff on payment of certain amount towards maintenance. On the other hand it is contended by Shri Parekh that all through it is the case of the wife that the flat in Paradise Apartment is jointly owned by her or in any case is her matrimonial home. She has also pleaded that her articles including her telephone, is inside the matrimonial home. The defendant was residing in her matrimonial home till the date of insti-

tution of her suit and as long as the marriage is subsisting the husband has no right to throw his wife out of their matrimonial home. He also contended that the trial court as well as the first appellate court have exercised their discretion judicially and this court sitting in the Letters Patent Appeal cannot make out an altogether new case in favour of the plaintiff nor the plaintiff can be permitted to make out an altogether new case in this appeal. According to Shri Parekh this is not a fit case wherein any interference is called for in this Letters Patent Appeal which is in substance a second appeal. He also contended that in the trial court no injunction was sought for subject to certain terms and conditions including payment of maintenance. At the first appellate stage at the last minute an affidavit was filed but at that stage the defendant had no opportunity to file a counter. He also contended that after the decision in the first appeal, the stay was refused by the High Court and the leave petition filed against it was also dismissed by the Supreme Court and since then the husband and wife are living in the same premises. No material is placed on record by the plaintiff husband to indicate that their living together is not peaceful. He also contended that during the course of the arguments in this Letters Patent Appeal the Court indicated to Mr. Karim, learned Advocate on record for the plaintiff that if he so desires, he can file an application indicating as to how the plaintiff will be providing an alternate accommodation and maintenance to his wife; but such an application is not filed. Therefore, according to Shri Parekh in the absence of any such application, the plaintiff is not entitled to any relief in this Letters Patent Appeal. It is also contended by Shri Parekh that the plaintiff's conduct all through was such that he cannot be heard in equity. It is also submitted by him that the plaintiff has filed a separate suit on the Original Side of this Court bearing Suit No. 1413 of 1978 wherein he has sought for a declaration that he is the absolute owner of the flat in the Paradise Apartment. He has also asked for a permanent injunction restraining the defendant wife from entering into the said premises. Thus the question of ownership of the flat is sub judice and until it is decided it cannot be assumed that the plaintiff is the sole owner. In the said plaint the plaintiff has made a reference to the injunction

earlier granted by this Court in Appeal from Order No. 251 of 1978, therefore, if so advised, he can approach the High Court in the said suit for an injunction on terms or otherwise and in that case the defendant will have an opportunity to put forward her case. According to Shri Parekh granting an injunction in the present case either on terms or otherwise will be most inequitable and will prejudice the case of the wife in the suit filed on the Original Side.

40. Having regard to the facts and circumstances of the present case, in our opinion, this is a fit case wherein an injunction subject to certain terms and conditions should be granted. From the bare reading of the letter, Exhibit 6, wherein respondent wife has made an allegation against the petitioner husband about his incestuous relationship we are more than satisfied that their living together is an impossibility. Shri Mody is also quite justified in complaining that she is motivated by desires of revenge. He is supported in his contention in this behalf by the entries in her diary. It further appears that not only in the trial Court but even at the first appellate stage various efforts were made for reconciliation or settlement. Such efforts were also made during the pendency of this Letters Patent Appeal also. However all these efforts failed. This clearly indicates that the relations between the parties are strained beyond reconciliation and the marriage has broken down beyond repairs. In these circumstances it will not be in the interest of either parties to force them to live together. Assuming that the residence in the Paradise Apartment is matrimonial home of the respondent wife, the wife has no specific right against her husband to live in the whole of the house or in any particular portion of the house. The flat in Paradise Apartment is big enough to allow the parties to live there separately by effecting suitable partition. This will be also in interest of children who are away for education but come home in vacations. It is clear from the record that both mother and father have love and affection for the children. Therefore if the parties are allowed to live though separately in the same house, the children will be in a position to enjoy the company of their parents when they come home. Therefore in our opinion it will be just and fair if an injunction is granted to the plaintiff on the condition that he will ef-

fect a partition in the flat as suggested in the plan submitted by the learned counsel for the defendant-wife and is also directed to pay her maintenance on an ad hoc basis. It is not disputed that the Court has jurisdiction to pass such a conditional order of injunction. In our view such an order is absolutely necessary in this case to do justice between the parties before us. The plaintiff is an eminent surgeon. Therefore he must have a peace of mind to enable him to discharge his duties as a surgeon more efficiently. Unless there is peace at home, such a peace of mind is an impossibility. Therefore in our view this is a fit case wherein the plaintiff should be granted an injunction though on certain terms and conditions, till the matter is decided in the suit pending on the Original Side of this Court or in any other appropriate proceedings.

41. It is submitted by Shri Parekh that in case Court comes to the conclusion that it is necessary to grant interim injunction, then the defendant wife should be given a portion of the flat as outlined by him in red boundary in the map accompanying his written submissions on the condition that the appellant-plaintiff shall pay all outgoings and shall not effect any sale or create third party rights or tenancy in respect of the flat. He should also be directed to pay additional ad hoc maintenance per month to the defendant from the date of the order in this appeal as the Court considers proper till quantum of maintenance is fixed by the order of the Court of competent jurisdiction in any other proceeding. In the plan submitted by Shri Parekh he has made a reference to points Nos. 1, 2, 3 and 4, which are doors and which will be closed and E 2 will be the defendant's entrance and at points 5 and 6 a notional or real partition will have to be created. E 1 which is a servant's room or passage marked 'A' can become kitchen. The hall, dining room, bedroom, toilet and two balconies will remain with the plaintiff and the other smaller portion which is less than one-third could be allotted to the defendant wife where-in she can live separately. Shri Parekh has further submitted that at points 5 and 6 where the partition will be constructed, the partition should have a door so that at least children can use both the parts of the flat. In our opinion the arrangement suggested by Shri Parekh in the plan attached to his written submission is most reasonable and if the plain-

tiff husband is granted injunction obviously subject to the decision or orders in suit bearing No. 1413 of 1978 pending on the Original Side, it will meet the ends of justice. This will be subject to the further term of paying additional ad hoc maintenance of Rs. 1,000/- per month to the defendant by the plaintiff from the date of the order of this Court in this Letters Patent Appeal, till the quantum of maintenance is fixed by the Court of competent jurisdiction in any other proceeding instituted by either of the parties. To that extent the appeal deserves to be allowed.

42. In the result, therefore, the appeal is partly allowed and the defendant will be restrained from entering into the portion of the flat, which is outlined in the map kept on record and which is reserved for the residence of the plaintiff after he effects a notional or real partition at points 5 and 6 i.e. door in between. The injunction will become operative from the date on which such partition is actually effected. The injunction will also be subject to the condition that the plaintiff shall pay to the defendant an amount of Rs. 1,000/- (one thousand) per month, on or before the 10th of each month, towards ad hoc maintenance subject to the fixation of the maintenance by a Court of competent jurisdiction in any other proceedings. The parties shall not effect any sale or create third party interest or tenancy rights qua the flat, of course subject to the order of the Courts of competent jurisdiction. The plaintiff will be liable to pay all outgoings including taxes etc. qua the portion of the flat in occupation of the defendant. Since we have decided major issues against the appellant plaintiff in this appeal, in our opinion this is a fit case where the appellant husband should be directed to pay costs of this appeal to the defendant, which is quantified at rupees one thousand (Rs. 1,000/-). The map produced is taken on record. In the view which we have taken no order on cross-objection are necessary. Counter-claim as decreed stands modified in terms of our aforesaid final order.

Appeal partly allowed.

AIR 1982 BOMBAY* 365**CHANDURKAR AND MEHTA, JJ.**

Hind Construction and Engineering Co. Ltd., Appellant v. Union of India. Respondent.

Appeals Nos. 273, 274 of 1976, D/- 23-12-1981.

(A) Arbitration Act (10 of 1940)
S. 2 (a) — Works contract containing arbitration clause — Term in contract for certificate of Engineer after completion of contract — Parties going to arbitration by consent long prior to completion — Held, on facts of case it was impossible to hold that certificate was condition precedent to entertainment of claim. (Para 11)

(B) Arbitration Act (10 of 1940), S. 2 (a) — Works contract — Term in contract for certificate of Engineer — Arbitration clause empowering arbitrator to open up, review and revise certificate — Effect of absence of certificate.

An arbitration clause in general terms a fortiori if it empowers the arbitrator to open up, review and revise any opinion or certificate of Engineer or specifically mentions disputes arising on the withholding of a certificate, will, in the absence of any provision to the contrary, empower the arbitrator to disregard a certificate or the absence of one. In a case where finality to any certificate is not specifically attached under the contract, the wide power given to the Arbitrator to open up, review or revise any certificate would enable him to consider the entire dispute referred to him and the absence of any certificate under the contract would not affect the claim. *Brodie v. Cardiff Corporation* (1919) AC 337 and *Neale v. Richardson* (1938) 1 All ER 753 and *Prestige v. Brattell* (1938) 4 All ER 346 Followed; *East Ham Corporation v. Bernard Sunley & Sons Ltd.* 1966 AC 406 and *Morgan v. Birnie*, 9 Bing. 672 Distinguished. (Paras 15, 20)

Cases Referred: Chronological Paras

1966 AC 406: (1965) 3 WLR 1096: (1965) 3 All ER 619 *East Ham Corporation v. Bernard Sunley & Sons Ltd.* 19

*Only portions approved for reporting by High Court are reported here.

(1957) 1 WLR 1102: (1957) 3 All ER 344, *Dunlop v. Herdall* 22
 AIR 1955 SC 468 8
 (1938) 1 All ER 753: 158 LT 308: 54 TLR 539 *Neele v. Richardson* 15, 16, 17, 18
 (1938) 4 All ER 346: 55 TLR 59: 82 SJ 929 *Prestige v. Brettell* 15, 18, 18A
 (1920) 2 KB 169: 123 LT 198: 89 LJ KB 805 *Eagleshan v. McMaster* 22
 (1919) AC 337: 120 LT 417: 88 LJ KB 609 *Brodie v. Cardiff Corporation* 15, 16, 17, 18
 (1865) 18 CB NS 278: 11 LT 679: 144 ER 450 *Clarke v. Watson* 22
 (1858) 44 ER 1297: 3 DE G & J 334 *Scott v. Corporation of Liverpool* 22
 (1833) 9 Bing 672: 131 ER 766: 3 Moo & S 76, *Morgan v. Birnie* 21

S. S. Ray with N. R. Khaitan i/b M/s. Mulla & Mulla and Craigie Blunt and Caroe (in Appeals Nos. 273 and 274 of 1976), for Appellant; H. H. Advani with R. L. Dalal (in Appeal No. 273 of 1976) and H. H. Advani with A. M. Setalvad (in Appeal No. 274 of 1976) For Respondent.

CHANDURKAR, J.:—This Judgment will dispose of Appeals Nos. 273 & 274 of 1976. Both these appeals arise out of two judgments delivered by Lentin J. in two Award Petitions which were filed by the Appellant Company, hereinafter referred to as 'the Contractor' for setting aside two Awards, dt. 14th Feb. 1974 arising out of disputes between the Contractor and the Union of India, the Respondent herein, in respect of a contract of construction for the development of the Naval Dockyard at Bombay, for which the tender of the Contractor was accepted by the Government of India. In view of the limited challenge to the two Awards, both in the trial Court as well as in this Court, it is not necessary to set out in detail the events which led to the contract of construction. It is sufficient to state that in connection with the scheme for the development of the Bombay Harbour in or about 1952, the Government of India had entered into an arrangement with a concern known as "Sir Alexander Gibb and Partners", referred to hereafter as "AGP Engineers" for the preparation of a detailed design after carrying out the necessary survey and investigation. The contract which was intended to be given

to the Contractor was intended for the work which was described as follows:—

1. Rock breaking and dredging.
2. Dredging of soft material.
3. Construction of Barracks and Destroyer wharves standing on vertical cylinders.
4. Boat Pond wall.
5. Custom Basin wall.
6. Mint storm water culverts and mint reclamation.

The Government of India invited global tenders for this work. The Contractor's tender was accepted by the Government in Aug. 1954 and the contract was formally signed on 2nd Sept. 1954. Works Order under Cl. 41 of the contract was issued on 24th Sept. 1954.

2. However, before the completion of the works, the Contractor addressed letters, dt. 9th June 1956 and 11th June 1956 to the Government, informing the Government of India that the Contractor had stopped the work of dredging and rock breaking. Finally on 4th Sept. 1956, after attempts to make some amicable settlement to enable the Company to complete the work had failed, the Contractor informed the Government that they were taking steps to wind up the organisation and that the plants, machinery, stores etc. lying at the site would be at the risk and responsibility of Government. Government thereupon forfeited the contract under Cl. 63 of the Agreement of Contract, which we shall shortly reproduce, and entered the site on 27th/28th Dec. 1956. On 2nd Feb. 1957 Government finally decided to carry out the unfinished contract works departmentally.

3. On or about 26th Dec. 1956, the Contractor served a Notice u/s. 80 of the Code of Civil Procedure on the Union of India, but later on invoked Cl. 66 of the contract for arbitration. Mr. J. M. Mazumdar, retired Judge of the Calcutta High Court was appointed sole Arbitrator. Unfortunately, after entering on the reference, he expired before any evidence could be recorded. Thereafter the Union Government appointed Mr. Bishan Narain, retired Judge of the Punjab High Court to act as the sole Arbitrator and the Arbitrator entered upon the reference on 15th April 1961. Before the Arbitrator, the Company claimed an amount of Rs. 84,47,527/- on various grounds. The Respondent Union

of India made a counter-claim against the Contractor for Rs. 2,65,00,000/-. In the course of the proceedings before the Arbitrator, a question arose as to whether the Arbitrator had jurisdiction to entertain the Respondent's counter-claim aggregating to Rs. 2,65,00,000/-. Thereupon the Union of India by its letter, dt. 8th Jan. 1962 appointed the Arbitrator as the sole Arbitrator under Cl. 66 of the contract to adjudicate upon the claim of the respondent contained in Parts A, C and D of the Respondent's pleadings filed before the Arbitrator on 1st June 1961. On 9th Jan. 1962, the Arbitrator entered upon the Reference. On 11th Jan. 1962 both the parties made a joint submission giving their consent "to the learned Arbitrator opening reference on Jan. 9, 1962 on all matters referred to him by the Secretary, Ministry of law, Government of India, vide his Instrument dt. Jan. 8, 1962, in spite of the fact that the works have not yet been completed." Prior to that, on 9th Oct. 1961, both the parties had already filed a joint application empowering the Arbitrator to adjudicate upon all disputes arising in the case and on the next day, they had also filed a joint application that the Government's counter-claim for — Rs. 2,65,00,000/- was covered by reference to arbitration already made by the Law Secretary on 30-3-1961. On 8th Jan. 1962, fresh appointment was, however, made by the Law Secretary as the Arbitrator was of the view that the agreement of parties did not confer any jurisdiction upon him and he had, therefore, suggested to the Counsel for the Government to reconsider the matter and get a new reference made relating to the Government's counter-claim and thus avoid complications later on.

4. By a further agreement between the parties, dt. 31-3-1964, the Arbitrator was appointed as the sole Arbitrator to adjudicate upon claims made by the Government in Ex. E. of Part D of the Government's pleadings filed before the Arbitrator on 1st June 1961. All the three references were consolidated by consent of parties and time for making the Award was extended from time to time and finally till 31st Mar. 1974.

5. On 14th Feb. 1974, the Arbitrator made three Awards. By the first Award, in the reference made by the letter, dt. 30th Mar. 1961, which dealt with the claim of the Contractor, the Arbitrator found an amount of Rs. 17,85,146/- due

to the Contractor from the Government of India. In the second Award made in respect of the counter-claim made by the Government of India, the Arbitrator found a sum of Rs. 30,27,300/- due from the Contractor to the Government of India. In the third Award made in the reference, dt. 31-3-1964 the Arbitrator found a sum of Rs. 3,27,881.90 being due from the Contractor to the Government of India. The sum total of all these three Awards was that finally the Contractor was liable to pay Rs. 15,70,035.90 to the Government of India. The first Award was challenged by the Contractor in Award Petition No. 31 of 1974, which was rejected by the learned Single Judge and that order is challenged in Appeal No. 273 of 1976. The second Award was challenged in Award Petition No. 32 of 1974, which was also rejected, and that decision is challenged in Appeal No. 274 of 1976. We shall first deal with Appeal No. 274 of 1976 which deals with the validity of the second Award.

6. Before the learned single Judge the second Award was challenged on four grounds: firstly, that the learned Arbitrator had misconstrued Cl. 63 (3) of the conditions of contract; secondly, that in the matter pertaining to "grabbing" the learned Arbitrator wrongly rejected an admission made by a witness for Government and erroneously relied on an admission made by the petitioner's witness; thirdly, that in the matter pertaining to "Soft Dredging", the Contractor's submission on mitigation of damages was wrongly rejected by the learned Arbitrator and fourthly, in assessing the amount spent by the Government in excess of the reasonable amount, by reason of delay in the completion of the works, the learned Arbitrator arrived at conclusions which were inconsistent with his own findings. All these four contentions were rejected by the learned single Judge, and we may point out at this stage that when the appeal was argued before us by Mr. Ray, only the first and the fourth submissions were canvassed.

7. Before we refer to the two submissions, made before us by Mr. Ray, it is necessary to reproduce Cl. 63 (3) and Cl. 66 of the contract. Cl. 63 (3) reads as under:—

"If the employer shall enter and expel the contractor under this clause he shall not be liable to pay to the contractor any money on account of the contract until the expiration of the period of maintenance and thereafter until the costs of completion and maintenance, damages for delay in completion (if any) and all other expenses incurred by the Employer have been ascertained and the amount thereof certified by the Engineer. The Contractor shall then be entitled to receive only such sum or sums (if any) as the Engineer may certify, would have been due to him upon due completion by him after deducting the said amount. But if such amount shall exceed the sum which would have been payable to the Contractor on due completion by him then the Contractor shall upon demand, pay to the Employer the amount of such excess and it shall be deemed a debt due by the Contractor to the employer and shall be recoverable accordingly."

Cl. 66 reads as under:—

"If any dispute or difference of any kind whatever shall arise between the Employer or Engineer on one side and the Contractor on the other in connection with or arising out of the contract or the carrying out of the work (whether during the progress of the works or after the completion and whether before or after the determination, abandonment or breach of the contract) the Engineer on behalf of the Employer, will endeavour to reach an agreement on the point in dispute with the Contractor and failing such agreement the aggrieved party may require that the dispute should be referred to an arbitrator appointed by the Secretary to the Ministry of Law, Government of India, provided always that notwithstanding the disagreement by the contractor any direction given by the Engineer shall be final and binding on the contractor until the completion of the work and shall forthwith be given effect to by the contractor who shall proceed with the work with all due diligence. All references to the arbitrator shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act 1940 or any statutory enactment or amendment thereof for the time being in force.

Such arbitrator shall have full power to open up, review and revise any deci-

sion, opinion, direction, certificate or valuation of the Engineer and neither party shall be limited in the proceedings before such arbitrator to the evidence or arguments put before the Engineer for the purpose of obtaining his decision above referred to. The award of the arbitrator shall be final and binding on the parties. Such reference except as to the withholding by the Engineer of any certificate or the withholding of any portion of the retention money under Clause 60 hereof to which the contractor claims to be entitled or as to the exercise of the Engineer's power to give a certificate under Clause 63 hereof shall not be opened until after the completion or alleged completion of the works unless the written consent of the Employer and the Contractor. Provided always:—

What is contended before us by Mr. Ray is that on an interpretation of Cl. 63 (3) of the contract, no claim can be filed by either the Contractor or the Employer either before the Arbitrator or anybody else before the grant of the certificate by the Engineer as envisaged in that Clause. It was contended that want of a certificate contemplated by Cl. 63 (3) will go to the root of the matter and if the Contractor is held liable without the certificate of the Engineer, then this would render the matter different in substance from what was stipulated for by the parties. In other words, the contention is that a certificate under Cl. 63 (3) of the contract is a condition-precedent before the Government of India could canvass its counter-claim and no such certificate having been obtained from the Engineers, the counter-claim was liable to be rejected. The learned Arbitrator had held that Cl. 63 (3) did not require the AGP Engineers to issue any certificate for the works done by the Government of India after forfeiture of the contract, and the learned Arbitrator recorded a finding in the alternative that the AGP Engineers were in error in not granting completion certificates as the rock-breaking work had been substantially completed. The learned Arbitrator held that the firm of AGP is a firm of Engineers and not that of Cost Accountants and its duties and powers are described in Cl. 2 of the contract, which inter alia provided "to watch and supervise the works and to test and examine any mate-

rial to be used or workmanship employed in connection with the works." According to the learned Arbitrator, under the contract, AGP had no power to control the expenses incurred by the Company or by the Government, and under Cl. 63 (3), AGP could only ascertain and certify the amount spent and, therefore, this provision was neither a condition precedent nor mandatory. The learned Arbitrator further held that "AGP's failure to issue such a certificate could not possibly deprive the Government from recovering the extra amounts spent by it in completing the works," and that it was not for the AGP to certify reasonableness of such expenses. The learned Arbitrator, therefore, held that it was open to him to ascertain and determine the amount of reasonable expenses incurred by the Government under Cl. 63 (3) of the contract. The Arbitrator pointed out that the reference was made when the Government was in the process of completing the works and the basis of the claim originally made was completion of the contract works under Cl. 63 (3) and the amount specified in the claim consisted of expenses already incurred and estimate of expenses to be incurred; this amount was not ascertained at that time and was only an estimate, but by the time the Award was made, the expenses were ascertained. The Arbitrator also referred to the joint applications of the parties, dt. 9-10-1961, 10-10-1961 and 12-1-1962 which clearly expressed "the parties' intention and position that I should decide all claims relating to both periods." According to the Arbitrator, any other conclusion would amount to multiplicity of legal proceedings and such a conclusion must be avoided.

8. With regard to Cl. 63 (3) of the contract, the learned Judge took the view that he was not sitting in appeal over the reasonings and findings of the learned Arbitrator who had taken all the factors into consideration, and even assuming that the Court might come to a different conclusion, that by itself was not sufficient to set aside an award. The limitations were strictly prescribed by S. 30 of the Arbitration Act beyond which it was not permissible to travel. According to Mr. Ray, the finding recorded by the learned Arbitrator that the requirement of a certificate under

Cl. 63 (3) was not a condition precedent was an error apparent on the face of the record and since the arbitrator proceeded on the erroneous view of the matter that certificate was not a condition precedent, the correctness of the finding on the question of law could be gone into. Reliance was placed on the decision of the Supreme Court in *Thawardas Pherumal v. Union of India*, AIR 1955 SC 468 where the Supreme Court pointed out that an arbitrator cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. It was held that he is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the Court provided his error appears on the face of the award. The exception to this was when the parties choose specifically to refer a question of law as a separate and distinct matter. When the matter was argued before us on behalf of the respondent, the hearing proceeded on the footing that the correctness of the finding given by the learned Arbitrator as to whether a certificate under Cl. 63 (3) was a condition precedent to be satisfied by the Government of India before the counter-claim was made, could be looked into u/s. 30 of the Arbitration Act. We need not, therefore, go into the contention whether the correctness of the finding could be validly looked into or not. The contention advanced before us on behalf of the appellant is based on certain decisions which are referred to in Ch. 7, S. 3 in *Hudson's Building and Engineering Contracts*, Tenth Edition under the heading "Whether Certificate, Satisfaction or Approval a Condition Precedent to Builder's Right to Sue."

9. Now, before we go to these authorities, it is necessary to refer to the relevant terms of the contract. Cl. 63 of the contract empowers the Government of India, under certain circumstances, to enter upon the site and the works and expel the Contractor therefrom without thereby avoiding the contract or releasing the Contractor from any of his obligations or liabilities under the Contract or affecting the rights and powers conferred on the Employer (the Government of India) or the Engineer (AGP) by the contract and the Government of

India could complete the works or employ any other contractor to complete the works and the Employer or such other contractor could use for such completion so much of the constructional and Dredging Plant, temporary works equipment, transport and materials on the Site as the Employer or the Contractor may think proper. This clause refers to the power of forfeiture and one of the circumstances in which this power of forfeiture can be exercised is that the Contractor has abandoned the contract. We are not concerned with the other grounds of forfeiture. Under Cl. 63 (1), therefore, it is open to the Employer (Government of India) to complete the works after entering upon the site and the works. Under Cl. 63 (2) the Engineer has to determine either *ex parte* or by or after reference to the parties or after such investigation or inquiries as he may think fit to make or institute and certify what amount had at the time of such entry and expulsion been reasonably earned by or would reasonably accrue to the contractor in respect of work then actually done by him under the Contract and what was the value of any unused or partially used materials, any plant and temporary works equipment or transport on the site. Then we come to Cl. 63 (3). Cl. 63 (3) is headed "Payment after Forfeiture." It is expressly provided in that clause that the Employer shall not be liable to pay to the Contractor any money on account of the Contract in the case of forfeiture until the expiration of the Period of Maintenance and thereafter until the costs of completion and maintenance, damages for delay in completion (if any) and all other expenses incurred by the Employer have been ascertained and the amount thereof certified by the Engineer. Cl. 63 (3) also provides for the quantum which the Contractor is entitled to get. The Contractor will be entitled to get only such amount as the Engineer may certify, would have been due to him upon due completion by him after deducting the said amount, i.e. the amount which the Contractor would be entitled to receive will be the difference between the amount which he would have earned if he had duly completed the contract and the expenses incurred by the Employer on account of costs of completion and

maintenance as well as after taking into account the damages for delay in completion. The Period of Maintenance in the instant case was 12 months calculated from the date of completion of the works certified by the Engineer in accordance with Cl. 48. Cl. 48 refers to the Certificate of Completion of Works. Cl. 47 refers to the Liquidated Damages for Delay under which if the Contractor failed to complete the Works within the time prescribed, he was to pay to the Employer the sum stated in the Tender as liquidated damages for such default — the amount specified in the instant case being Rs. 7,200/- per week — and the Employer had the right without prejudice to any other method of recovery, to deduct the amount of such damages from any moneys in his hands due or which may become due to the Contractor. Cl. 63 (3) further provides that if the amount of costs of completion and maintenance, damages for delay in completion (if any) and all other expenses incurred by the Employer exceeded the sum which would have been payable to the Contractor on due completion by him, then the Contractor shall upon demand pay to the Employer the amount of such excess and it shall be deemed a debt due by the Contractor to the Employer and shall be recoverable accordingly.

10. The counter-claim of the Union of India made before the Arbitrator was under this later clause of Cl. 63 (3) and the question is whether a certificate of the Engineers was a pre-condition before this claim could be entertained or granted. Now, according to Cl. 66, if there was any dispute or difference of any kind whatever between the Employer or Engineer on one side and the Contractor on the other, in connection with or arising out of the contract, primarily it was the Engineer who had to endeavour to reach an agreement on the point in dispute, and failing such agreement the aggrieved party had the right to require that the dispute should be referred to an Arbitrator appointed by the Secretary to the Ministry of Law, Government of India. The powers of the Arbitrator are given in the second paragraph of Cl. 66 and it shows that the Arbitrator had the power to open up, review and revise any decision, direction, certificate or valuation of the Engineer and neither party was limited

in the proceedings before such Arbitrator to the evidence or arguments put before the Engineer for the purpose of obtaining his decision on the dispute. Normally, under Cl. 66 a reference is not to be opened until after the completion or alleged completion of the works, except in respect of three matters viz.

(1) Withholding by the Engineer of any certificate;

(2) Withholding of any portion of the retention money under clause 60 to which the Contractor claims to be entitled; and

(3) As to the exercise of the Engineer's power to give a certificate under Cl. 63.

However, it is provided in Cl. 66 that in respect of other matters, the reference can be opened with the written consent of the Employer and the Contractor. The effect of clause 66 is that in respect of the three matters referred to above, the reference could be opened before the completion or alleged completion of the works. It is obvious, therefore, that when clause 66 specifically provides that the reference as to the Engineer's power to give a certificate under Cl. 63 can be opened before the completion of the works, the reference cannot be to anything else except clause 63 (2) which refers to the valuation at the date of forfeiture. That clause specifically requires the Engineer to certify what amount (if any) at the time of entry of the Employer and the expulsion of the Contractor, the Contractor had reasonably earned on the date of forfeiture. Such a reference alone could be opened prior to the completion. Reference in respect of all other disputes had to be postponed after the completion or alleged completion of the works, unless the parties agreed in writing to have the reference opened.

11. Now, it is no doubt true that clause 63 (3) refers to the Engineer ascertaining the costs of completion and maintenance, damages for delay in completion and all other expenses incurred by the Employer and this amount will be certified by the Engineer. The occasion to certify this amount can arise only after the completion of the contract. As a matter of fact, the right

of the Contractor to claim any moneys in terms of clause 63 (3) can arise only after the completion of the works. No claim for any amount due or alleged to be due from the Employer to the Contractor could have been made under clause 63 (3) before the completion of the contract. Thus, clause 63 (3) comes into operation only after the completion of the work contract. Now, admittedly in the instant case, both the parties have gone to the Arbitrator before the completion of the contract. Indeed, originally the first arbitration proceeding was taken by the Contractor after they had served a Notice under Section 80 of the Civil P. C. Admittedly, at that time, the contract was not complete and it is not in dispute that the Contractor took recourse to the procedure for arbitration under Cl. 66 prior to the completion of the contract. Now, if the parties have, by consent, gone to arbitration in respect of their disputes prior to the completion of the contract itself and prior to the time when the said Cl. 63 (3) could really become effective, it is difficult to see how any certificate as contemplated by Clause 63 (3) could be treated as a condition precedent which had to be satisfied by the Government of India before making their counter-claim. Mere reference to Cl. 63 (3) by the Arbitrator that the claim was under Cl. 63 (3) would not necessarily imply that all the conditions under Cl. 63 (3) would also have to be satisfied. When the Arbitrator was relying upon the fact that the claim was under clause 63 (3), obviously it was intended to convey that the rights and liabilities of the parties had to be determined on the basis that the Contractor would be entitled to claim the difference between such amount as he would have earned if the contract was completed and the costs of completion and maintenance, damages for delay and the other expenses incurred by the Union of India. This was the mode of determining the quantum of liability of the parties against each other and that was why a reference to clause 63 (3) was required to be made by the Arbitrator. The Arbitrator was, therefore, clearly right when he took the view that no certificate under clause 63 (3) was required to be issued. Indeed, when the parties by consent have gone to arbitration long before the completion of the

works and when the certificate contemplated by clause 63 (3) was a certificate after completion, it is difficult to see how the certificate could be required as a condition precedent on the facts of the case.

12. Even otherwise the question as to whether a certificate, which is normally contemplated by such contracts, has to be obtained as a condition precedent before the claim is made, will have primarily to be decided on the basis of the intention of the parties to be deduced from the contract, and as pointed out by Hudson at page 404 'there is no magic in the existence of a contractual provision as to a certificate.' We have not been shown any provision in the contract which indicates that the parties ever intended that any certificate is to be treated as conclusive by the parties under the contract. In Halsbury's Laws of England, Fourth Edition, paragraph 1194, it is observed as follows :—

"Contracts for works of construction frequently provide that the contractor should carry out and complete the works to the satisfaction or approval of the architect or engineer. In such a case, such approval may, on the proper construction of the contract, be a condition precedent to the contractor's right to payment. This question of construction may turn on considerations similar to those which determine whether the issue of a certificate is a condition precedent, but the mere fact that the architect or engineer is required to express his approval in a certificate is not decisive. The main test seems to be whether the decision of the architect or engineer in granting or withholding approval was intended by the parties to be final".

13. Now, certificates which are normally contemplated by such contracts are either progress or interim certificates or final certificates or some other certificates. Progress or interim certificates are issued from time to time during the course of the work, certifying that, in the opinion of the Architect, work has been carried out and in some cases, materials supplied is of a certain value. A final certificate may certify the amount finally payable to the contractor under the contract or the satisfaction of the Architect that work conforms with the contract or both. Upon these matters the Architect's decision embodied in his cer-

ificate is often binding and conclusive on the parties. The other certificates may empower the Architect to certify various matters, such as the happening of an event which entitles the employer to exercise a right of forfeiture or to record an extension of time given by the Architect to the contractor. The Architect's decision may be binding and conclusive upon these matters. (See Building Contracts by Keating, Fourth Edition, pages 76 and 77). We are not concerned in this case with the certificate of approval which is normally given by the Engineer to the Contractor. As a matter of fact, it does not appear that when the arbitration proceedings commenced, the certificate required under clause 63 (2) of the contract was obtained even by the Contractor.

14. In the present case, there is no specific provision with regard to the finality of any certificate given by the Engineer. The power of the Arbitrator under clause 63 is so wide that he has been given the power to reopen or review any decision of the Engineer and therefore, when the matter is taken to the Arbitrator, the merits of the claim have to be gone into completely and fully by the Arbitrator. Even assuming that there was any requirement of the certificate, which indeed we do not find on the contract, as being condition precedent, it is necessary to refer to the law with regard to the powers and jurisdiction of the Arbitrator in such cases. On the question as to the effect of the arbitration clause on the certificate clause, where a building contract contains a clause by which the determination or certificate of the Architect is made final and conclusive between the parties, or is made a condition precedent to any right of the contractor to payment and the contract also contains a clause by which all disputes are to be referred to arbitration, the law is stated thus by Halsbury in paragraph 1298:—

"Where the arbitration clause excludes certain matters in express terms and leaves them to the sole discretion of the architect, no arbitration can arise in respect of these matters except by agreement, and, in the absence of an allegation of fraud, neither the Court nor the arbitrator has jurisdiction to review the determination of the architect as to those matters.

On the other hand, where there is no express restriction of the scope of the arbitration clause, the jurisdiction of the arbitrator does not apparently extend to review the correctness of measurements and valuations where they are made conclusive between the parties, or conditions precedent to a right to payment. Where, however, the architect has power to issue a certificate which is neither made conclusive between the parties, nor is a condition precedent to payment, such a certificate would be subject to an arbitration clause in the contract."

Also in Paragraph 1215, the learned Author has observed as follows:—

"A clause giving an arbitrator power to open up, review and revise the certificate, opinion or decision of the certifier and to determine all disputes and matters submitted to him as if no such certificate, decision or opinion had been given will certainly be wide enough".

15. After a review of several decisions, to some of which we shall refer, Hudson has culled the principles as follows at page 446:—

"(a) An arbitration clause in general terms a fortiori if it empowers the arbitrator to open up, review and revise any opinion or certificate, or specifically mentions disputes arising on the withholding of a certificate, will, in the absence of any provision to the contrary, empower the arbitrator to disregard a certificate or the absence of one,

(b) Once an arbitrator is held to have jurisdiction to hear the merits of a claim, any purely technical or procedural difficulties in the way of giving full practical effect to his decision arising out of the wording of the contract in relation to the certifier and the parties are likely to be disregarded, the implication being that all necessary powers have been conferred on the arbitrator to enable him to give full effect to his decision."

Both these propositions are founded, inter alia, on *Brodie v. Cardiff Corporation*, (1919) AC 337, *Neale v. Richardson* (1938) 1 All ER 753 and *Prestige v. Bretzell*, (1938) 4 All ER 346. On the basis of proposition (a), Mr. Advani appearing on behalf of the Respondent has urged that the proposition clearly laid down that the absence of a certificate does

not prevent the Arbitrator to deal with the disputes between the parties, Mr. Ray, however, has contended that when reference in proposition (a) is made to the absence of a certificate, it must be construed to mean that the certificate was not produced or could not be obtained because the Engineer wrongly declined to issue the certificate, when asked for.

16. Now, it is no doubt true that in the case of *Brodie v. Corporation of Cardiff and Neale v. Richardson*, cited (*supra*), the Engineer had declined to issue the necessary certificate. In *Brodie's* case, the contract was to construct a reservoir for a Municipal Corporation at a fixed price in accordance with the specification, and the work had to be done to the satisfaction of the Corporation's Engineer, with such additions, alterations and variations as might from time to time be directed by the Corporation or the Engineer as provided by the specification. The contract provided that the Corporation would not be liable for payment of any charge for additions, alterations or deviations unless instructions for them were given in writing by the Engineer. The contract provided that in case any dispute should arise, either during the progress of the works or after the determination of the contract, as to the construction of the contract, or as to any matter or thing arising thereunder, or as to any objection by the Contractor to any certificate, finding, decision, requisition or opinion of the engineer, such dispute was to be referred to the arbitration and final decision of a single arbitrator, and either party might demand an immediate determination of the dispute. In respect of certain works which the contractor contended were extras, for which he was entitled to be paid in addition to the contract price, the Engineer refused to give written orders on the ground that the works were in accordance with the contract and were not extras. The matter was referred to arbitration. The Arbitrator found that the requirements were not in accordance with the contract, that the Engineer improperly refused to give orders in writing for the same as extras and that in deciding against the claim of the contractor, the Engineer did not act fairly or impartially, but had no dishonest motive and, therefore, awarded certain sums to be paid to the contractor. The House of

Lords held that upon these findings the Arbitrator had power to award that the items in question should be paid for as extras, notwithstanding the absence of any orders in writing by the Engineer. The question which was posed for decision in that case was "whether the claim for payment is barred for want of a certificate in writing." The contention that the Cardiff Corporation was entitled to defeat the contractor by pleading that there was no order in writing was rejected by the House of Lords with these words :—

"When the arbitration was held it appeared that the engineer was in the wrong, and the award finds that the claims ought to have been allowed as extras. On the arrangement for arbitration at the end the contractor executed these extra works, and it is now strenuously contended on behalf of the corporation that although the award is in favour of the contractor, and shows that an order in writing should have been given, the corporation are entitled to defect the contractor by pleading that there is no order in writing. In my opinion this contention is unfounded. The dispute was whether the item was an extra for which an order in writing should be given, and when the parties agreed that the work should be done and that the question should stand over for arbitration, the effect of the contract is that the finding of the arbitrator is to take the place of the order in writing which ought to have been given. Otherwise, the postponed arbitration would be entirely useless." (p. 351)

17. The decision in *Brodie's* case (1919 AC 337) was followed in *Neale v. Richardson*, (1938) 1 All BR 753. That was also a case where under the contract to build a house for the defendant, the plaintiff was to be paid by instalments when a certificate was given by the architect and in case of disputes, the architect was to act as arbitrator. A dispute arose and the arbitrator nominated a person other than himself to act as arbitrator and when it was pointed out to him that the contract provided that he himself should be the arbitrator, he refused to arbitrate or to issue a certificate with regard to the final instalment. The plaintiff thereupon sued the defendant for the balance alleged to be due according to him. The defendant

took no steps to appoint a new arbitrator or stay the suit. Before the County Court Judge it was argued for the defendant that under the contract obtaining a certificate was a condition precedent to payment. The County Court Judge held that the arbitrator had failed to carry out his duties and a decree was passed. The defendant appealed. The Court of Appeal took the view that the arbitration clause in the contract provided that in all cases of dispute arising out of the contract, the decision of the architect shall be binding on the parties, and held that the arbitration clause was sufficiently wide to empower the Architect as Arbitrator to determine whether a certificate should have been given and since he had refused to act and the defendant had taken no steps to have a new Arbitrator appointed, the Court could assume the powers which the Arbitrator would have had and determine whether a certificate should have been given. Referring to Brodie's case, it was observed in the judgment of Slesser L. J., as follows :—

"Here, the question being as to whether or not the final certificate ought to be given, a dispute arose on which, under clause 8, I think the arbitrator had power to determine that the certificate ought to have been given, and, if he had, the legal effect would have been, as their Lordships assumed in Brodie's case, as if it had been so given.

In the present case, it is clear on the facts that the arbitrator under the contract has refused to arbitrate, and the question of the builder's right to remuneration, in the absence of a final certificate, has failed to be determined. Following Brodie's case, an arbitration resulting in favour of the builder for a sum there determined would have enabled him to use for his payment as if a final certificate for that amount had been granted and not wrongfully refused." (pp. 757-758)

Now, it is no doubt true, as contended by Mr. Ray, that Neale v. Richardson was also a case where the Architect had declined to issue a certificate and the Court, therefore, proceeded to determine the right of the builder on the basis of his claim to which he would have been entitled if a final certificate for that amount had been granted by the Architect.

18. Though the two decisions in Brodie's case 1919 AC 337 and Neale v. Richardson (1938) 1 All ER 753, arose out of the refusal of the architect, it is instructive to see how these decisions have been construed by the Court of Appeal in Prestige & Co. Ltd. v. Bretzell, (1938) 4 All ER 346. That was also a case where the architect had refused to issue a certificate to the builders on the ground that he had received a complaint from the building owner with reference to the work. The architect asked the builders to get in touch with the owner. Upon this the builders alleged that a dispute had arisen and claimed that the matter should be referred to an arbitrator under the arbitration clause in the contract. The arbitrator took the view that he was entitled to consider not only the withholding of the certificate, but also the manner in which the work had been done. The Court of Appeal took the view that in view of the decision in Brodie v. Cardiff Corporation, the arbitrator had power not only to decide as to the issue of a certificate, but also to make an award of the sum due, having regard to the manner in which the work had been done Slesser, L. J., who was a party to the decision in Neale v. Richardson, was one of the learned Judges who decided Prestige & Co's. case. Slesser, L. J., referred to the judgment of Bankes, L. J. in Brodie v. Cardiff Corporation in the Court of Appeal and reproduced the following paragraph from Bankes, L.J.'s judgment :—

"The dispute between the parties which arises under these circumstances appears to me to be a dispute not merely as to whether the engineer was right or wrong in refusing to treat the work as an extra and to give a written order for it, but the dispute includes the question of what the contractor is entitled to be paid for the work so done, assuming that the engineer ought to have given a written order for it."

Dealing with the scope of the arbitration in the case of a dispute which arose out of the refusal of the arbitrator to issue the necessary certificate, Slesser, L. J., observed as follows, referring to the above-quoted observations of Bankes, L. J. :—

"There, as I read Bankes, L. J., you have a situation very similar to the one

in this case. That is to say, on a very strict and technical interpretation of the reference, it might be said, as was there said, that all that was being asked was whether the failure or refusal to issue the certificate was well founded. Alternatively, it might be said that it was reasonable to imply that the reference included the question whether the full amount for which such certificate might have been issued, or some lesser sum which the arbitrator thought the contractors were entitled to, should be paid." Now, it may be pointed out that the arbitration clause in Prestige & Co's case was very similar to the arbitration clause in the present case. The operative part of Cl. 26, which deals with the powers of the Arbitrator, was as follows:—

"The arbitrator shall have power to open up, review and revise any certificate save in regard to the said matters expressly excepted above, and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given as aforesaid, in the same manner as if no such certificate ... had been given." It was while considering such a clause that the Court of Appeal held in Prestige & Co's case that the dispute referred to the arbitrator could not be considered as being restricted merely to the issuance or non-issuance of the certificate and that the claim on merits was also referred. Certain observations in the judgment of Greer, L. J. are worth noting. Greer, L. J. while reading the contract as meaning that as a condition precedent to liability to pay anything from time to time during the progress of the work, there must be, first, a certificate of the architect and that without that certificate, there was no legal liability established by the contract to pay any sum whatsoever observed that he was precluded by authority from giving effect to the view which he would otherwise have taken, but for the authorities. He also observed that he was inclined to accept the view that there never was in that case any reference to the arbitrator to decide whether or not there was an amount due from the building owner to the building contractor, Greer, L. J., then observed as follows:—

"I cannot read these as being other than decisions that there may be occasions on which the Court may say that,

notwithstanding the failure of the claimant to establish that conditions precedent to liability have happened, the Court has power to make an order, in the absence of the performance of these conditions, for payment of money which by the contract, is made dependent upon those conditions. It is because I am impressed with the effect of the two authorities which have been cited that I am able to agree with the view which has been expressed by my brethren. I cannot read either *Brodie v. Cardiff Corporation* or *Neale v. Richardson* except as expressing the view that, in the opinion of the House of Lords in *Brodie's* case and in the opinion of this Court in *Neale v. Richardson*, an arbitrator to whom a matter is remitted in the form in which it was in this case has the power to dispense with the conditions precedent, and to order that, notwithstanding the non-performance of those conditions precedent, a liability may be established on which money may be ordered to be paid."

18-A. The abovequoted observations from Prestige and Co's case (1938) 4 All ER 346, will, therefore show that where the dispute with regard to the claims of the parties is expressly referred to the arbitrator, then the Arbitrator has the power to dispense with the condition precedent and that non-performance of the condition precedent does not prevent him from determining the claim of the parties on merits. In the light of these observations, the joint submission made by the two parties to the Arbitrator, dated 11th January, 1962, becomes extremely relevant. We have already referred to this joint submission by which the parties gave their consent to the opening of reference on January 9, 1962 "on all matters referred to him by the Secretary, Ministry of Law, Government of India, vide his Instrument dated January 8, 1962." The order issued by the Law Secretary on 8th January, 1962, is on record and it expressly refers to the claim both as a set-off as well as substantive claim made by the Government of India against the Company while replying to the claims of the Company in the reference pending before the Arbitrator, and it refers to the consent given by the Contractor "to the said Shri Bishan Narain opening reference on the claims of the Union of

India as contained in its Statement dated the 1st day of June, 1961, in the said reference and adjudicate upon the same both as substantive claim and as set off against the claims of the Company as contained in its Statement dated the 26th day of April 1961 in the said reference." By this instrument the Secretary to the Ministry of Law Govt. of India, specifically appointed the arbitrator "for the purpose of reference of the dispute arising out of the claims made by the Union of India as set out in Parts A, C and D of the said Statement filed by the Union of India, dated 1st day of June, 1961." In view of the Terms of the Reference, therefore, and in view of the Statement of Law in Prestige and Company's case, it does not appear that there was any legal impediment in the way of the Arbitrator to deal with the claim.

19. Mr. Ray has invited our attention to the decision of the House of Lords in East Ham Corporation v. Bernard Sunley & Sons Ltd, 1966 AC 406. The question in that case was to what extent the certificate is conclusive even where the Arbitrator has the power under the contract to open up, review or revise any certificate. Under the contract for the erection of a school for a local authority, Cl. 24 (f), which dealt with the final certificate to be issued by the Architect, read as follows:—

".....(f) Upon expiration of the defects liability period (six months from the practical completion of the work) ... the architect shall issue a final certificate and such final certificate save as regards all defects and insufficiencies in the works or materials which a reasonable examination would not have disclosed, shall be conclusive evidence as to the sufficiency of the works and materials."

Then clause 27, after providing for arbitration in cases of dispute, stated:—

".....the arbitrator shall have power to open up, review or revise any certificate ... in the same manner as if no such certificate...had been given." After the completion of the work and some two years after the architect had given his final certificate, stone panels fixed to the exterior walls fell off owing to defective fixing by the contractors and were repaired by the local authority who sought to recover the cost from the contractors in an arbitration pur-

suant to clause 27 of the contract. The question before the House of Lords was (a) whether the arbitrator had power to reopen the architect's final certificate and (b) if so and liability were established, at what date damages were to be assessed. The House of Lords held that clause 24 (g) showed that the final certificate was to be conclusive evidence that the works and materials were in accordance with the contract and, therefore, the architect's final certificate was placed in a special position for a special purpose and, therefore, the wide general words of clause 27 could not be read literally, because so to do would deprive clause 24 (f) and (g) of any effect or operation. It was further held that in order to give effect to both clauses, clause 27 must be read as being subject to Cl. 24 (f) and (g) and accordingly the final certificate of the architect was conclusive and could not be reopened by the arbitrator save in the exceptional circumstances therein stated.

20. Now, it is difficult for us to see how this case can be of any assistance to the appellant. We have already pointed out that there is no clause which gives finality to any certificate of the Engineers in the contract and the law laid down by the House of Lords that in spite of the fact that the arbitration clause was widely worded, the Arbitrator could not reopen matters in respect of which the certificate was made final, was not relevant for the purpose of the case before us. As a matter of fact, if the converse proposition is spelt out, the position would be that in a case where finality to any certificate is not specifically attached under the contract, the wide power given to the Arbitrator to open up, review or revise any certificate would enable him to consider the entire dispute referred to him and further, in view of the earlier decisions, the absence of any certificate under the contract would not affect the claim. It is, therefore, not possible to accept the argument of Mr. Ray that when in proposition (a) laid down in Hudson at p. 446 reference to the absence of a certificate was made, that contemplated only a case where the certificate was asked for and declined.

21. We must mention that in support of his contention that a certificate by the Engineer must

be treated as a condition precedent, the learned Counsel for the appellant has referred to certain decisions which are clearly distinguishable. They were all decisions where the question was whether, unless there was a certificate in favour of the contractor, the contractor would be entitled to the payment or not. The earliest in point of time was the decision in *Morgan v. Birnie*, (1833) 9 Bing 672. That was a case in which an action was brought on a builder's contract under which the defendant was to pay for building upon receiving the architect's certificate that the work was done to his satisfaction. The architect checked the builder's charges and sent them to the defendant. It was held that the certificate did not amount to a certificate of satisfaction as contemplated by the contract so as to enable the builder to sue the defendant, although the defendant had not objected to pay on the ground that no sufficient certificate had been rendered.

22. The second case is *Scott v. Corporation of Liverpool*, (1858) 44 ER 1297. Other cases are *Clarke v. Watson*, (1865) 18 CB (NS) 278, *Eaglesham v. McMaster*, (1920) 2 KB 169 and *Dunlop v. Hendall*, (1957) 1 WLR 1102. In the view which we have taken about the scope of the clause of arbitration and the absence of any clause making any certificate issued by the Engineer conclusive, we do not think it necessary to discuss in detail these authorities.

23-27, xx xx xx xx
Appeals dismissed.

AIR 1982 BOMBAY 377
DESHPANDE, Actg. C. J. AND
KOTWAL, J.

Hanmantrao Yeshwantrao Patil and others, Petitioners v. Chintamani K. Gulvani and others, Respondents.

Writ Petn. No. 2339 of 1980, D/- 9-12-1980.

Maharashtra Municipalities Act (40 of 1965), Ss. 16, 44, 2 (7), 302 — Disqualification of President — Disqualification prescribed for elected Councillor applies to President also.

There is no provision in the Act prescribing any qualification or disqualification of the President as such. The

DZ/DZ/B755/82/MBR

meaning given to the word "Councillor" by S. 2 (7) of the Act must prevail in terms of the opening sentence of S. 2" unless the context otherwise requires." The definition requires the President to be deemed to be an ex-officio Councillor and to be treated as an additional Councillor. The fact that he is elected as President and not as Councillor, or that the nature of his constituency is different from the one from which other Councillors are elected or co-opted, cannot affect the potency of the fiction of his being such Councillor. The statutory fiction requires the President to be assumed to be a Councillor for all purposes as any other Councillor. The disqualifications in S. 16 apply therefore with equal force to the President as well. (Para 14)

This explains why no other provision prescribes any qualification or disqualification for the persons seeking or holding the office of the President. Under the fiction raised u/s. 2 (7), the word "Councillor" in Ss. 16 and 44 must be deemed to be inclusive of even the "deemed Councillor". It was not necessary to include expressly the office of the "President" or "deemed Councillor", as the word "Councillor" itself was found adequate enough to embrace the said office. The Legislature could not have intended to permit any person to be elected or to hold the office of the President even when he was disqualified to become or to act as Councillor u/s. 16 or S. 44. The Legislature did not presumably feel it necessary to expressly refer to the office of the President in Ss. 16 and 44 when it had achieved the said object by raising a fiction of his also being such Councillor u/s. 2 (7). (Para 15)

The fiction of the President being a deemed Councillor is not without some basis (vide S. 81 (9) and (13).) The context of Ss. 9 and 21 and other sections, however, would make it clear how the addition of the word "President" was necessary to make the same applicable to him as, but for such additions, the provisions would not have ipso facto been applicable to him. There are various other sections in the Act e.g. Ss. 95, 96, 302 etc. omitting any reference to the President. Yet, reference to the Councillor in the context implies reference to the deemed Councillor and indirectly to the President in the same

manner as it is implicit in Ss. 16 and 44. The different contingencies in which the President ceases to hold his office e.g. Ss. 55, 56, 313 etc. have no bearing on the interpretation of Ss. 16 and 44.

(Paras 16, 17, 18 19)

A. V. Savant, for Petitioners; P. M. Pradhan (for Nos. 1 to 5); C. J. Sawant with M. B. Mehre, Asst. Govt. Pleader (for Nos. 9 to 12), For Respondents.

KOTWAL, J.:—This petition raises a short question as to whether acts or omissions disqualifying a person from becoming or acting as a Councillor of a Municipal Council under S. 16 read with S. 44 of the Maharashtra Municipalities Act, 1965 (shortly stated as "the said Act"), also so disqualify the "President" who is elected as such directly by the voters of the Council & who becomes a "deemed Councillor" ex-officio on account thereof, though not elected as a Councillor.

2. The petitioners Nos. 2 to 4 and respondents Nos. 1 to 7 were elected as Councillors to the Vita Municipal council in the election held on 7-11-1974. Petitioner No. 1 was elected as President at the said election directly by all the voters of the Council under the amended Act.

3. A contract was entered into on behalf of the Municipal Council by the Chief Officer on October 1, 1975, with the Vita Co-operative Electric Supply Society Ltd., (shortly stated as "the said Society") for the supply of electricity for street lights. A resolution was unanimously passed in the meeting of the Council held on July 29, 1976, ratifying the said contract. The five petitioners admittedly voted in favour of the said resolution though each one of them admittedly held share in the said Society and as such held some interest therein.

4. On or about August 20, 1977, respondents Nos. 1 to 5 moved the Collector of Sangli, respondent No. 9, herein, making a grievance that the five petitioners incurred a disqualification under Section 44 (1) (b) read with Section 16 (1) (ii) of the said Act by voting in favour of a matter in which they had an interest and a share. They, therefore, requested that the five petitioners be declared to have become disqualified to continue as Councillors. The petitioner No. 1, the president, is alleged to

have incurred the disqualification by reason of being a deemed Councillor.

5. In response to the notice, by the Collector in this behalf, the petitioners explained on June 13, 1978 how they were not so disqualified. The petitioners inter alia, explained that they were merely shareholders in the Society and did not take part in the management. They also came out with the defence that the Society was supplying electricity since long and passing of such a resolution was just a formality and entering into a contract in favour of the said Society was an indispensable requirement of the residents of town Vita, the undertaking of the Society being the only source of supplying electricity for street lights. The Government was moved by the Council to require the Maharashtra State Electricity Board to take over the undertaking to avoid such contingencies in future. Petitioner No. 1 raised an additional contention that the disqualifications prescribed for an elected Councillor do not apply to the president who is directly elected as such President under Section 51 of the said Act and not as a Councillor and becomes only an ex-officio Councillor under Section 2 (7) of the said Act.

6. All these contentions were overruled by the Collector by his order dated 29-10-1978. He declared all the petitioners to have become disqualified under Section 44 (1) (b) by virtue of having voted for the matter in which they had interest and further declared the seats to have fallen vacant under Section 44 (3) of the said Act. The petitioners' appeal to the State Government, respondent No. 12, was dismissed by an order dated August 14, 1980. Hence this petition under Article 226 of the Constitution to this Court. At the admission stage, claim of the petitioners numbers 2 to 5 was summarily rejected. Rule is granted only with regard to claim of petitioner No. 1 whose case obviously stands on different footing.

7. Shri A. V. Savant, the learned counsel appearing on behalf of petitioner No. 1, does not dispute either that petitioner No. 1 held shares in the Society or voted at the meeting for ratification of the contract with it. He, however, contends that under the amended Act, a person directly elected as the president is not elected as Councillor but is to be deemed to be such Councillor

by virtue of his being the President. The Act does not prescribe any qualification or disqualification for holding the office of the President or discharging and performing its consequential functions including that of the Councillor. The acts or omission disqualifying a Councillor under Section 16 of the said Act cannot, therefore, disqualify the President and consequently cannot prevent him from being deemed as such Councillor. Strong reliance was placed by Shri Savant on the circumstances that, (1) unlike under the pre-amended Act, a person is not required to be elected as Councillor to become the President as also, (2) on the omission of the words "President," "ex-officio" or "deemed Councillor" in S. 44 or Section 16 of the said Act. He also contends that the so-called interest of the petitioners, in the shares of the Society is too nominal, and ratification of the of the contract is too formal to incur the disqualification.

8. A short survey of the relevant provisions of the said Act may not be out of place at this stage. The words "Council" and "Councillor" are defined under Section 2 (6) of the Act and Section 2 (7) of the Act, while Sec. 2 (49) defines the words "total number of Councillors". The President is deemed to be an ex-officio Councillor under Section 2 (7) of the said Act, in addition to the total number of Councillors elected or co-opted. Various Municipal authorities are enumerated under Section 7 indicating that the President and the Council are distinct authorities. Under Section 9 (i) of the Act the Council is to consist of (1) a President and (2) elected or co-opted Councillors. A deemed and ex-officio Councillor is not separately or expressly included therein. The total number of Councillors of any Council is to be determined by the Director in accordance with sub-section (2) of S. 9 by reference to the class to which it belongs. Section 11 prescribes (1) the manner of preparing the voters' list and (2) the eligibility to vote. Section 15 prescribes the fundamental qualifications for a Councillor. Section 51 (2) makes Sec. 15 applicable to the candidate seeking election as President.

9. Section 16 of the said Act enumerates the acts, omissions and circumstances which disable any candidate

from becoming a Councillor. Clause (i) of Section 16 (1) disqualifies a person from becoming a Councillor, if he has directly or indirectly, by himself or his partner, any share or interest in any contract with or under or by on behalf of the Council. Exceptions to this clause (i) are, however, carried out in sub-section (3) of the said S. 16. The relevant Cl. (b) thereof provides that a person shall not be deemed to have incurred such disqualification under subsec. (1) (i) merely by having such a share or interest in a company or co-operative society, so contracting with the Council. Reading Sections 16 (1) (i) and 16 (3) (b) of the said Act together, it would be clear that the disqualification contemplated under cl. (i) is made inapplicable if the interest of the person happens to be of a share or interest in a company or co-operative society, which enters into any contract with the Council.

10. However, Section 44 (1) (b) operates as an exception to such an exception. This Sec. 44 (1) (b) reads as follows :

"44(1). A Councillor shall be disqualified to hold office as such, if at any time during his term of office, he:—

xx xx xx xx

(b) as a Councillor or as a member of any Committee of the Council votes in favour of any matter in which he has directly or indirectly by himself or his partners any such share or interest as is described in Cls. (a), (b), (c), (e) and (g) of sub-section (3) of Sec. 16, whatever may be the value of such share or interest or in which he is professionally interested on behalf of a client, principal or other person; or".

11. This clause (b) stipulates that a Councillor shall be disqualified if, as a Councillor or as a member of any Committee of the Council, he votes in favour of any matter in which he is directly or indirectly by himself or his partner any share or interest as described in Section 16 (3) (b) of the said Act. A distinction is thus made between the passive part of merely having share or interest in a company or co-operative society, having contract with the Councillor, and the active additional part of voting in favour of such a contract at the meeting of the Council. The former does not, but the latter does incur the disqualification.

12. Section 51 provides for election of the President and Vice-President. This S. 51 is amended by the Maharashtra Act No. XLVII of 1973. The President of the Council is now directly elected by persons whose names are included in the Municipal Voters' List. Before this amendment, the President and Vice-President of the Council were elected from amongst the Councillors who were elected or were deemed to have been elected. A person could be elected as President only if he was a Councillor. This amendment of Section 51 made it necessary to amend other relevant provisions vis-a-vis office of the President to make them accord with the new set up.

13. Then, reference to sub-secs. (6), (9), (12) and (13) of Sec. 81 also is relevant. Section 81 deals with various aspects of the meetings of the Council. Sub-section (6) enables any other Councillor to preside over a meeting in case of need while sub-section (9) provides for the quorum. Sub-sec. (12) deals with the minutes while sub-sec. (13) stipulates that in a meeting convened and presided over by the presiding officer, the business will be carried on and decided by a majority of votes of the Councillors present and voting, and in the event of equality of votes the presiding authority shall have a right to a second or a casting vote.

14. Shri Savant's contention shall have to be examined in the light of these provisions. It is true that Section 16 and S. 44 provide for the disqualifications of a Councillor and not of the President. In fact, there is no section in the Act prescribing any qualification or disqualification of the President as such separately or expressly. The word "Councillor", however, shall have to be construed by reference to its definition under S. 2 (7) of the Act. The President is also a "Councillor" under this definition. The meaning given to this word under the legislative mandate of Section 2 (7) must prevail in terms of the opening sentence of S. 2 "unless the context otherwise requires". Shri Savant could not show any such context of these two sections requiring departure from the plain definition. The definition requires the President to be deemed to be an ex-officio Councillor. It also requires him to be treated as an additional Councillor, i. e., in addition to

other total number of Councillors, as defined under Section 2 (49). The fact that he is elected as President and not as Councillor, or that the nature of his constituency is different from the one from which other Councillors are elected or co-opted, cannot affect the potency of the fiction of his being such Councillor. The statutory fiction requires the President to be assumed to be a Councillor for all purposes as any other Councillor. The disqualifications in Section 16 of the Act apply therefore with equal force to the President as well.

15. This explains why no other provision prescribes any qualification or disqualification for the persons seeking or holding the office of the President. Under the fiction raised under Sec. 2 (7), the word "Councillor" in Sections 16 and 44 must be deemed to be inclusive of even the "deemed Councillor". It was not necessary to include expressly the office of the "President" or "deemed Councillor", as the word "Councillor" itself was found adequate enough to embrace the said office. It is difficult to believe that the Legislature could have intended to permit any person to be elected or to hold the office of the President even when he was disqualified to become or to act as Councillor under Section 16 or Section 44 of the Act. The Legislature did not presumably feel it necessary to expressly refer to the office of the President in Sections 16 and 44 when it had achieved the said object by raising a fiction of his also being such Councillor under S. 2 (7) of the Act. The contention of Shri Savant that the word "Councillor" in Sections 16 and 44 does not include a "deemed Councillor" such as the President is thus devoid of substance. The act of the President of voting for the resolution amounts to the act of so voting by a Councillor even if he happens to be a deemed such Councillor and, therefore, is hit by S. 16 (1) (i) and is not saved by Sec. 16 (3) because of its being covered by S. 44 (1) (b) of the Act.

16. The fiction of the President being a deemed Councillor is not hollow and without some basis. He is empowered to discharge the function of the Councillor apart from his functions as President enumerated in Section 58 of the Act. Section 81 (9) and (13) are illus-

trative of how he has to vote at the meeting as a Councillor in addition to vote as President when necessary. He attends the meeting in the dual capacity of the President and the Councillor. He presides over the meeting in discharge of his presidential function under clause (a) of S. 58 (1) of the Act. He also exercises the right of "second" or "casting" vote, in the event of equality of votes, as such President as contemplated under Section 81 (13) of the Act. His presence is taken into account for the purposes of the quorum under sub-section (9) of Section 81 which can only be in his capacity of a Councillor. He exercises his right to vote only as a Councillor at the first round of voting which may or may not result in the equality of votes to require his casting second vote. The occasion to exercise second or casting vote arises only when the first round discloses equality. This second or casting vote on the equality of votes can be exercised by him in discharge of the functions of the President. Any other presiding authority also can exercise such a casting vote even when any other Councillor happens to preside over the meeting under sub-section (6) of Section 81, due to the absence of the President and Vice-President. This is illustrative firstly of how the office of President and the deemed Councillor gets blended integrally when he has to act as Councillor, exercising right to vote at the meeting of the Council being one such contingency. This is also illustrative of how fiction of the President being a deemed Councillor is not without some basis,

17. Shri Savant drew our attention to Sections 9, 21 and some other provisions of the Act in which the word "President" is added to the word "Councillor" in contrast to the glaring omissions to that effect in the wording of Secs. 16 and 44 of the Act. This omission according to Shri Savant is reflective of legislative intent to exclude the President from the disqualifications contemplated thereunder. The context of Sections 9 and 21 and other sections, however, would make it clear how addition of the word "President" was necessary to make the same applicable to him as, but for such additions, the provisions would not have ipso facto been applicable to him. It was thus neces-

sary to refer to the President as constituent of the Council under Section 9 as otherwise he cannot fall under any of the other categories of Councillors enumerated in the section. Similarly, a plain, reading of Section 21 would indicate that but for the words "including the president" no disputes as to his election could have been raised in any election petition under S. 21 of the Act. In spite of his being a deemed Councillor, he cannot be said to have been co-opted or elected Councillor to attract the section.

18. There are various other sections in the Act omitting any reference to the President. Yet, reference to the Councillor in the context implies reference to the deemed Councillor and indirectly to the President in the same manner as it is implicit in Secs. 16 and 44 of the Act. Thus, for instance, Section 302 of the said Act prescribes that every Councillor and officer of a Council and other persons shall be deemed to be public servants within the meaning of S. 24 of the I. P. C. However, the omission of the word "President" is obviously innocuous, inasmuch as it is implicit that the same is covered by the term "Councillor" it cannot be gainsaid that the President cannot be said to be a public servant. Reference can also be made on the same pattern to the other provisions such as Sections 95 and 96 of the said Act.

19. Shri A. V. Savant then submitted that Section 55 of the said Act is the only provision under which President such as the petitioner No. 1 can be removed. Section 55 on the face of it relates to the removal of the President consequent to a resolution to that effect passed by the prescribed majority at a special meeting convened on requisition. It has nothing to do with the effect of disqualification. Section 56 contemplates his ceasing to be in office consequent to his absence for a particular period. He ceases to hold this office on his resignation also under Sec. 53 and can also be removed by the State Government under certain contingencies. Dissolution of the Council including the office of the President in case of supersession is also contemplated by Section 313 of the said Act. These different contingencies in which the President ceases to hold his office have no bearing on the interpre-

itation of Sections 16 and 44 of the said Act.

20. Having thus taken the survey of the entire situation, we are of the opinion that Section 44 (1) of the Act squarely embraces the case of the petitioner No. 1 notwithstanding the fact that he is elected directly as the President and not as a Councillor. The resultant consequence is that he having voted in favour of the impugned resolution as a Councillor, in the matter of which he had an interest, he did incur the disqualification contemplated under Section 44 (1) of the Act. The protection afforded by Section 16 (3) (b) of the Act to the situation covered by Section 16 (1) (i) is lost due to the act of voting. We are, therefore, of the opinion that the impugned order passed by respondent No. 9, i.e., the Collector, is not open to any exception. This conclusion is inevitable on the rational and harmonious interpretation and construction of the various provisions of the Act having regard to the scheme and object thereof as also the legislative intent. Any other course would be contrary to the plain reading and would also defeat and frustrate the object and would equally disturb the harmonious coherence of the fabric.

21. Shri A. V. Savant made a faint endeavour to under-estimate the implications of the impugned voting. The value of the share is claimed to be insignificant and the resultant interest being negligible. Holding of mere such shares along with a number of villagers, without any active part in the management of the Society could not be, according to Shri A. V. Savant, any evidence of any interest of substance. It is argued that he had no option but to vote in favour of the resolution inasmuch as the said Society is the only available source of electricity supply to the town of Vita and contracts were renewed every time without any objection from anyone almost as rituals. We are unable to uphold the contention. The clear mandate contained in Sections 16 (1) (i), 16 (3) (b) and 44 (1) (b) of the Act leaves no choice once the same are attracted by the facts admitted or proved. The wording is clear enough not to admit of any other construction. The result may, be unfortunate, but is equally inevitable.

22. In the result, the rule is discharged with no order as to costs. At the request of Shri A. V. Savant the operation of this order is suspended till 19th January 1981.

Rule discharged.

AIR 1982 BOMBAY 382

DESHPANDE, J.

Saheblal Rasulkhan Pathan, Appellant v. Nanubi Kasimsaheb Shaikh, Respondent.

Second Appeal No. 475 of 1976, D/- 15-10-1981.

Civil P. C. (5 of 1908), Sec. 103 (b) — Applicability — Suit for specific performance of contract of sale — Issue of delivery of possession wrongly determined by lower appellate court on totally wrong assumption trial court had found that possession was delivered to plaintiff and agreement was acted upon — Held, High Court in second appeal could re-open issue u/s. 103. (Para 9)

J. R. Lalit, for Appellant; V. B. Rajure for Bhimrao N. Naik, for Respondent.

JUDGMENT :— This second appeal arises out of a suit filed by respondent Mhanubi Kasimsaheb Shaikh, original plaintiff against the defendant Saheblal Rasulkhan Pathan who is the appellant before me. The suit was filed by the plaintiff for getting specific performance of a contract of sale Exh. 34 dt. 17th, Aug. 1970. It was the case of the plaintiff that the property sold was a house situated at Siddeshwar peth, Solapur and the terms of the contract were reduced into writing. It was stated that Rs. 4,000/- were fixed as the sale price and Rs. 2,000/- were to be paid at the time of agreement as earnest money. It was also agreed that the sale-deed was to be executed within a week from the date on which the said agreement was to be executed. It was further averred by the plaintiff that under the said agreement Exh. 34, two rooms were given in possession of the plaintiff on Aug. 17, 1970. The plaintiff stated that at the time of filing of the suit she was not in possession because she alleged that on 24th of Aug. 1970, the defendant broke open the house and forcibly took possession of the said two rooms. The plaintiff prayed for specific performance of the con-

EZ/EZ/C88/82/HR/RSK

tract Exh. 34 and in the alternative, she also prayed for decree of Rs. 2,000/- which were paid by her as earnest money, in case, the contract is not accepted.

2. The defendant filed his written statement at Exh. 15 and his principal defence was that the alleged transaction of the sale was not truly reflected in the documents but in fact the alleged transaction was only in the nature of loan transaction. The plaintiff does not possess any money lending license, though carries on the transaction of money lending. She has earlier entered into such transaction with defendant in the year 1968 and therefore defendant stated that the alleged agreement not being an agreement of sale, the suit is liable to be dismissed.

3. The learned trial Judge framed necessary issues, which are as follows.—

"(1) Whether the plaintiff proves the agreement of sale dt. 17-8-1970 as alleged.

(2) Does she prove that she was put in possession of two rooms as part performance of the alleged agreement of sale.

(3) Does defendant prove that suit dealing was a money-lending transaction.

(4) Whether plaintiff is entitled to get specific performance of the agreement of sale as claimed? If yes, on what terms.

(5) Whether in the alternative plaintiff is entitled to the refund of Rupees 2,000/- with interest as claimed." Other issues are not necessary to refer to for the disposal of this appeal. Parties led evidence. Plaintiff examined three witnesses in support of her case. The plaintiff's witness 1 Kasimsaheb Imamsaheb Shaikh examined at Exh. 40 is the husband of the present plaintiff. Plaintiff's witness 2 is Narayan Dakaji Murjkar who is examined at Exh. 43. Plaintiff's third witness is Abdul Rahiman Hussinsaheb Merchant, who is examined at Exh. 44.

4. The defendant himself is examined as witness at Exh. 46 and no other evidence was produced by the defendant. After going through the oral evidence and the document relied on by the plaintiff (Exh. 34), the learned trial Judge found that the plaintiff has failed to prove the nature of transaction as

alleged. He also found that the defendant also failed to prove the transaction as of loan and on the issue of delivery of possession, he found that the plaintiff was not in possession. The learned Judge also relied on the circumstance that the plaintiff had given different versions with regard to the payment of earnest money and in view of this fact, he was not impressed by the terms of the agreement and therefore he negatived the finding against her. Therefore the learned trial Judge dismissed the suit of plaintiff as far as the specific performance of the agreement is concerned and granted, in the alternative, the decree for Rs. 1,750/- with interest and the decretal debt was kept as charge on the property described in the plaint. In the result, he dismissed the suit of the plaintiff by his judgment and decree dt. 27-6-1973.

5. Being aggrieved by this decree, the plaintiff filed an appeal before the District Court at Solapur and the Assistant Judge, Solapur, who heard the appeal, reversed the decree passed by the learned trial Judge and decreed the suit for specific performance of the agreement as per Exh. 34 Dt. Aug. 17, 1970. He also directed the plaintiff to deposit the remaining part of the sale price and thus plaintiff's claim was decreed by him. The learned appellate Judge framed two points for determination as under:—

"(1) Whether the plaintiff succeeded in proving that both the parties had intended to have a genuine agreement of sale in respect of the suit property as per the document Exh. 34 D/- 17th Aug. 1970.

(2) Whether the defendant proved that the document was executed as a surety for the repayment of Rs. 2,000/- and it enshrined the transaction of loan."

The District Judge did not choose to raise point regarding the alleged delivery of possession under the agreement but it appears that he has confirmed the same finding recorded by the trial Judge on the point, as recorded in his judgment at para 17. The learned Asst. Judge held the agreement to be proved on the finding that the price agreed has not been proved to be grossly inadequate and secondly, he relied on the fact that since the plaintiff was residing in rented premises, she had advanced the

substantial sum of Rs. 1,750/- to the defendant in the hope that she would get property of her own. From this he inferred that she must have intended to purchase the property and having held that these circumstances are in favour of the plaintiff, especially he relied on the vital circumstance that the plaintiff's husband had paid Rs. 2,000/- to the defendant and taken back Rs. 250/- for payment of Municipal Taxes. Thus he reversed the decree of the trial Court and allowed the appeal by his judgment and decree dt. 17th March 1976.

6. The defendant being aggrieved by this judgment and decree, has preferred this second appeal in the High Court, which is placed before me for final hearing. Today before the hearing started, the learned Advocate Mr. J. R. Lalit, who was appearing for the appellant and Mr. V. B. Rajure who was appearing for Mr. Bhimrao N. Naik on 14th Oct. 1981, were present and I heard the appeal, which was part heard and kept today in the early hours. Mr. Bhimrao N. Naik appearing for respondent, requested that he should be allowed to appear and address the Court as he was not able to come on earlier day. I have permitted Shri Bhimrao N. Naik to address me on behalf of the respondent along with Mr. V. B. Rajure. Mr. J.R. Lalit, learned Advocate for the appellant has not raised any objection and he has fairly consented that Mr. Bhimrao N. Naik should be permitted to argue the appeal and Mr. Bhimrao N. Naik then resumed the arguments.

7. Mr. Lalit, the learned Advocate for the appellant submitted three points for consideration. Mr. Lalit firstly contended that the decree of the trial Court was perfectly justified especially because that the trial Court was right in refusing the specific performance to the plaintiff. Mr. Lalit pointed out to me first of all, that the agreement Ex. 34 is on ordinary paper. It is signed as many as by five witnesses. It appears that the revenue stamp and the recitals in the agreement regarding the price and in respect of delivery of possession are not borne out by the plaintiff herself. Mr. Lalit then contended that the alleged price, which is one of the important terms of such agreement regarding the earnest money is not found to be un-

animous, because the plaintiff alleged in the suit that the earnest money was Rs. 2,000/- while in the notice Exh. 42 dated 21-8-1970 plaintiff has stated that Rs. 2,100/- were paid. The agreement Exh. 34 itself mentions that Rs. 1,842/- were paid and Rs. 250/- were to be paid towards the Municipal taxes. The sum total of Rs. 1,842/- and Rs. 250/- will be Rs. 2,092, though a calculation is given, as it is only to emphasize the discrepancy as to the earnest money which is paid by the plaintiff according to her own say. Mr. Lalit, therefore, contended that the learned trial Judge was right in holding that there are different versions given by the plaintiff, as many as three versions and therefore the specific performance was refused and it was quite proper. Thirdly, Mr. Lalit further submitted that the alleged amount of Rs. 250/- which was retained by the plaintiff for payment of Municipal taxes was spent towards some private affairs and therefore this case to that extent appears to be incorrect. I find sufficient force in the above contention because in a suit for specific performance the terms of contract are strictly to be obeyed. Lastly, Mr. Lalit pointed out that the recital in the agreement with regard to the possession that two rooms were given in pursuance of agreement dated the 17th August, is not correct because the defendant never delivered possession, according to Mr. Lalit, the possession continued with the defendant. On this aspect of the case Mr. Lalit pointed out rightly that the learned appellate Judge committed an error in holding that the trial court had, in fact found that possession of two rooms was given to the plaintiff.

8. In this connection, Mr. Lalit pointed out from the contents of para 17 of the Appellate Court's judgment that this assessment of the learned Appellate Judge was absolutely wrong, because in fact the trial Court had found on issue 2 specifically that two rooms were not given in possession as part performance of the agreement Exh. 34. The learned Assistant Judge was certainly in error in concurring with the trial Court holding that the agreement was acted upon on the basis that possession was actually delivered to the plaintiff. The initial assumption of the learned Assistant Judge was found to be erroneous.

Mr. Bhimrao N. Naik, the learned Advocate for the respondent was permitted to read the evidence in this second appeal because I thought that the learned Assistant Judge has wrongly determined the issue of delivery of possession.

9. It is true that in a second appeal, apparently, if the two courts below had found the factum of possession has been proved or disproved, this Court will be reluctant to reopen this finding. But in this case, in view of the provisions of S. 103, C. P. C., I find that there is much substance in the grievances made by Mr. Lalit that the learned appellate Judge wrongly determined the issue of delivery of possession on a totally wrong assumption that the learned trial Judge had found that the possession is delivered and the agreement was acted upon. This finding of the learned Appellate Judge has resulted in reversing the decree of trial Court. As I have stated above, S. 103, Civil P. C. reads as under:—

"103. In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal—

(a) Which has not been determined by the lower appellate court or both by the Court of first instance and the lower appellate court, or

(b) which has been wrongly determined by such court or courts by reason of a decision on such question of law as is referred to in S. 100."

In this case, the learned appellate judge has certainly committed an error in wrongly assuming that the learned trial judge had found in favour of the plaintiff as far as the delivery of possession is concerned and it is on this wrong assumption that the learned appellate judge concluded the issue with a cryptic reasoning, saying that:

"This fact has been clearly borne out by evidence of plaintiff's witness and, therefore, the lower Court rightly held that the plaintiff was put in possession of the two rooms."

I think that the learned appellate judge was totally in error in recording the finding on this issue and as pointed out by Mr. Lalit, I agree with his sub-

mission that this error has vitiated his judgment.

9A. Mr. Bhimrao N. Naik contended that the evidence on record, especially evidence of witness 1, plaintiff's husband and second witness, who is scribe of the document and the third witness Abdul Rahman son of Hussainsaheb Merchant, whose statement of deposition is at Exh. 44, proves the factum of possession and relying on the evidence of these three witnesses, he pointed the evidence of the first witness, which is to this effect:

"(1) Kasimsaheb Imamsaheb Shaikh has deposed that at the time of said agreement, amount of Rs. 2,000/- was paid and he also deposed that on 24th Aug. 1970 the defendant broke open the lock and took forcible possession of the said rooms."

This evidence of Kasimsaheb suffers from basic infirmity that Kasimsaheb was not a witness of the said agreement Exh. 34. It is doubtful, whether he was present at the time of execution of the agreement Exh. 34. He is husband of the plaintiff. It is not known, why the plaintiff herself did not choose to come in the witness box. For these reasons the evidence of this witness is not sufficient to be accepted for the purposes of proof of the alleged transaction as well as delivery of possession. There is no evidence on record to show that defendant took forcible possession of two rooms on Aug. 24, 1970. It would have been very significant, if this forcible dispossession would have been proved by the plaintiff in this case, but for want of evidence in this regard it is not possible to accept the statement of Kasimsaheb that plaintiff was put in possession of two rooms and she was again dispossessed.

10. The evidence of second witness relied on by Mr. Naik is a scribe, Narayan Dekeji Murajkar, who has deposed that:

"On the day Rs. 2,000/- were paid, the defendant also gave possession of two rooms."

Relying on this deposition Mr. Naik contended that the delivery of possession should be held proved. I am not able to accept this part of evidence to be correct. The agreement Exh. 34 itself recites that possession was given

on the said day and the recital in the agreement is to this effect:—

“सदरी जागेचा कबजा आज रोजी दोन खोल्यांचा दिला आहे”.

This recital in the Exh. 34 has to be read along with recital regarding the amount of earnest money which is mentioned in the agreement as Rs. 1,842/- and which according to the recital is that this amount was agreed to be kept for depositing in the Post Office for the purpose of paying dues of the earlier purchasers referred to in the earlier part of the recital of this document. Evidence of Narayan saying that Rs. 2,000/- were paid and possession was delivered, appears to be discrepant because earnest money mentioned in the agreement is Rs. 1,842/- while Narayan's deposition is that Rs. 2,000/- were paid. Therefore, I do not attach much importance to this evidence.

11. Mr. Naik then relied on the evidence of the third witness in order to show that possession must have been delivered as part performance of the agreement Exh. 34. Mr. Naik invited my attention to the deposition of Mr. Abdul Rehman son of Hussainsaheb at Exh. 44, whose deposition is as follows.—

“Hayatbi was in possession of two rooms I do not know personally about any transaction between the plaintiff and defendant and Hayatbi. Hayatbi and myself handed over the possession of two rooms to Kasimsaheb. Kasimsaheb paid Rs. 2,000/- to Saheblal and Saheblal paid the said amount to me and thus we delivered the possession to Kasimsaheb.”

It is noticeable that the above evidence is inconsistent and completely discrepant with the evidence given by the witness Narayan, because he refers that the defendant i.e. Saheblal gave possession while the above deposition shows that this witness Abdul Rahiman and Hayatbi handed over possession. Secondly, it is to be noticed that the evidence of this witness suffers from basic infirmity by his own saying that he has no personal knowledge of the transaction which took place between Hayatbi and plaintiff. It is the case of the plaintiff that in view of the earlier transaction the present agreement should be held to be genuine and if that is so the deposition of this witness saying that he

has no personal knowledge of the earlier transaction shows that there is no connection between the earlier transaction and the transaction embodied in Exh. 34. It is contrary to the case of plaintiff herself. Therefore this evidence is also quite insufficient to support the case as made out by the plaintiff. In view of this summary of evidence and observations which I have made, it is not possible to accept the contention of Mr. Bhimrao N. Naik that the possession of two rooms must have been delivered as part performance of the alleged contract Exh. 34. Mr. Bhimrao N. Naik, the learned Advocate then contended that as stated by the learned Appellate Judge in para 18 of the judgment the plaintiff was residing in rented house and it is likely that she must have paid that amount with a hope that she would get the property of her own. The learned appellate judge in para 18 of his judgment has stated thus:—

“In view of the evidence on record and the various transactions which have been referred to by the plaintiff in the plaint which were entered into by the defendant with various persons in respect of the suit house, it seems that the plaintiff must be held entitled to the relief of specific performance of the agreement.”

The reason given in this para quoted above seems to be quite irrelevant. The fact that the various transactions referred to by the plaintiff earlier would only show that the defendant is trying to obtain moneys cancelling the earlier transactions and therefore it may perhaps lend support to the defence of the defendant that the transaction which he entered into was in the nature of a loan transaction. It is not that the mere changing the nature of transaction from time to time would give support to either of them. Second reason given by the learned Judge that since the plaintiff is staying in the rented house, she must have been in the hope to get the property of her own and therefore she entered into this agreement, also is not correct. It would be unreasonable to assume that a tenant staying in the rented house, if entered into any such transaction would like to purchase the house. Almost her point is that the Rent Act is applicable to this case, if that is so, it requires to be noticed that no tenant would like to purchase the

house instead of remaining satisfied with the benefits of the protection available under the Rent Act. It would be too far to interfere with this case, but suffice it to say that both the reasons given by the learned Judge appear to be incorrect. They do not support the case of the plaintiff as far as the agreement Exh. 34 is concerned. The relevant question which the learned appellate Judge ought to have taken into consideration is, "what is the effect of non-delivery of possession in part performance of the agreement?" and secondly, different versions of the plaintiff in respect of principle terms of payment of earnest money under the agreement. Unfortunately, the learned appellate judge committed the basic error in wrongly assuming that the delivery of possession was made as part performance of the contract as held by him in para 17 of the judgment and which error according to me has vitiated his judgment and this is a clear error of law, because if the finding was based on vital points on his erroneous assumption as to the view of the trial Court and it was also vitiated because the learned appellate Judge had not chosen to examine or discuss the evidence in detail. Therefore, in my opinion, the judgment of the appellate judge is liable to be set aside in this appeal. No other point is urged in this second appeal.

12. It may be stated here that the jurisdiction for the decree of specific performance is discretionary and in my opinion the discretion in refusing to give the decree was rightly exercised by the learned trial judge relying on the various circumstances. Although in appeal it is liable to be corrected u/s. 20, Specific Relief Act, for the reasons which I have given above, the learned appellate judge committed an error in understanding the view of the learned trial judge regarding the delivery of possession, the learned appellate judge came to the erroneous conclusion as shown by me above and, therefore, in my opinion the discretion which was exercised by him in reversing the decree passed by the trial Court was not properly exercised and it appears that because of his erroneous approach and finding he committed an error in passing the decree for specific performance of agreement of sale Exh. 34 in this case.

13. In the result, I allow the appeal and reverse the decree of learned appellate judge and restore that of the learned trial judge. Mr. Lalit pointed out to me that the decree of the appellate court regarding the costs throughout should be maintained and he also made a grievance that he has succeeded to the extent of Rs. 2,250/- and therefore costs should be allowed. As the matter relates to the grant of decree for specific performance of the contract and the jurisdiction as I have stated is discretionary. I have reversed the decree of the appellate court. I do not see any reason to maintain the decree as far as the cost given to the defendant is concerned and therefore the decree of the appellate court is reversed and the appeal is allowed with no order as to costs.

Appeal allowed.

AIR 1982 BOMBAY 387

JAHAGIRDAR, J.

Prakash Cotton Mills Pvt. Ltd., Petitioner v. Municipal Commissioner for Greater Bombay and another, Respondents.

Spl. Civil Applns. Nos. 1331 and 1846 of 1978, D/- 15-1-1982.

Evidence Act (1 of 1872), Ss. 5, 64, 67 — Proof of contents of sale deed — Executant of sale deed not examined — Proof of signature of executant, however, offered — Held that could not prove truth of contents of document, which could only be proved by executant — Therefore, sale deed was inadmissible in evidence in view of failure to examine executant. (1966) 68 Bom LR 228 and AIR 1971 SC 1949 Rel. on; View expressed by Vimadalal, J. in (1968) 70 Bom LR 683 Held not good law in view of AIR 1971 SC 1949. (Para 3)

Cases Referred: Chronological Paras
AIR 1971 SC 1949 3
(1968) 70 Bom LR 683: 1968 Mah LJ 879 2
(1966) 68 Bom LR 228 2
AIR 1954 Bom 305: 56 Bom LR 147 2

B. G. Vaidya i/b M/s. H. V. Mehta & Co. and M/s. Bachubhai Munim & Co., for Petitioner; V. T. Walavalkar with Mrs. M. V. Shetty, N. V. Kamat and P. B. Karhadkar, for Respondents.

DZ/DZ/B700/82/HR/RSK

JUDGMENT:— Normally I would have discharged the rule in this petition on the threshold itself because it challenges an interlocutory order passed by the Additional Chief Judge of Small Cause Court at Bombay disallowing the exhibition of a sale-deed on which the petitioner wanted to rely. Since, however, the petition has been admitted and rule granted on the same and since arguments have been advanced before me on the interpretation of a judgment of this Court I have proceeded to hear and dispose of this petition on merits.

2. Before the learned Additional Chief Judge of the Small Cause Court reliance had been placed by the petitioner on a sale-deed but the executant of the sale-deed was not examined. The proof of the signature of the executant, however, was offered but that itself could not prove the contents of the sale-deed or the truth of the contents of the sale-deed. On this ground the learned Judge refused to exhibit the sale-deed. While so doing he relied upon a judgment of Division Bench of this Court "In the matter of Mr. D and Mr. S" (1966) 68 Bom LR 228) in which it was held:

"To conclude this part of the discussion, we hold, in the first place that what has been formally proved is the signature of Abreo and not the writing of the body of the document at Exh. 28 and secondly, that even if the entire document is held formally proved, that does not amount to a proof of the truth of the contents of the document. The only person competent to give evidence on the truthfulness of the contents of the document was Abreo."

This view in fact confirms the view taken by Bhagawati J., as he then was, in *Madholal Sindhu v. Asian Assurance Co. Ltd.* (1954) 56 Bom LR 147: (AIR 1954 Bom 305). Both the judgments were noticed by Vimadalal J. in *Bhima Tima Dhotre v. Pioneer Chemical Co.*, (1968) 70 Bom LR 683. In this latter judgment Vimadalal J. has made himself bold to say that he, sitting as a single Judge, did not agree with the view which the Division Bench has taken and thereafter proceeded to express his own views on the question of the proof of the contents of a document. Obviously the views expressed by Vimadalal J. cannot be bind-

ing upon a Judge of this Court or any Judge of the subordinate Court because they are only his personal views and they are contrary to the binding decision given by the Division Bench, as Vimadalal J. himself has mentioned.

3. Further the matter is no longer in doubt because in the decision of the Supreme Court in *Bishwanath Rai v. Sachhidanand Singh*, AIR 1971 SC 1949, it has been held that the correctness of the contents of the letter can only be proved by examining the writer of that letter. In this state of law the view taken by the learned Additional Chief Judge of Small Cause Court is correct, and cannot be interfered with.

In the result, this petition must fail. Rule is discharged with no order as to costs. Rule is discharged in Civil Application No. 1846 of 1978.

Petition dismissed.

AIR 1982 BOMBAY 388

MASODKAR, J.

Nilkanth Balappa Managave Shop, a Registered Firm, and another, Petitioners v. M/s. Raj & Co. and others Respondents.

Writ Petn. No. 3078 of 1981, D/- 9-3-1982.

Partnership Act (9 of 1932), S. 49 — Applicability — Debt of partnership firm — Joint and several decree against firm and its partners — Decree must be executed as it stands and S. 49 cannot be invoked, nor O. 21, R. 50 (1) of Civil P. C. (Civil P. C. (5 of 1908), O. 21, R. 50 (1).)

Before the principles underlying S. 49 are pressed in aid, all the conditions that bear upon the principles must be available. In case of a decree which clearly makes the debt payable by the firm as such and also by each of the defendants, who may happen to be its partners, the principle is clearly not available, for it is not as if that in every case where the debt is of the partnership and the decree is made joint and several against the firm as well as the partners of the firm, such principle would hold good in the matter of execution of a decree in favour of a third party. If such a principle were to be universally applied, several complica-

tions will arise in the matter of execution of the decree which is obtained by the third party who is not concerned with the inter se rights and obligations of the firm and its partners. In fairness and in law, therefore, the matter must depend on the terms of a given decree. What is required to be executed is the decree as such and, if the term is clear that the same is liable to be executed even severally, then the executing Court cannot refuse the execution on the ground that the firm is made liable and it should be first proceeded against. When a decree is made by use of the words "jointly and severally", there is no question of any ratable distribution of the liability. It is in those cases only where the liability can be ratably distributed inter se among the judgment-debtors on the terms of the decree that, presumably, the principles of S. 49 may be available for application. In all other cases, the term of the decree is determinative of the liability. (Paras 4, 7)

Now, as regards the provisions of O. 21, R. 50 (1), Civil P. C., they are clearly enabling in nature and the same permit a decree made against a firm to be executed in the manner as is indicated by cls. (a), (b) and (c) thereof. Such a decree could be executed against the personal property of the partners. The provisions of this Rule are not intended for making it compulsory upon the decree holder to exhaust the remedies in the manner laid down by cl. (a) or cl. (b) or cl. (c). In other words, it is not necessary to proceed first and with priority in every case against the property of the partnership and without that as if no recourse can be had to proceed against the personal property of the persons mentioned in cls. (b) and (c). However, the enabling provisions of O. 21, R. 50 (1) govern the case of a decree which has been passed against the firm and not against the firm and against the partners personally. Furthermore, a Court executing the decree cannot go behind the decree. It must take the decree, as it stands, for the decree is binding and conclusive between the parties to the suit. Therefore, when a decree is made not only against the firm but also against the partners personally, it follows that by recourse to any other method, the executing Court cannot refuse to execute the

decree which is clearly a personal decree against the partners. AIR 1960 SC 388 and AIR 1964 SC 581, Rel. on.

(Paras 5, 6)

Cases Referred: Chronological Paras
AIR 1964 SC 581 5
AIR 1960 SC 388 5, 6

K. J. Abhyankar, for Petitioners;
Bhimrao N. Naik, for Respondent No. 4.

ORDER:— By this petition the challenge is to the order made by the Civil Judge, Senior Division, Kolhapur, raising the attachment with regard to an amount of Rs. 16,000/- to Rs. 17,000/- which was attached in execution of a decree passed in the suit, being Special Civil Suit No. 206 of 1973. That decree reads as follows:—

"Plaintiff's suit against defendants 1 to 6 is decreed in the sum of Rs. 93,971.78 Ps. with future interest on Rs. 93,871.78 Ps. at 6% per annum from the date of this suit till the realisation of the entire amount herein.

Defendants 1 to 6 jointly and severally shall pay all this amount to plaintiff firm by bearing its costs of this suit in addition to their own.

Decree shall be drawn accordingly."

2. It is not in dispute that the amount that was attached was the deposit belonging to judgment-debtor No. 4 and was available for attachment. After the attachment, the said judgment-debtor No. 4 filed an objection which has been decided in his favour and attachment has been lifted. By the impugned order, the learned trial Judge held that the decretal amount was a joint debt due from the firm and upon the principles underlying S. 49 of the Partnership Act, 1932, the separate property of the partner should not be proceeded against till the property of the firm is first proceeded against and applied for the satisfaction of the decretal amount. That view of law is under challenge in the present petition.

3. Now, as far as the decree is concerned, it makes the decretal amount jointly and severally payable. Primarily, therefore, such a decree has to be executed as is ordered and made payable and that shows that not only the liability is joint but several against each of the defendants. The executing Court is bound to execute the decree as it is made. Had there been any other direc-

tion in keeping with the principles underlying S. 49 of the Partnership Act, the question would have been different. In the present case, the decree clearly makes each of the defendants severally liable to pay and satisfy the decretal amount.

4. No doubt, the principles underlying S. 49 of the Partnership Act have been applied when the question of firm debts are in issue, but those have been applied in principle and not by reason of the statute. S. 49 has to be read along with S. 25 of the Partnership Act and, if so read, it would indicate that, even while applying the provisions of S. 49, the debt by the third party can be recovered by proceeding against the partners. Before the principles underlying S. 49 are pressed in aid, all the conditions that bear upon the principles must be available. In case of a decree which clearly makes the debt payable by the firm as such and also by each of the defendants, who may happen to be its partners, the principle is clearly not available, for it is not as if that in every case where the debt is of the partnership and the decree is made joint and several against the firm as well as the partners of the firm, such principle would hold good in the matter of execution of a decree in favour of a third party. If such a principle were to be universally applied, several complications will arise in the matter of execution of the decree which is obtained by the third party who is not concerned with the inter se rights and obligations of the firm and its partners. In fairness and in law, therefore, the matter must depend on the terms of a given decree. What is required to be executed is the decree as such and, if the terms are clear that the same is liable to be executed even severally, then the executing Court cannot refuse the execution on the ground that the firm is made liable and it should be first proceeded against.

5. The provisions of O. 21, R. 50 (1) of the Civil P. C. are clearly enabling in nature and the same permit a decree made against a firm to be executed in the manner as is indicated by cls. (a), (b) and (c) thereof. That such a decree could be executed against the personal property of the partners is well settled. (See *Topanmal v. M/s. Kundomal Gangaram*, AIR 1960 SC 388, and *Gajendra*

Narain Singh v. Johrimal Prahlad, AIR 1964 SC 581). The provisions of this Rule are not intended for making it compulsory upon the decree-holder to exhaust the remedies in the manner laid down by cl. (a), or cl. (b), or cl. (c). In other words, it is not necessary to proceed first and with priority in every case against the property of the partnership and without that as if no recourse can be had to proceed against the personal property of the persons mentioned in cls. (b) and (c).

6. It is obvious that these enabling provisions of O. 21, R. 50 (1) govern the case of a decree which has been passed against the firm and not against the firm and against the partners personally. Further more, as stated above, a Court executing the decree cannot go behind the decree. It must take the decree, as it stands, for the decree is binding and conclusive between the parties to the suit. (See *Topanmal v. M/s. Kundomal Gangaram*, AIR 1960 SC 388). Therefore, when a decree is made not only against the firm but also against the partners personally, it follows that by recourse to any other method, the executing Court cannot refuse to execute the decree which is clearly a personal decree against the partners. The question, when such a personal decree is not made what should be the procedure to be followed, is not relevant for determining such a position. Suffice it to say that the provisions of O. 21, R. 50 (1) of the Civil P. C. are attracted when the decree is in terms against the firm and there is no personal decree against the other defendants who were joined to the suit as partners.

7. When the decree is made by use of the words "jointly and severally", there is no question of any ratable distribution of the liability. It is in those cases only where the liability can be ratably distributed inter se among the judgment-debtors on the terms of the decree that, presumably, the principles of S. 49 may be available for application. In all other cases, the terms of the decree is determinative of the liability.

8. That being the position, the impugned order is unsustainable and the same is set aside. The attachment of the amount in deposit to continue. It is for the executing Court to make the eventual order as to the payment of

that money. The Rule is made absolute with no order as to costs.

Petition allowed.

AIR 1982 BOMBAY 391

M. N. CHANDURKAR AND

D. N. MEHTA, JJ.

Municipal Corporation of Greater Bombay, Appellant v. Ramadevi Shrinivas Ruia and another, Respondents.

Appeal No. 244 of 1976 in Land Acquisition Reference No. 80 of 1972, D/- 5-12-1981.

Land Acquisition Act (1 of 1894), Section 30 read with S. 3 (b) — Person interested in appropriation of compensation — Person having a mere agreement in his favour to enter into agreement of lease is not such a person — In absence of enforceable agreement S. 40 of T. P. Act could not be invoked. (T. P. Act (1882), S. 40) Decision in L. A. Ref. No. 80 of 1972 (Bom.) Reversed.

In this case the Municipal Corporation of Greater Bombay had certain plots available to be let out for building purposes on building lease. The practice of the Corporation was to invite offers firstly to enter into an agreement to enter into a lease and then to execute the lease in respect of such plots. So far as the plot in question is concerned, respondent wrote a letter to the Municipal Commissioner offering "to enter into an agreement in the terms set out in the accompanying draft for a building lease". Along with this letter, approved securities of the face value of Rs. 5000/- duly endorsed to the Corporation to be held by the Corporation if the offer was accepted for due compliance with the obligations under the agreement were also sent. In addition, a sum of Rs. 300/- was sent "to be held by the Corporation, if this offer is accepted, as an advance on account of stamp duty, registration charges and other costs payable in respect of the abovementioned agreement". The letter further stated that if respondent failed to execute and complete the original and duplicate of the agreement within one month after the date of delivery thereof or within such extended period (if any) as the Corporation may

permit, the Corporation was to forfeit the security deposit and the advance of Rs. 300/-. This offer was accepted by the Corporation. Admittedly respondent never entered into the agreement of lease and there was no question of any lease in his favour. The plot in question became subject of land acquisition and respondent received an intimation from Corporation about it. Before the Land Acquisition Officer both the Corporation and the respondent claimed the entire amount of compensation whereupon a reference was made to the Court:

Held that even on the offer which had been made by the respondent that she had undertaken to enter into an agreement of lease, the mere fact that this offer was accepted on behalf of the Corporation would not bring about any contract binding on the Corporation unless the contract was in compliance with the provisions of Ss. 69, 70 and 71 of the B. M. C. Act. It was, therefore, an essential term of the offer that an agreement to lease would be executed and the said agreement was to be under seal. Unless that agreement was executed, there was not even a right which could be enforced specifically by the respondent against the Corporation requiring it to lease out the disputed property to her. Hence respondent could not be said to have any right to or interest in land. In absence of even an enforceable agreement question of the provisions of Sec. 40 of the T. P. Act being attracted does not arise at all. AIR 1923 PC 47, AIR 1958 Andh-Pra 533 and F. A. Nos. 367 to 389 of 1964, D/- 27-8-1973 decided by Vaidya J. (Bom) Rel. on. (1958) 60 Bom LR 1208 Disting. Decision in L. A. Ref. No. 80 of 1972 (Bom) Reversed.

(Paras 17, 29)

Cases Referred: Chronological Paras

AIR 1980 SC 1334	9. 26, 27, 29
AIR 1978 SC 803	9. 30
(1973) First Appeals Nos. 367 to 389 of 1964, D/- 27-8-1973 (Bom)	10, 17
AIR 1970 SC 564	9. 30
AIR 1968 SC 366	15
AIR 1958 Andh-Pra 533	17
(1958) 60 Bom LR 1208	1, 6, 7, 8, 9, 19, 25, 31
AIR 1933 PC 29: ILR 60 Cal 980	17
AIR 1924 PC 156: ILR 3 Pat 625	17
AIR 1923 PC 47: ILR 47 Bom	16, 17

(1912) 1 Ch 284; 81 LJ Ch 184, Von Hatzfeldt Wildenburg v. Alexander 17

(1857) 6 HLC 238; 10 ER 1287; 27 LJ Ch 46, Ridgway v. Wharton 16

K. K. Singhavi with R. L. Dalal and P. B. Karadkar, for Appellant; P. L. Nain i/b Doru & Doru Co. (for No. 1) and B. E. Patil with S. P. Kanuga, (for No. 2), for Respondents, T. R. Andhyarujina with S. H. Kapadia i/b. Gagrut & Co. for Interveners.

CHANDURKAR J.:— This is an appeal by the Municipal Corporation of Greater Bombay challenging the decision of a learned single Judge of this Court holding that respondent No. 1 was entitled to apportionment of amount of compensation payable to the Municipal Corporation under the Land Acquisition Act in the ratio of 10: 6 in view of the decision of this Court in Dossibai Nanabhoy Jijeebhoy v. P. M. Bharucha (1958) 60 Bom LR 1208.

2. The facts in this case are not in dispute. The Municipal Corporation of Greater Bombay (hereinafter referred to as "the Corporation") had certain plots available to be let out for building purposes on building lease. The practice of the Corporation was to invite offers firstly to enter into an agreement to enter into a lease and then to execute the lease in respect of such plots. So far as the plot in question is concerned, respondent 1 wrote a letter to the Municipal Commissioner some time in 1956 offering "to enter into an agreement in the terms set out in the accompanying draft for a building lease". The plot in question is 1600 square yards. Along with this letter, approved securities of the face value of Rs. 5000/- duly endorsed to the Corporation to be held by the Corporation if the offer was accepted for due compliance with the obligations under the agreement were also sent. In addition, a sum of Rs. 300/- was sent "to be held by the Corporation, if this offer is accepted, as an advance on account of stamp duty, registration charges and other costs payable in respect of the abovementioned agreement." The letter further stated that if respondent 1 failed to execute and complete the original and duplicate of the agreement within one English calendar month after the date of delivery thereof or

within such extended period (if any) as the Corporation may permit, the Corporation was to forfeit the security deposit and the advance of Rs. 300/-. There is no dispute that this offer was accepted by the Corporation on 15th Nov. 1956.

3. Now, the agreement which respondent 1 had undertaken to enter into is different from the lease itself. This agreement has several clauses and under this agreement, possession was to be given to the intending lessee and the tenant was required to submit the necessary plans of the construction for approval and take the necessary steps. The agreement reserved the power of inspection to the Commissioner and the City Engineer or the Estate Agent and Land Manager in respect of the building and works erected and in the course of erection. The provision with regard to the lease is contained in para 14 of the agreement and it appears that the lease is to be granted only after completion of the structure and the relevant stipulation with regard to the lease is as follows:—

"So soon as the City Engineer has accepted the completion certificate granted by the approved architect and certified that the main building has been roofed in to the satisfaction of the City Engineer the Corporation shall if this agreement has not previously been determined and if the tenant has otherwise fulfilled all the terms and conditions of this agreement grant to the tenant or to any nominee of the tenant who may be approved by the Corporation and the tenant or such nominee shall accept a lease of the plot with the building thereon in perpetuity from the date of possession at the yearly rent mentioned in Cl. 13 hereof"

A separate form of the lease is also prescribed. Now, admittedly respondent 1 has not entered into the agreement of lease and clearly there was no question of any lease in his favour.

4. Now, the plot in question became the subject-matter of land acquisition proceedings consequent upon a notification under Section 4, Land Acquisition Act, being issued on 12th May 1961 and notification under Sec. 6 having been issued on 7th Feb. 1962. Prior to this the Corporation had already sent an intimation to respondent 1 on 20th

Aug. 1960 that the land was under acquisition.

5. The Land Acquisition Officer by an award dated 30th March 1970 determined the compensation inclusive of 15% solatium at Rs. 1,56,400. Before the Land Acquisition Officer the Corporation claimed the entire amount of compensation. Respondent 1 also claimed the entire compensation on the ground that she had entered into an agreement with the Corporation. The Land Acquisition Officer thus made a reference to the Court under Sec. 30 to which the compensation amount was also directed to be sent. In his reference the Land Acquisition Officer stated that there was no application for reference under Section 18, L. A. Act. It is this reference which came before the learned single Judge.

6. The learned single Judge passed a very brief order as follows:—

"Upon the authority of *Dossibai Nanabhoy Jijeebhoy v. P. M. Bharucha* (1958) 60 Bom LR 1208, an intending lessee under an agreement to lease is a person interested in land and is entitled to claim apportionment"

Holding that the lessor and the lessee were entitled to compensation in the ratio of 10:6 the Corporation was held entitled to Rs. 97,750/- and the lessee was held entitled to Rs. 68,650/-. The reference was accordingly answered by the learned Judge. This view of the learned Judge is being challenged in this appeal.

7. Mr. Singhavi appearing on behalf of the Corporation has contended that the learned Judge was not justified in relying upon the decision in *Dossibai's* case because the tenant who was held entitled to apportionment of compensation was in possession in pursuance of an agreement of lease. According to the learned Counsel, all that respondent 1 has in her favour in the instant case is an agreement to enter into agreement to lease which is not even specifically enforceable and respondent 1 was not, therefore, a person interested within the meaning of Sec. 3 (b), L. A. Act, and was not, therefore, entitled to claim any compensation.

8. Mr. Nain appearing for respondent 1 has contended that the reference before the learned single Judge has come to be decided on the footing that

there is an agreement of lease in favour of respondent 1 and that the appellant is not now entitled to contend that there is in fact no agreement of lease in favour of respondent 1. Reliance was placed by the learned counsel for respondent 1 almost exclusively on the decision in *Dossibai's* case and on the authority of that decision it was contended that it is not necessary that the interest of the claimant for the purpose of Sec. 30, L. A. Act should be a proprietary interest but that such an interest could be in the nature of an obligation annexed to ownership and a corresponding right in the claimant flowing from the agreement to have the property leased out to her. On the basis of the authority in *Dossibai's* case, it was contended that if there was a right to or claim to land, it was enough to make the claimant a person interested for the purposes of Sec. 30, L. A. Act.

9. It appears that similar matters are pending in this Court and Mr. Andhyarujina sought permission to intervene and he was also heard in the matter and the arguments advanced before us by Mr. Andhyarujina were also advanced on the basis of the authority of the decision in *Dossibai's* case (1958-60 Bom LR 1208). In addition, some reliance was placed on the decision of the Supreme Court in *Bai Dosabai v. Mathuradas*, AIR 1980 SC 1334, to which we shall refer later. Mr. Andhyarujina's arguments were then supplemented by Mr. Kapadia who wanted to go into the larger question as to whether the right in the instant case could be considered as property having regard to the decisions of the Supreme Court in *Bank Nationalisation* case in AIR 1970 SC 564, and another decision of the Supreme Court in *M. M. Pathak v. Union of India*, AIR 1978 SC 803.

10. We may at this stage refer to a judgment of Vaidya J. on which reliance was placed by Mr. Singhavi, where a similar question arose for consideration. That judgment is in First Appeals Nos. 367 to 389 of 1964 decided on 27th August 1973. The claimants in that case claimed a share of compensation awarded under the Requisitioning and Acquisition of Immovable Property Act, 1952, and the argument on behalf of the Municipal Corporation was that the claimants were merely prospective lessees under the terms of a public auc-

tion of plots allotment for building leases for 999 years and no agreement of lease having been executed by any of them as required by Secs. 69 and 70 of the Bombay Municipal Corporation Act, their status was merely that of prospective lessees who had agreed to execute in future agreements of lease and those agreements had become impossible of performance or execution on account of acquisition of land which were first requisitioned under the Defence of India Rules and then under the Requisitioned Land (Discontinuance of Powers) Act, 1947, and lastly under Sec. 3 of the Requisitioning and Acquisition of Immovable Property Act, 1952. The learned Judge set out the terms of public auction and those whose bids were accepted had first to enter into an agreement and the agreement had to be under seal and had to be registered. In that case also, the offer of the claimants was accepted by the sanction of the Improvements Committee. The agreements were, however, never executed nor registered nor was possession ever delivered. The learned Judge held that the agreement, whether it is considered as an agreement to execute in future an agreement or an agreement to create a lease, it became void on the issue of notification of acquisition and then the learned Judge observed as follows:—

"Having regard to the nature of the agreements entered into by the claimants, and the subsequent notification, the claimants had no interest whatsoever in any compensation money which the Municipal Corporation got from Government in respect of the lands acquired by the Government."

The claim of the claimants was thus rejected.

11. According to the learned counsel for the Corporation, the judgment of the learned single Judge is contrary to the view taken much earlier by Vaidya J. It does not appear that at the time when the reference in this case was argued, the decision of Vaidya J. was brought to the notice of the learned single Judge. However, since the matter has been fully argued before us, we will consider the contentions on their own merits.

12. It does appear that when the learned single Judge decided the refer-

ence, he proceeded on the footing that respondent 1 was a lessee or a tenant of the plot in question. That, however, cannot be the basis on which the reference could be decided. It is undisputed on facts that all that had happened in the instant case is that the offer to enter into an agreement was accepted on behalf of the Corporation on 15th November, 1956. It is no doubt true that the offer by respondent 1 refers to the draft of the agreement, but admittedly if the agreement has not been actually signed or executed, the position is that beyond the acceptance of the offer to enter into an agreement to lease, nothing more had taken place and unless it is possible for us to hold that on these facts the claimant or respondent 1 can be said to be a person interested and entitled to apportionment, it will be difficult to sustain the order of the learned single Judge.

13. Now, so far as the Bombay Municipal Corporation Act is concerned, the contract has to be made on behalf of the Corporation by the Commissioner under Sec. 69 (a) and under Sec. 70 (1) cl. (a) if any such contract entered into by the Commissioner required to be under seal, it has to be sealed with the common seal of the Corporation. It is not in dispute that under the terms of auction the agreement to lease was required to be under seal. The manner of executing a contract required to be under seal is specified in Sec. 70 (2) which reads as follows:—

"The common seal of the Corporation which shall remain in the custody of the Municipal Secretary, shall be affixed in the presence of two members of the standing committee to every contract or other instrument (other than contract relating to the acquisition of immovable property or interest therein or a right thereto), required to be under seal and such contract or instrument shall be signed by the said two members of the standing committee in token that the same was sealed in their presence. The signature of the said members shall be distinct from the signatures of any witnesses to the execution of any such contract or instrument."

Section 71 of the Act provides that no contract of the nature specified in subsec. (2) of the last preceding section nor

executed as in the said section provided, shall be binding on the Corporation. Therefore, so far as the provisions of the B. M. C. Act are concerned, it is necessary that before any rights or liabilities are created against Corporation, the contract has to be under seal.

14. Now, Sec. 30, L. A. Act, provides as follows:—

"When the amount of compensation has been settled under Sec. 11 if any dispute arises as to the apportionment of the same or any part thereof or as to the persons to whom the same or any part thereof is payable, the Collector may refer such dispute to the decision of the Court."

15. A reference was made before us to the definition of "person interested" having regard to the decision in Dossibai's case. The definition of "person interested" in Sec. 3 (b) is an inclusive definition and the first part thereof provides that the expression "person interested" includes all persons claiming an interest in compensation to be made on account of acquisition of land under this Act. In *Sunderlal v. Paramsukhdas*, AIR 1968 SC 366, while construing the words "person interested," it was pointed out that it was not necessary that in order to fall within the definition, a person should claim an interest in land which has been acquired. Now, for the purposes of the present case, it is really not necessary for us to go into the extended definition because in so far as the claim to apportionment of compensation is concerned, unless respondent 1 is entitled to claim compensation qua compensation, a claim by him under Sec. 30, L. A. Act, will not be maintainable. In order to claim apportionment of compensation under Sec. 30, respondent 1 must show that she had some interest in or right to land.

16. Now, the maximum that can be said in favour of the present claimant-respondent 1 is that she has an agreement in her favour to enter into an agreement of lease and it is well known that while an agreement to lease may be specifically enforceable, an agreement to enter into an agreement is not recognised by law. In *Harichand v. Govind*, AIR 1923 PC 47, the Privy Council has observed as follows:—

"Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations take a concrete shape. As observed by Lord Chancellor (Lord Cranworth) in *Ridgway v. Wharton* (1857) 6 HLC 238 (299) (268 ?) the fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to an agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement."

Now, it is nobody's case that when an offer was made to respondent 1 to enter into an agreement, an agreement to lease did in fact take place because it was clearly intended by the parties that respondent 1 would enter into an independent agreement of lease which would have to be under seal.

17. In *Dhulipudi Namayya v. Union of India*, AIR 1958 Andh Pra 533, a Division Bench of the Andhra Pradesh High Court was dealing with the question as to whether the agreement formed by the acceptance of the defendant's tender was provisional and subject to the execution of another formal document and the following observations are instructive (at p. 537):—

"On the question whether the agreement formed by the acceptance of the defendant's tender was provisional and subject to the execution of another formal document, the averment in the plaint was that no separate agreement was intended or contemplated and this was traversed in the defendant's written statement.

The position of the law on the subject has been summarised by Parker J. in *Von Hatzfeldt Wildenburg v. Alexander*, 1912-1 Ch. 284 at p. 288 (E), in the following passage which has been approved by the Judicial Committee in *Hukum Chand v. Ran Bahadur Singh*, ILR 3 Pat 625: (AIR 1924 PC 156) (F), *Harichand Mancharam v. Govind Laxman*, ILR 47 Bom 335: (AIR 1923 PC 47) (G) and *Currimbhoy & Co. Ltd. v. L. A. Creet*, ILR 60 Cal 980: (AIR 1933 PC 29) (H).

'It appears to be well settled by the authorities that if the documents or let-

ters relied on as constituting a contract contemplated the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction, already agreed to, will in fact go through.

In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

Having regard to this statement of the law, it is clear that even on the offer which has been made by respondent 1 that she had undertaken to enter into an agreement of lease, the mere fact that this offer was accepted on behalf of the Corporation would not bring about any contract binding on the Corporation unless the contract was in compliance with the provisions of Secs. 69, 70 and 71, B. M. C. Act. It was, therefore, an essential term of the offer that an agreement to lease would be executed and the said agreement was to be under seal. Unless that agreement was executed, there was not even a right which could be enforced specifically by respondent 1 against the Corporation requiring it to lease out the disputed property to her. We are in complete agreement with the view taken by Vaidya J. in First Appeals Nos. 367 to 389 of 1964 decided on 27th August 1973 referred to earlier.

18. Once we come to the conclusion that all that respondent 1 had in her favour was an offer which was accepted by the Corporation and respondent 1 was herself to enter into the agreement of lease and if such an agreement is not recognised by law as not creating any obligation or enforceable right, it is difficult for us to see how respondent 1 can be said to have any right to or interest in land because it is clear that there was no question of any proprietary interest in the land in the case of respondent 1.

19. As already pointed out, the contention on behalf of respondent 1 and

the interveners is solely founded on the decision in Dossibai's case (1958-60 Bom LR 1208) and that contention seems to have been accepted by the learned single Judge when he applied the ratio in Dossibai's case. It is, therefore, necessary to deal in some detail with Dossibai's case.

20. Dossibai has been described throughout in the judgment as claimant 1 and some of the lands which were under acquisition by the Government by notification dated 1st October 1947 were agreed to be let by the owner Dossibai, claimant 1, to Trivedi, who was a nominee of claimant 2 P. M. Bharucha, at an annual rent of Rs. 500/- per acre for 99 years with an option of renewal for a further period of 99 years. Some other lands were also agreed to be let out by the owner Dossibai to Trivedi for 99 years and an agreement of lease was executed on 2nd June, 1947. Now, all these lands were agreed to be let out by claimant 2 to a co-operative housing society described as claimant 3 and all the three claimants claimed compensation, when the lands were acquired, in respect of their respective interest in the land. It appears that the compensation was divided between claimants 1 and 2 in respect of certain lands and in respect of some lands, compensation was awarded to all the three claimants and finally the dispute came to the High Court after reference was decided by the District Court.

21. It is necessary to refer to the facts found in that case. The facts found were that the first claimant had put the second claimant in possession of the land agreed to be demised by her and in pursuance of the agreements, claimant 2 was in occupation of some of the lands and the remaining lands were in the occupation of the third claimant. It was undisputed that the second claimant had paid rent which was agreed to be paid by him and the second claimant was ready and willing to carry out his part of the contract. Claimant 2 was, therefore, entitled to claim the benefit of part performance under Section 53A, T. P. Act, and also to claim specific performance of the agreement to lease the lands in the event of the first claimant being unwilling to carry out her part of the contract. On the date of the notification, the first claim-

ant was ready and willing to execute a conveyance on the terms agreed upon and the second claimant was willing to take a conveyance from the first claimant. There was also no dispute that the third claimant remained in occupation under an agreement of lease from the second claimant and the third claimant was ready and willing to carry out its part of the contract and the second claimant was also willing to carry out his part of the contract. The third claimant was also, therefore, entitled to the benefit of part performance under Sec. 53A, T. P. Act, and also to obtain specific performance against the second claimant in the event of the second claimant being unwilling to carry out his part of the contract. As against the first claimant, the second claimant had possession of the lands agreed to be demised and he was entitled to hold possession of the lands and the first claimant was debarred from enforcing against the second claimant and persons claiming under him any right in respect of the lands agreed to be demised other than the right expressly provided by the terms of the agreement. The third claimant was also entitled to hold possession as against the second claimant. It was found that if the first claimant, that is, the owner, relying on the title, sought to obtain possession of the lands agreed to be demised to the second claimant, the latter could effectively resist the claim made by the first claimant except a claim arising out of any express terms of the agreement. The Division Bench found that though the second claimant had not acquired any interest of a tenant, there being no registered lease, he was entitled to remain in possession as if he had obtained a lease in his favour. Similarly as against the second claimant, the third claimant had right to remain in possession as if it had obtained a lease.

22. Now, before we come to the legal position set out in this decision, it is necessary to appreciate the fact that the second and the third claimants, who claimed apportionment of compensation, were in possession in part performance of the agreement to lease and could, therefore, resist a claim for possession by the owner. A claim for possession by the second claimant against the third claimant could also be resisted by the third claimant. It is in this con-

text that the passages relied upon heavily on behalf of respondent 1 must be read.

23. Dealing with the question as to who was the person interested in the land, the Division Bench observed as follows in the context of the contention that only those persons were entitled to claim compensation who had interest in the land compulsorily acquired and no others.

"A 'person interested in the land' under Sec. 9 will, in our judgment, by the definition in Sec. 3 (b), include a person who claims interest in compensation to be paid on account of the acquisition of land, and the interest which is contemplated by Sec. 9 and the other sections to which we have referred is not restricted to legal proprietary estate or interest in the land but includes such interest as will sustain a claim to apportionment with the owner of the land. If a person has a right to remain in occupation or has a claim against the land, or some obligation or restriction is imposed upon the ownership of the land, the person in whom the right or claim is vested or who is entitled to the benefit of the obligation or restriction will, in our judgment, be entitled to compensation, even though the right, claim or the benefit may not amount to an interest or estate in the land. If a person has without having any interest a right to remain in occupation or possession of land of the ownership of another, compensation for extinction of that right by compulsory acquisition will be payable to the person having the right of occupation or possession.

For instance, a person who has a licence which is irrevocable will be a person interested, even though the license does not amount to an interest in the land. The owner of a dominant tenement, having an easement over a servient tenement, even though the easement does not amount to an interest in the land, is by the definition declared expressly to be a person interested in land. In our judgment, the right to receive compensation for compulsory acquisition of land is not restricted to those persons who have a legal or proprietary interest or estate in the land and is

available to all persons who have a right or claim to land, even if such right or claim does not amount to legal or proprietary estate or interest in the land."

24. Now, both Mr. Nain and Mr. Andhyarujina have laid emphasis on the observations of the Division Bench that it is not necessary to have a legal or proprietary interest or estate in land in order to sustain a claim to apportionment of compensation with the owner of the land and, according to the learned Counsel, if a person has a right to or interest in land, he will be entitled to compensation.

25. There can hardly be any quarrel with the proposition laid down by the Division Bench. But we cannot lose sight of the fact that the Division Bench in that case was dealing with the right of apportionment claimed by claimants 2 and 3 who were in possession in pursuance of an agreement of lease and though the lease was not registered, though it was for 99 years, the Division Bench found that they were entitled to continue in possession in part performance of the agreement under S. 53A T. P. Act and that the agreement of lease could be specifically enforceable. It appears to us that when the Division Bench observed that the agreements of lease in that case were specifically enforceable, even though they were not registered, the obvious reference was to the provisions of Sec. 27 (a), Specific Relief Act, which section has now been deleted but with which we are not concerned because even in the instant case, the transactions are much prior to 1963. Section 49 (c) Registration Act, requires even an agreement to lease to be registered if it is for a lease from year to year or for a period more than one month. Therefore, it is obvious that what weighed with the Division Bench was that although claimants 2 and 3 were in possession, they may not have any interest in land because no such interest was created in the absence of a registered lease deed, but they had a right to land inasmuch as their possession was protected by the doctrine of part performance under Sec. 53A, T. P. Act. When the Division Bench, therefore, referred to a right to land, it was a right which enabled a person to continue in possession of the land. If there is merely an agreement which does not

create any enforceable right, as in the instant case, it is difficult for us to appreciate how that can create either a right to or an obligation in respect of that land. The ratio of Dossibai's case (1958-60 Bom LR 1208) was wholly inapplicable to the instant case because it is clear that though the Division Bench laid down that the person need not have proprietary interest or right, the observations clearly indicated that they had in view a right to land or an obligation attached to land which was of an enforceable nature.

26. Reference was made before us to the decision of the Supreme Court in Bai Dosabai's case (AIR 1980 SC 1334) cited supra. That was a case which dealt with the doctrine of equitable ownership or an obligation annexed to the ownership of the property and we have not found anything in that case which will support the claim of present respondent 1 because basically she has not in her favour even an enforceable agreement which can be said to create an obligation in favour of respondent 1 which can be attached to the ownership of the land in dispute.

27. In Bai Dosabai's case, a deed of lease executed by the lessor on 25th Feb. 1946 provided that the lessor was to get a full sale price of Rs. 1,29,111-8-0 either from the lessee or by selling the property by public auction if the lessee did not want to buy it. If the price recovered by public auction was less, the lessee was to make up the deficit. The lessor was under an obligation to sell the land to the lessee, if the lessee so desired, within a period of 7 years and if he paid the purchase price, but if he did not so desire, the land could be sold by public auction. However, if the lessor recovered by public auction sale price larger than that stipulated in the agreement, the excess had to be paid over to the lessee. The lessor had given a notice to the lessee demanding rent for 1950-51 and 1951-52 and he was informed that if rent was not paid, a suit would be instituted to recover possession and the property would be sold thereafter by public auction at the cost and risk of the lessee. After another notice demanding payment of rent for the next year and also for the first two years was given, a suit came to be filed for recovery of rent and a claim for posses-

sion as well as damages in lieu of rent was made. The suit was decreed. The property, it appears, was in the possession of a tenant of the lessee and the lessee had also filed a suit for possession against the tenant. Against the decree for possession in favour of the lessor, the lessee filed an appeal which was dismissed. The lessor obtained possession in execution of the decree and thereafter the lessee filed a suit for specific performance of the agreement dated 25th February, 1946 directing the lessor to execute a sale deed in his favour after receiving from the plaintiff-lessee the balance of the sale price or, in the alternative, to direct the lessor to sell the land by public auction and to retain a sum of Rs. 93,833-10-0 out of the sale proceeds to pay the excess amount to the plaintiff. The claim for specific performance was given up. The suit of the lessee, though it was dismissed by the City Civil Court, was decreed in appeal by the High Court and the land was directed to be sold by public auction or by private treaty if the parties so agreed. Out of the sale price, the lessor was first to reimburse himself to the extent of the balance of the original purchase price with interest at the rate of 9% p. a. and thereafter the remaining amount was to be equally divided between the plaintiff and the defendant. If the price fetched was less, then the lessor was to recover the deficit from the lessee. The High Court took the view that the deed dated 26th Feb. 1946 had created an equitable interest in land in favour of the plaintiff, that is, the lessee. The lessor then appealed to the Supreme Court against the decision of the High Court.

28. While disposing of the lessor's appeal, the Supreme Court pointed out that the concept and creation of duality of ownership, legal and equitable, on the execution of an agreement to convey immovable property as understood in England, is alien to Indian Law which recognises one owner, i. e., the legal owner. Reference was made to Sec. 54, T. P. Act, which expressly stated that a contract for sale of immovable property does not, of itself, create any interest in or charge on such property and then the Supreme Court observed as follows (at p. 1338 of AIR):—

"But the ultimate and penultimate paragraphs of Sec. 40, T. P. Act, make

it clear that such a contract creates an obligation annexed to the ownership of immovable property, not amounting to an interest in the property, but which obligation may be enforced against a transferee with notice of the contract or a gratuitous transferee of the property. Thus the equitable ownership in property recognised by equity in England is translated into Indian law as an obligation annexed to the ownership of property, not amounting to an interest in the property, but an obligation which may be enforced against a transferee with notice or a gratuitous transferee." Analysing the rights of the lessee, the Supreme Court found that the lessor was under an obligation to pay the excess price, if realised by public auction, to the lessee and then in para 10 of the judgment, the following observations were made:—

"We do not have any doubt, on a consideration of the terms of the deed and the relevant statutory provisions earlier referred, that the obligation of the lessor to sell the land by public auction and pay the excess price to the lessee is an obligation annexed to the ownership of the property, not amounting to an interest in the property, that it is an obligation in the nature of a trust, and, therefore, an obligation which may be specifically enforced."

29. Now, it is no doubt true that the principle of Sec. 40, T. P. Act, was invoked in Bai Dosabai's case (AIR 1980 SC 1334) but it is difficult for us to see how the principle of Section. 40 can at all be invoked or attracted in the instant case. The obligation in Bai Dosabai's case arose from the agreement of sale. In so far as the case before us is concerned, there is not even an enforceable agreement and there was, therefore, no question of the provisions of Sec. 40 being attracted in the instant case.

30. It is wholly unnecessary for us to refer to the arguments advanced before us by Mr. Kapadia on the basis of the decision in the Life Insurance Corporation's case (AIR 1978 SC 803) and the Bank Nationalisation case (AIR 1970 SC 564) as to the scope of the concept of property. Obviously the contention is that as a result of acquisition of land, a right or interest of respondent 1 has been extinguished and that was property for which she was entitled to

compensation. The question really does not arise in the instant case because we have taken the view that there is not even an enforceable agreement in favour of respondent 1.

31. Some argument was advanced before us on behalf of the Corporation that there was a frustration of the contract. If there was any contract which vested some rights in respondent 1 enabling her to claim compensation, she could not have been deprived of that right merely because there was frustration of the contract, but in any case, that argument now does not survive. It, therefore, appears to us that the learned single Judge was in error in applying the ratio of the decision in Dossibai's case (1958-60 Bom LR 1208) to the facts of the instant case. On the facts of the present case, the ratio of that case was not at all attracted and consequently the order made by the learned single Judge is liable to be set aside.

32. Accordingly, the appeal is allowed, the order of the learned single Judge is set aside and it is held that respondent 1 is not entitled to make any claim in respect of the compensation which is awarded by the Land Acquisition Officer in respect of the property in dispute. Respondent 1 to pay the costs of this appeal. We are informed that the amount awarded to respondent 1 was already withdrawn by her subject to guarantee furnished to the Prothonotary and Senior Master by order dated 11th October 1976. If the amount is not deposited back within four weeks by respondent 1, the Corporation will be entitled to have the guarantee enforced.

Appeal allowed.

AIR 1982 BOMBAY 400

MODY, J.

P., Appellant v. K., Respondent.

First Appeal No. 374 of 1980, D/-15-7-1981.

(A) Hindu Marriage Act (25 of 1955), Sec. 12 — Evidence — Requirements of notice and petition — Minute details and entire evidence need not be stated.

Notice is supposed to give only the bare outlines of the grievances of the party sending the notice. How much to

reveal, how much not to reveal, will depend on the opinion of the advocate who is sending the notice. Not mentioning of a particular fact in the notice, unless it is so material as ought to have found place in the notice, cannot be a subject of any serious comment nor can such an omission by itself affect the veracity of the evidence. In fact, often a notice is sent even though not necessary as notice is rarely a part of the cause of action. The function of the petition is to give material facts which give rise to the cause of action; it should not contain evidence or other unnecessary details. The notice or the petition are not proper place for minute details and entire evidence is not required to be stated in them.

(Para 8)

(B) Hindu Marriage Act (25 of 1955), S. 12 (1) (c) (as amended in 1976) — Consent as to any material fact or circumstance concerning the respondent — Connotation of — Fact of prolapse of uterus concealed — Marriage is avoidable and is liable to be annulled. AIR 1972 Bom. 132 held no longer good law in view of amendment in 1976.

It is difficult to define with any certainty what can be said to be material fact or circumstance but it may be safely said that the fact or circumstance which is of such a nature as would materially interfere with the marital life and pleasure, including sexual pleasure will be a material fact or circumstance. The only limitation is that the material fact or circumstances must be concerning the respondent, meaning thereby that it must be in respect of the person or character of the respondent. It is immaterial whether such fact or circumstance is curable or remediable. If a party to a marriage is suffering from some abhorrent disease such as leprosy or venereal disease and this is not disclosed it will be definitely concealment and consequently fraud as to material fact and circumstance. Similar would be the case with suppression of the fact of immoral life prior to the marriage. In the present case the sexual intercourse was not possible without manipulation of the protruding uterus by hand, which obviously is likely to cause dislike, abhorrence or disgust to a newly wed husband; concealment of such a fact will be fraud as to material fact or circumstance con-

cerning the respondent as now contemplated by Sec. 12 (1) (c). In the circumstance, the marriage solemnised between the petitioner and the respondent is avoidable and is liable to be annulled. AIR 1972 Bom 132 Held no longer good law in view of amendment in 1970. (Para 20)

(C) Hindu Marriage Act (25 of 1955), Sec. 12 (1) (a) (after amendment in 1976) — Impotency — Question of curability is immaterial. AIR 1977 Cal 213 Rel. on. AIR 1978 Punj & Har 181, Explained. (Para 28)

(D) Hindu Marriage Act (25 of 1955), Sec. 12 (1) (a) — Impotency — Aversion shown by husband due to prolapse of uterus can amount to impotency.

If the condition of a spouse is such as to make intercourse imperfect or painful it would amount to impotency. Even the aversion or abhorrence shown by spouse to having intercourse caused by prolapse of uterus can amount to impotency. In the present case the respondent was impotent for two reasons. Firstly, it is proved that the respondent resisted all the approaches of the petitioner to consummate the marriage, possibly with a view to conceal the condition or prevent the pain which may possibly result because of the intercourse and secondly, because with such a prolapse the intercourse is possible only after manipulation with hands. The sight of the protruding uterus is more likely than not to cool down the ardour and desire of the husband to perform the sexual act resulting in frustration for the husband. Even if the ardour and desire survive the sight of the protruding organ, the manipulation itself will cool it down. In any case an intercourse which demands previous manipulation of the uterus before penetration cannot be said to be an intercourse in the normal way. Therefore, both reasons independently of each other are indicative of impotency and this coupled with non-consummation held, to have been established, entitled the petitioner to annulment of the marriage. (Para 29)

Hindu Marriage Act (25 of 1955),

(1) (a) — Evidence — Non-consummation of marriage — Details of attempts are sufficient.

are not required to be proved by the petitioner or examined.

G—11

nation in chief when the case is of complete non-consummation and impotency. If it is the allegation of cruelty by reason of some positive acts, the details are obviously necessary with dates and particulars, but in respect of a negative case, such as non-consummation, a statement that throughout the period there has not been consummation, will normally suffice, with details of one or two attempts. (Para 14)

Cases Referred: Chronological Paras

AIR 1979 Andh Pra 169	26
AIR 1978 Punj & Har 181	27
AIR 1977 Cal 213	25
(1976) 78 Bom LR 85: 1976 Hindu LR 607	19
AIR 1975 Cal 413	24
AIR 1972 Bom 132: 73 Bom LR 840	18
AIR 1970 SC 137	22
AIR 1957 Mad 243	28
(1956) 3 All ER 769: (1956) 3 WLR 975: 1957 P 139, M. v. M.	23
AIR 1954 Mad 316 (FB)	21
1913 P. 198: 109 LT 408: 29 TLR 765	21
(1871) 2 P & D 287: 48 LJ P & M 83	21
(1845) 163 ER 1039: 1 Rob Ecc 279, D. E. v. A. G.	21
M. K. Nesari, for Appellant; C. R. Dalvi, for Respondent.	

JUDGMENT:— The appellant (original petitioner) the husband, and the respondent (the original respondent) were married on 20th June 1976. The appellant and the respondent were both Hindus and were about 36 and 27 years of age respectively at the time of marriage. Due to certain unfortunate circumstances, the husband was driven to file a petition for nullity within a short time which he did on or about 30th Nov. 1976.

2. The petition proceeds to make the following allegations. The marriage had not been consummated owing to the impotency of the respondent. On the very first night the respondent refused to have sexual intercourse saying that for one year she would not have sexual intercourse with the appellant. The respondent appeared to be very much upset at the approach of the appellant to consummate the marriage and was averse to any sexual act. It was decided by the petitioner and his elders to take the respondent on a pilgrimage so that there might be a change in her

mentality and outlook by the blessings of God. Even during pilgrimage the matter did not improve. Soon after return from pilgrimage on 29-7-1976 the respondent's father had come to the petitioner's house and the petitioner complained to her father about the behaviour of the respondent. Father ignored the complaint. The respondent's attitude continued. Then followed a medical check up on 27-8-1976, by Dr. Bhatia when it was discovered by the petitioner that the respondent was suffering from second degree prolapse of the uterus. This was indicative of non-virginity. Taking into consideration the medical report and the odd behaviour of the respondent and the surrounding circumstances, the petitioner had reasons to suspect that the respondent wanted to conceal facts from the petitioner and that was one of the main reasons why she was refusing to have sexual intercourse with the petitioner and have the marriage consummated. It was clear from the conduct of the respondent and that of her parents that fraud was committed and that the marriage had been brought about by fraud and misrepresentation. The respondent and her parents had suppressed material facts about the sexual lapse and defect. The petitioner's consent to the marriage was obtained by fraud and misrepresentation as to the material fact or circumstances concerning the respondent. In any event, the respondent was impotent at the relevant time, and there was non-consummation by reason thereof. The petitioner prayed for annulment of the marriage under Sec. 12 (1) (a) and (c). In the written statement the respondent denied that marriage was not consummated or that she refused to consummate the marriage or was averse to sexual act or that she was impotent at any time. It is alleged that she was taken to Dr. Bhatia on 27th Aug. 1976 but the respondent did not understand the result of the said examination. It is denied that the respondent suffered from sexual defects before her marriage and it is averred that neither she nor her parents were aware of any defect at any time before or after the marriage.

3. Mr. Nesari for the appellant has taken me through the evidence and the judgment and contended that the learned trial judge has not correctly appraised the evidence and on the bal-

ance ought to have accepted the evidence of the petitioner and Dr. Bhatia and rejected the evidence of the respondent as unreliable and that of Dr. Pancholi as not very reliable on certain aspects of the matter in view of contradictions and that if the evidence of petitioner and Dr. Bhatia is accepted, the grounds for nullity stand proved.

4. Before considering the evidence of the petitioner, I will deal with the evidence of the respondent as in my view her evidence is completely unreliable and the petitioner's evidence not being inherently unreliable will have to be accepted, irrespective of some discrepancies. (After discussing evidence of respondent His Lordship proceed-Ed.)

5. and 6. x x x x

7. Mr. Dalvi has attacked the evidence of the petitioner and contended that the case now made out by the petitioner is different from the one in the petition. He says that initially in the notice of the advocate, case was made out of misrepresentation as to the virginity of the respondent, while the case sought to be made out in the petition is that of concealment of the evidence of prolapse and of impotency and in the evidence there are further embellishments. In support he refers to a statement "my client has reasons to suspect, taking into consideration, the medical report and your behaviour and the surrounding circumstances, that you were not a virgin and you wanted to conceal the fact from my client, and that, that was one of the main reasons why you were refusing to have sexual intercourse with my client and have the marriage consummated". However, the notice has to be read as a whole. Moreover, a notice is not a pleading and not to be interpreted as a pleading. The notice does mention that the marriage had not been consummated till the date of the notice due to the impotency of the respondent. It is further stated that she was examined by Dr. Bhatia and she had given a certificate to the effect that it was found that the hymen was torn and that there was a second degree prolapse of the uterus, indicative of non-virginity. It would appear that words 'non-virginity' are the words used by the petitioner or on the facts disclosed

Then follows a sentence relied on by Mr. Dalvi followed by another sentence in the same paragraph, "that you have suppressed the material facts and your sexual lapse and defect, which were within your own knowledge". It is therefore, clear that the notice proceeds on the basis of non-disclosure of sexual lapse i.e. loss of virginity before marriage as also concealment of sexual defect viz: prolapse. I do not think that either the petition or petition read with notice are open to the attack made by Mr. Dalvi.

8. The evidence of the petitioner practically follows the petition. However, it gives more details than the petition and the notice. Mr. Dalvi attacks the evidence of the petitioner by contending that certain details given in the evidence do not find place in either the notice or the petition, and therefore, should not be believed. I must here point out what is normally required of a notice and a petition. Notice is supposed to give only the bare outlines of the grievances of the party sending the notice. How much to reveal, how much not to reveal, will depend on the opinion of the advocate who is sending the notice. Not mentioning of a particular fact in the notice, unless it is so material as ought to have found place in the notice, cannot be a subject of any serious comment nor can such an omission by itself affect the veracity of the evidence. In fact, often a notice is sent even though not necessary as notice is rarely a part of the cause of action. The function of the petition is to give material facts which give rise to the cause of action; it should not contain evidence or other unnecessary details. In my view the petition in the present case contains sufficient particulars in respect of the facts which constitute that cause of action and no fact which forms material part of the cause of action has come out for the first time in the evidence. The cause of action of the petitioner is that the respondent was suffering from second degree prolapse of uterus and this fact was concealed from him at the time of marriage. That the respondent had no inclination to any sexual intercourse and was repelled by the attempts of the petitioner to consummate marriage subsequently came to the notice of the petitioner because of the prolapse.

He claims that he is entitled to annulment on the ground of concealment of material fact concerning the respondent and non-consummation due to impotency. This case is brought out in the petition. It is averred that sexual lapse and the defect of the nature described were known to her but they were not disclosed before the marriage, and therefore, he is entitled to annulment on the ground of fraud (what is meant thereby is obviously concealment) of material facts relating to the respondent. Having asserted non-consummation of the marriage, it was not necessary to mention in the petition each and every approach the petitioner made to the respondent and which was repulsed. It was sufficient to say generally that from the very first night till the relevant date, there was no consummation of marriage. Therefore, I do not see any substance in the attack of Mr. Dalvi that facts brought out in the evidence of the petitioner do not find place either in the notice or the petition and so the petitioner is improving upon the story from time to time and his evidence should not be accepted. I do not see any substance in Mr. Dalvi's attack as the notice or the petition are not proper place for minute details and entire evidence is not required to be stated in them.

(After examining the evidence of the petitioner in paras 9 to 13. His Lordship proceeded — Ed.)

14. Mr. Dalvi then attacks the evidence on the ground that except the details as to what happened on the first night, there are no details given regarding the attempts made to approach the respondent by the petitioner and as to what was the response either in the advocate's notice or the petition or the evidence. This attack of Mr. Dalvi has no substance. It is not necessary for the petitioner to prove each and every approach made with dates and other details. It is sufficient if he says that he made attempts which were repulsed by the petitioner. It is obvious that the attempt of first night only is described as that would be the most important and it is stated and maintained by the petitioner in his evidence that there was no change in the situation after the first night. It is the respondent who will have to say that it is not true, give some details as to when the relations took place and then the question will

be as to whom to believe; but the minute details as contended by Mr. Dalvi are not required to be given in the notice, petition or examination in chief when the case is of complete non-consummation and impotency. If it is the allegation of cruelty by reason of some positive acts, the details are obviously necessary with dates and particulars, but in respect of a negative case, such as non-consummation, a statement that throughout the period there has not been consummation will normally suffice, with details of one or two attempts. Moreover, if it is believed that the respondent was aware of her condition since prior to marriage as appears to be the case, it is possible that she will try to repulse the petitioner's advances and the petitioner's version becomes probable. (After discussing the medical evidence in paras 15 and 16 His Lordship proceeded—Ed.)

17. The evidence therefore, establishes that the respondent must be deemed to be aware of her condition of prolapse since prior to marriage and that either she wanted to hide her condition from the petitioner or had developed abhorrence or repugnance towards intercourse. Not only did she not inform the petitioner about the same at or before the time of marriage but also did not submit to the petitioner with the result that the marriage remained unconsummated.

18. This brings me to the question as to whether it can be said that the respondent was impotent at the relevant time or that the non-disclosure of a known prolapse amounts to obtaining consent of the petitioner "by force or by fraud as to the nature of the ceremony or as to the material fact or circumstances concerning the respondent".

19. Dealing first with the second aspect of the matter, it is to be considered as to what amounts to fraud as to any material fact or circumstance concerning the respondent. Prior to the amendment of the Hindu Marriage Act by Act 68 of 1976, S. 12 (1) (c) read as follows:—

"that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under Section 5, the consent of such guardian was obtained by force or fraud",

These words were interpreted by this Court in *Raghunath Gopal v. Vijaya Raghunath*, 73 Bom LR 840: (AIR 1972 Bom 132). In that case the consent to the marriage was procured by concealing from the husband the fact that the wife was suffering from curable epilepsy and false representation that she was healthy and it was held that this concealment and representation though otherwise fraudulent did not amount to fraud within the meaning of S. 12 (1) (c) as then existing. The reason for coming to this conclusion is that the Hindu Marriage though may be in the nature of a contract for some purpose was still a sacrament and therefore, 'fraud' cannot be interpreted in light of its definition in the Contract Act. After relying on certain well-known treatises on the law of divorce prevailing in England, and the commentary in *Mulla's Hindu Law* (13th Edition) page 862, and on *Derrett's Introduction to Modern Hindu Law* (1963 Edn.) page 193, it was held by Malvankar J. (at p. 137 of AIR):

"It would thus be seen that the word 'fraud' used in S. 12 (1) (c) of the Hindu Marriage Act does not speak of fraud in any general way, nor does it mean every misrepresentation or concealment which may be fraudulent. If the consent given by the parties is a real consent to the solemnization of the marriage, the same cannot be avoided on the ground of fraud. The marriage, therefore, solemnized under the Hindu Marriage Act cannot be avoided by showing that the petitioner was induced to marry the respondent by fraudulent statement relating to her health".

Malvankar J. then proceeded to consider Indian Cases in which the physical deficiency or illness or suppression of the fact that the wife was a *naikin* by profession or of her having been kept by more than one person prior to the marriage were not considered as amounting to fraud. After considering all these authorities, it was stated (at p. 138 of AIR).

"These, decision, therefore, before and after the Hindu Marriage Act, 1955, came into force definitely show that Indian Contract Act, 1872, does not apply to the marriage under the Hindu Marriage Act, 1955, and the word 'fraud' used in S. 12 of the Hindu Marriage Act does not mean fraudulent representation".

ment. The test to be applied is whether there is any real consent to the solemnization of the marriage."

It was then held (at p. 138 of AIR):—

"A person who freely consents to a solemnization of the marriage under the Hindu Marriage Act with the other party in accordance with customary ceremonies, that is, with knowledge of the nature of the ceremonies and intention to marry, cannot object to the validity of the marriage on the ground of fraudulent representation or concealment. Moreover, in the present case, the fraud alleged is non-disclosure or concealment of epilepsy from which the respondent was suffering since before her marriage, and false representation that she was healthy. I have found that the type of epilepsy she was suffering from is curable. I am also, therefore, of the opinion that non-disclosure or concealment of such curable epilepsy and false representation that the respondent was healthy does not amount to fraud within the meaning of that word used in Sec. 12 (1) (c) of the Hindu Marriage Act, 1955. The petitioner, therefore, has failed to prove that his consent was obtained by the respondent or her relations by fraud." It is therefore, clear that according to the learned Judge the fraud contemplated was such as must be regarding the ceremony or the identity of the respondent and not as regards the condition of the respondent or her life at the time of or before the marriage. This judgment was followed in *David v. Kalpana* (1976) 78 Bom LR 85, which was a case under the Indian Divorce Act.

20. If the matter rested there the things would have been simple and I would had no alternative but to hold that no fraud could be said to have been committed in the present case. However, the wordings have now been changed by the amendment of Section 12 (1) (c) which now reads as follows:—

(1) (c) — that the consent of the respondent where the consent of the petitioner was obtained by force or fraud or by the concealment of the nature of the ceremony or of the fact or condition of the respondent

This amendment clearly contemplates change in law and brings into the ambit of fraud, misrepresentation or concealment of any material fact or circumstance concerning the respondent. Fraud must mean representing as existing what is not and concealing what is material. The misrepresentation or concealment necessarily presupposes that the respondent was aware of the facts and circumstances which were misrepresented or concealed. In the present case as I have already held that the fact of the prolapse of uterus was known to the respondent and the only question is whether the non-disclosure thereof can be fraud as to any material fact or circumstance concerning the respondent. Every fact and circumstance cannot be material. Therefore, concealment of misrepresentation of every fact and circumstances cannot be said to be fraud sufficient for annulment. It is difficult to define with any certainty what can be said to be material fact or circumstance but it may be safely said that the fact or circumstance which is of such nature as would materially interfere with the marital life and pleasure including sexual pleasure will be a material fact or circumstance. The only limitation is that the material fact or circumstance must be concerning the respondent, meaning thereby that it must be in respect of the person or character of the respondent. It is immaterial whether such fact or circumstance is curable or remediable. If a party to a marriage is suffering from some abhorrent disease such as leprosy or venereal disease and this is not disclosed it will be definitely concealment and consequently fraud as to material fact and circumstance. Similar would be the case with suppression of the fact of immoral life prior to the marriage. Without going into the detail or definition as to what may or may not constitute material fact or circumstance, it can be said that existence of a condition in the respondent which materially interferes with the sexual intercourse or its pleasure or which makes its indulgence in a normal way difficult or is such as is likely to cause dislike or abhorrence in the mind of the other spouse to have sexual intercourse it will be material fact or circumstance even though it may or may not amount to impotency. In the present case as I

have already held the sexual intercourse was not possible without manipulation of the protruding uterus by hand, which obviously is likely to cause dislike, abhorrence or disgust to a newly wed husband; concealment of such a fact will be fraud as to material fact or circumstance concerning the respondent as now contemplated by Section 12 (1) (c). In the circumstance, the marriage solemnised between the petitioner and the respondent is avoidable and is liable to be annulled.

21. This brings me to the question of impotency. This question was considered by the Full Bench of Madras High Court in *K. Balavendram v. S. Harry*, AIR 1954 Mad 316 (FB). In that case, the petitioner had alleged that the respondent's male organ was so abnormally big as to render sexual intercourse with her impracticable. It had proved to be positively dangerous to the life of the petitioner. She stated that on several occasions when the respondent attempted to have intercourse with her the petitioner evinced great aversion to the act and also suffered great pain on each occasion, with the result she had to push the respondent away or jump out of the bed and in the circumstances, the marriage had not been consummated and that the consummation of marriage was impossible. The respondent in his reply asserted that intercourse was possible and that it had taken place on several occasions. The facts alleged by the petitioner were held to be proved as the respondent did not give evidence or appear. On the basis of these facts the question arose whether these facts amounted to impotency. The said judgment has considered various authorities to come to the conclusion as to what amounts to impotency. The relevant portion of the judgment is as follows (at p. 317):—

"(4) Impotency has been understood by Judges in England in matrimonial cases as meaning incapacity to consummate the marriage, that is to say, incapacity to have sexual intercourse, which undeniable is one of the objects of marriage. The question is, what does 'sexual intercourse' mean? we cannot do better than refer to what has been considered to be the leading decision on this topic, namely — *D. E. v. A. G.*

(1845) 163 ER 1039. In that case, the husband prayed for a declaration of nullity of his marriage with the respondent who was married to him on the ground that carnal consummation was impossible by reason of malformation of his wife's sexual organ. Dr. Lushington dealt with the point namely, what exactly is to be understood by the term "sexual intercourse", because as he said everyone was agreed that in order to constitute the marriage bond between young persons, there must be the power, present or to come, of sexual intercourse. Dr. Lushington stated,

"Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse; it does not mean partial and imperfect intercourse; Yet, I cannot go the length of saying that every degree of imperfection would deprive it of its essential character. There must be degrees difficult to deal with, but if so imperfect as scarcely to be natural, I should not hesitate to say that legally speaking, it is no intercourse at all. If there be a reasonable probability that the lady can be made capable of a 'vera copula' of the natural sort of coitus, though without power of conception I cannot pronounce this marriage void. If, on the contrary, she is not and cannot be made capable of more than an incipient, imperfect and unnatural coitus, I would pronounce the marriage void."

In — '*G v. G*' (1871) 2 P & D 287 the rule laid down by Dr. Lushington was followed. The ground on which the husband in that case sought a declaration of nullity of marriage was the wife's peculiar condition which made it impossible for him to consummate the marriage. The wife was suffering from excessive sensibility. Lord Penzance in dealing with the case, after laying down the law that the ground of interference of the courts in cases of impotence is the practical impossibility of consummation said:—

"The invalidity of the marriage cannot be consummated by some structural defect, but the basis of the Court is not the impracticability of the marriage. The learned judge held that

"13. Impotence simply means inability to perform the sexual act. It may be pathological or psychological, permanent or temporary, complete or partial. The judgment of Ramaswamy J. in *Rangaswami v. Arvindammal*, AIR 1957 Mad 243, contains a full and comprehensive discussion of what impotence means. It is unnecessary to refer to the wealth of literature on the subject. I will confine myself to the consideration of a few cases where problems similar to the one before me had arisen."

Then reference is made to the observation of Dr. Lushington. These observations of Dr. Lushington show that the sexual intercourse in the proper meaning of the term is "ordinary and complete intercourse". It does not mean "partial and imperfect intercourse". He then observes that he cannot go to the length of saying that every degree of imperfection would deprive the intercourse of its essential character. There must be degree difficult to deal with; but if so imperfect as scarcely to be natural (sic) he would not hesitate to say that legally speaking, it is no intercourse at all. Then the observation proceeds to say that if it is curable the marriage cannot be declared void. But that observation appears to be made in the light of the law applicable then. Here as already held by Calcutta High Court, with which I respectfully agree, the question of curability is immaterial and that appears to be the present law in England also as is apparent from the case of *M v. M* referred to earlier.

29. In my view; therefore, if the condition of a spouse is such as to make intercourse imperfect or painful it would amount to impotency. Even the aversion or abhorrence shown by spouse to having intercourse caused by prolapse can amount to impotency. In the present case in my view the respondent was impotent for two reasons. Firstly, it is proved that the respondent resisted all the approaches of the petitioner to consummate the marriage, possibly with a view to conceal the condition or prevent the pain which may possibly result because of the intercourse and secondly, because with such a prolapse the intercourse is possible only after manipulation with hands. The sight of the protruding uterus is more likely

than not to cool down the ardour and desire of the husband to perform the sexual act resulting in frustration for the husband. Even if the ardour and desire survive the sight of the protruding organ, the manipulation itself will cool it down. In any case an intercourse which demands previous manipulation of the uterus before penetration cannot be said to be an intercourse in the normal way. Therefore, both reasons independently of each other are indicative of impotency and this coupled with non-consummation which I have already held, to have been established, entitle the petitioner to annulment of the marriage.

30. The learned trial Judge in my view has not appreciated the evidence properly and has come to erroneous conclusions. He has wrongly not believed the evidence of Dr. Bhatia, particularly when the evidence of the respondent is absolutely unreliable and has failed to appreciate the effect of the evidence of Dr. Bhatia which clearly leads to the conclusion that the respondent was aware of her condition since prior to marriage. He has no doubt strongly relied on the fact that certificate at D-1 did not mention that the respondent was having masturbation for last 3 years though Dr. Bhatia said so in her evidence. He has erroneously come to the conclusion that Dr. Bhatia's enquiry about masturbation was unnecessary; as I have already pointed out she has not been cross-examined on this point and that the question could have arisen naturally in the course of discussion with the respondent. He has failed to take notice of the fact that Dr. Bhatia had maintained notes on the basis of which she was giving evidence and though a question was asked about maintaining of notes to which she replied in the affirmative, she was not called upon to produce the notes. He has disbelieved Ex. D1 which ought not to have been discarded. He has failed to notice material discrepancies in the evidence of Dr. Pancholi. He has failed to appreciate the fact that the father of the respondent has not stepped in to the box to contradict the evidence of the petitioner that he had informed the father about the respondent's behaviour on 25th July 1976 and has also not appreciated that the evidence of the respondent is thoroughly unbelievable and useless. In the circumstances, the judg-

ment of the learned Judge cannot stand. He had also failed to notice that there is now change in S. 12 (1) (c) and the position is now different from what it was prior to 1976, when the decision of Malvankar J. was given.

31. In the circumstances, I set aside the judgment and decree of the trial Court dismissing the petition and make the petition absolute in terms of prayer (a).

32. As regards the quantum of maintenance and alimony it is agreed between Mr. Nesri for the petitioner and Mr. Dalvi for the respondent that the respondent should be paid a lump sum of Rs. 13,500/- as and by way of permanent alimony. I pass the order for alimony accordingly. This amount will be paid within 2 months from today. There will be no order as to the costs of the appeal.

Order accordingly.

AIR 1982 BOMBAY 416

(AT NAGPUR)

DHARMADHIKARI AND BHONSALE, JJ.

Krishnarao Anandrao Dhayagude and others, Petitioners v. Khandala Taluka Shetkari Sahakari Kharedi Vikri Sangh Ltd., Lonand and others, Respondents.

Writ Petn. No. 1049 of 1981, D/- 10-11-1981.

(A) Maharashtra Co-operative Societies Act (24 of 1961), S. 144-T (3) and (4) — Election petition — Powers of Commissioner or Specified Officer — Has power to dismiss petition for non-appearance or for default.

Under Section 144-T (3), the Commissioner or Specified Officer has been conferred with the same powers as are vested in the Court in respect of items mentioned in the section. If the Commissioner or the Specified Officer under S. 144-T is vested with and empowered to exercise certain powers of the Court, it follows that all such incidental and ancillary powers which a Court is empowered to exercise as is referred to in S. 144-T (3) can also be exercised by the Commissioner or the Specified Officer. Though there is no positive provision for dismissing election petition for non-appearance or default, there is is neither an indication in the Statute nor Rules to the contrary. On the contrary, the Commissioner or Specified Officer has been specifically conferred with powers under the

Civil P. C. for limited purpose. For effectively discharging the duty of deciding the election petition, the incidental and ancillary powers can also be exercised by the Commissioner or the Specified Officer under the provisions of S. 144-T and other sections and relevant rules. Such authorities being quasi-judicial in nature have the duty to determine objectively the matters referred to them under Section 144-T and have to exercise their discretion in judicial manner without caprice and according to the general principles of law and Rules of natural justice. Therefore, even in absence of specific provisions under the Act and the Rules, the Commissioner or Specified Officer under Section 144-T has the power to dismiss the election petition for non-appearance or default. As is provided in Section 144-T (4), petitions are to be disposed of as expeditiously as possible. If petitioners for any reason choose to remain absent for considerable time, it cannot possibly be held that the Commissioner or Specified Officer in such circumstances cannot have the power to dismiss for default the election petition. It therefore necessarily follows that since the Commissioner or Specified Officer has been conferred with certain powers vested in the Court, he has, by implication, the incidental and ancillary power to dismiss the election petition for default. Such a power is not only incidental or ancillary, but is necessary and is consistent with the object and the scheme of the Act as well as Rules framed thereunder. The power of dismissal for non-appearance or for default also implies a power of restoration of such dismissed election petition. AIR 1981 SC 606, AIR 1969 Bom 393, 1965 Mah LJ 65 (SC), AIR 1970 All 1 (FB), AIR 1968 Punj 152 (FB), AIR 1969 Raj 75, AIR 1965 Pat 378 and AIR 1968 J & K 91, Rel. on. (Paras 13, 14, 18-A)

In the instant case, the election results were declared on Nov. 21, 1978 and the petition was filed on Jan. 20, 1979 and the petition ultimately came to be dismissed for non-appearance of the petitioners or their advocate on Dec. 26, 1979. In between these two dates several adjournments were granted though the petitioners were not to be blamed for all the adjournments. However, the petitioners themselves had asked for a number of adjournments and ultimately on Dec. 20, 1979 petitioners' evidence was to begin. On Dec. 20, 1979, in spite of this, all the petitioners as well as their advocate chose to remain absent. The Additional Commissioner waited till 4.40 P. M. on that day, but neither there was any intimation to him seeking an adjournment nor mentioning of the matter before

him as to why the petitioner could not remain present. According to the petitioners, they had sent a telegram dt/- Dec. 20, 1979 itself at about 12.45 P. M. Admittedly, this telegram reached the office of the Additional Commissioner on Dec. 21, 1979. The matter was posted to Dec. 26, 1979 for passing final order. However, no enquiries were made by the petitioners or their advocate between 21st and 26th Dec., and therefore, the Commissioner passed the order on Dec. 26, 1979 dismissing the petition. In the application made by the petitioner for the restoration of the said election petition, a very strange case was made out that there was an understanding that the contesting respondents and the petitioners had reached an understanding to seek adjournment on Dec. 20, 1979 as both the parties were busy in canvassing for their respective candidates in Parliamentary elections. It was further stated that the petitioners as well as contesting respondents belonged to the different parties but not to disturb their work of election campaign, it was not possible to attend the proceedings before the Additional Commissioner on Dec. 20, 1979. As the respondents had agreed to this arrangement, petitioners informed their advocates, and therefore their advocate did not make separate application before the learned Additional Commissioner for adjournment and further date for hearing of the petition. The contesting respondents opposed the petition being restored and denied the theory of mutual agreement on account of preoccupation with the Election Campaign in support of their respective candidates. The Additional Commissioner heard both the parties on the restoration petition and came to the conclusion that reasons assigned in the application for restoration were an afterthought inasmuch as the contesting respondents had denied claim made by the petitioner in the restoration.

Held, the Additional Commissioner was right in dismissing the election petition for non-appearance. He was also right in dismissing the restoration application. In spite of the mandate contained in Section 144-T (4), hearing of the election petition had gone on for a period of one year and there were several adjournments. The petitioners had not made out good or sufficient grounds as to why they were absent on Dec. 20th 1979. Even if they were busy in the election campaign, that was no reason as to why they or their advocate had chosen to remain absent before the Additional Commissioner. The Additional Commissioner was absolutely in the dark as to why the petitioners did not

choose to remain present. No doubt he had received a telegram on the next day i.e. on Dec. 21, 1979, but merely sending a telegram was not sufficient enough and this tendency on the part of the litigants to seek an adjournment by correspondence could not be encouraged. Admittedly, from Dec. 21st to Dec. 26th, none of the petitioners or their advocate had chosen to remain present or had explained the reasons to remain absent. In the circumstances, the Additional Commissioner was not in error in ultimately dismissing the election petition for non-appearance on Dec. 26, 1979. Regarding the restoration application, the reasons assigned for the restoration application were clearly an afterthought and they did not amount either to good or sufficient grounds having been made out for restoration of the election petition. The contesting respondents having disclaimed any mutual understanding whatsoever, the Additional Commissioner was right in dismissing the restoration application also.

(Para 21)

(B) Maharashtra Co-operative Societies Act (24 of 1961), S. 144-U — Term 'a petitioner' — Includes petitioners — In case of joint election petition, security deposit payable is only Rs. 500, since petition is only one — Security deposit credited under S. 144-U is not liable to forfeiture. (General Clauses Act (1897), S. 13).

The expression "A petitioner shall deposit an amount not exceeding Rs. 500/-" in Section 144-U is to be read to mean that by ordinary rule of construction that the singular in this section would include plural, and therefore, where there are two petitioners, the section would be read to include more than one petitioner. Such a construction is warranted upon the provisions of S. 13 of the General Clauses Act itself. In such a case even though there are more than one petitioner as long as one deposit is made for the election petition, it would be deemed to be made on behalf of all the petitioners and the only inescapable inference that would follow is that all the petitioners have complied with the requirement of S. 144-U. (Para 22)

Held, even if there was more than one petitioner in the instant case, since a joint petition by more than one petitioner was permissible the deposit made by only one of the petitioners was valid one and the joint petitions by others without paying deposit did not suffer from any infirmity whatsoever. The Addl. Commissioner's view that the petition in absence of security deposit by other three petitioners was liable to be dismissed in limine was wholly wrong and not sustainable

In the eyes of law. Further, the order for forfeiture of security deposit was palpably illegal, untenable and without any authority of law and liable to be set aside. There was no provision either in the Act or Rules framed thereunder or even in the Election Rules of 1971 to sustain the said order. The only reference to forfeiture in the entire election rules was contained in R. 68 of the Election Rules which had nothing to do with the provisions relating to forfeiture of the security deposit which was deposited under S. 144-U of the Act at the time of filing of the petition. AIR 1964 Bom 137 and AIR 1974 Goa 4, Rel. on. (Paras 23, 24, 25)

Cases Referred: Chronological Paras

AIR 1981 SC 606 : 1981 Lab IC 155	14
AIR 1974 Goa 4	24
AIR 1970 All 1 : 1969 All LJ 87 (FB)	17
AIR 1969 Bom 393 : 1969 Mah LJ 421	15
AIR 1969 Raj 75	18-A
AIR 1968 J & K 91 : 1968 Lab IC 1157	18-A
AIR 1968 Punj 152 (FB)	18
1965 Mah LJ 65 : 1965 MPLJ 81 (SC)	16
AIR 1965 Patna 378	18, 18-A
AIR 1964 Bom 137 : 65 Bom LR 843	23

S. A. Deshmukh, for Petitioners; A. V. Savant and R. D. Rane, Asstt. Govt Pleader, for Respondents.

BHONSALE, J.:— This petition is filed by the petitioners under Arts. 226 and 227 of the Constitution of India challenging two orders dated December 26, 1979 and April 19, 1980 passed by the Additional Commissioner, Pune Division, Pune in Election Petition No. 17/79. The petitioners contested the election to the Board of Directors of respondent No. 1, i.e., Khandala Taluka Shetkari Sahakari Kharedi Vikri Sangh Ltd., Lonand, District Satara. The respondents Nos. 3, 4 and 8 to 12 are the returned candidates in the election the results of which were declared on Nov. 21, 1978. The respondent No. 1 is a Specified Society and as per provisions of S. 73-G of the Maharashtra Co-operative Societies Act, 1960, it is the Collector of District who holds and conducts the election in a manner laid down in Chap. XI-A of the said Act.

2. The petitioners filed Election Petition No. 17/79 before the respondent No. 13, i.e., the Additional Commissioner, Pune Division, Pune. The Board of Directors consists of 7 Directors (A Class) representing the various Co-operative Societies in the jurisdiction of respondents Nos. 1, and 2 Directors (B Class) representing agriculturists members. The

main grounds on which the election of the respondents was challenged were as follows:

(i) That the nomination paper of representative of one Dhavadwadi Society was wrongly accepted as a Society had not purchased share of Rs. 1,000/- from the respondent No. 1 as per the Bye-law No. 30-(b) of the respondent No. 1. The representative of Dhavadwadi Society was, therefore, disqualified from contesting the election and this wrong acceptance of the nomination paper had materially affected the result of the election. The election was, therefore, illegal and deserved to be set aside;

(ii) At the time of the counting of the votes, the Returning Officer-respondent No. 2 to this petition, wrongly treated ballot papers as valid votes although on each of them the marking was done in favour of six candidates instead of 7 candidates (who) were to be returned in election from 'A' group constituency of Directors. This kind of defective voting had materially affected the election.

(iii) Election of returned candidate-respondent No. 8, was illegal inasmuch as Dhavadwadi Society which he represented as candidate was not cleared under a proper audit report by an auditor and as such the election of the said respondent No. 8 is illegal and deserves to be set aside;

(iv) The returned candidates did not render proper accounts relating to the expenses incurred in election after the election to the Collector, Satara, and therefore, on that count also the election deserves to be set aside.

The petitioners also prayed that the entire election, having been illegal, void and vitiated ab initio for the reasons stated in the petition, should be declared illegal and it be set aside and further the petitioners be declared as elected, alternatively fresh elections to the Board of Directors of respondent No. 1 may be ordered.

3. The notices of this petition were served on the respondents. The returned candidates submitted written statements and apart from denying all the allegations in the petition on merits, contended that the petitioners being representatives of the respective societies, had no legal right to file the petition in the absence of authority delegated to them by the concerned societies and on that ground alone the petition deserved to be dismissed placing reliance on the provisions of Rule 74 of the Maharashtra Specified Co-operative Societies (Elections to Committees) Rules 1971 (hereinafter for the sake of brevity described as "Election Rules"). It was further contended by the returned candidates

that the nominee or delegate of the society had no legal right to file the election petition. They further denied the allegations on the point of disqualification as well as denied the other contentions raised in the petition.

4. On these rival contentions, the learned respondent No. 3, i.e., Additional Commissioner, framed necessary issues and the parties were called upon to file their documents and list of witnesses in support of their claims. However, on the adjourned date, i.e., on Dec. 20, 1979 which was fixed for evidence of the petitioners, all the four petitioners as well as their advocate, remained absent. There was no intimation to the respondent No. 13 regarding their inability to remain present for hearing. From the record, it appears that respondent No. 13 waited until 4.40 P. M. on that day expecting some kind of intimation from petitioners or their advocate. As the petitioners and their advocate failed to present themselves before the Commissioner, the Commissioner passed the following order.

"None for the petitioners. There is no information from either of the 4 petitioners regarding their absence for today's hearing.

Respondents Nos. 1, 3, 4, 8, 9, 10, 11 and 12 by Shri S. J. Khurjekar, Advocate

The case was fixed for evidence of petitioners. But the petitioners remained absent Shri V. M. Chimbalkar, Advocate for the petitioners is also absent — although the names of all the petitioners were called out and I waited for their appearance or the appearance of their Advocate till 4-40 p.m. today, but no one has turned up so far nor is there any information regarding their absence or inability to remain present for today's hearing. On account of default in appearance on the part of the petitioners I close the petition for final orders. For orders.

C. F. 16-12-1979.

Sd/- (M. R. Kher)

Addl. Commissioner, Pune, Dn. Pune."

5. From the record, it does appear that the petitioners had sent a telegram on Dec. 20, 1979 itself informing respondent No. 13 that they would not be able to attend the proceedings. This telegram was received by the office of the respondent No. 13 on Dec. 21, 1979. However, the learned respondent No. 13 dismissed the election petition by his order dated Dec. 26, 1979 as referred to above. In addition, the respondent No. 13 further observed that the petitioner did not want to avail the opportunity and wanted to

delay the trial of this petition by remaining absent without any sufficient cause. He further observed that out of four petitioners, only one petitioner, viz., Shri Madhav Bhikaji Dhaygude has credited security deposits of Rs. 500/- on 19-1-1979. According to the interpretation placed by the learned respondent No. 13 on the provisions of S. 144-U of Maharashtra Cooperative Societies Act, there could not be one deposit of Rs. 500/- in support of election petition in respect of four petitions. According to the learned Additional Commissioner, the provisions of Section 144-T of the said Act are mandatory and unless each petitioner deposits security deposit of Rs. 500/- at the time of presentation of election petition, the petition shall be summarily dismissed.

6. This defect of non-compliance of mandatory provisions of S. 144-T and U of the said Act against the remaining three petitioners, is a defect of serious nature by reason of which the petition deserves to be dismissed.

7. The learned Additional Commissioner, therefore, by his order dated Dec. 26, 1979 dismissed the election petition as not maintainable and further directed that the security deposit of Rs. 500/- made by the petitioner Shri M. B. Dhayagude shall be forfeited to the government. It is further directed that parties to bear their own costs.

8. The petitioners realised that their petition was dismissed for non-appearance and, therefore, they filed a restoration application dated Jan. 9, 1980 before the respondent No. 13. In this application several reasons were assigned by the petitioners as to why they were absent on Dec. 20, 1979. The main reason given by the petitioners was that there was understanding between themselves and the returned candidates to ask for adjournment of the hearing of the petition fixed on 20-12-1979. Both the parties were busy in canvassing in the parliamentary elections which were to be held in the first week of January. It was further stated that since he returned candidates had consented to such an arrangement, petitioners sent a telegram on the same day i.e. on Dec. 20, 1979 for adjournment. It was also stated in the said petition for restoration that as both the parties had decided amongst themselves to ask for adjournment, the petitioners had informed their advocate. Accordingly, they did not make separate application praying that the petition should be restored and heard on merits. Notices of this restoration petition were served on the returned candidates — respondents to this petition. As there were some

doubts as to whether this petition amounted to review of the earlier order passed by the respondent No. 13 or was one for setting aside *ex parte* order passed by the respondent No. 13 by reason of wilful default on the part of the petitioners in regard to their appearance on the day fixed i.e. on Dec. 20, 1979 the learned Additional Commissioner heard the advocate for the petitioners on Mar. 4, 1980. The advocate for the petitioners submitted that this was an application for restoration of the petition as the Court order dated Dec. 26, 1979 was *ex parte* against the petitioners who wanted the respondent No. 13 to hear the petition on merits. Accordingly, the learned Assistant (Additional?) Commissioner directed notices to be issued to the respondents. The respondents thereafter filed the reply and ultimately (sic) heard the arguments of both the sides on Apr. 19, 1980 and rejected the petitioners' application dated Jan. 19, 1980 for restoration of their election petition No. 17/79.

9. In his order, the learned Additional Commissioner has recorded that the respondents filed written statement and denied that there was any arrangement between the parties to seek the adjournment on Dec. 20, 1979. The returned candidates had further denied they had consented to the prayer of the petitioners to restore the election petition. The learned Additional Commissioner observed that the reasons for restoration were not at all convincing apart from the fact that the respondents had categorically denied the contentions of the petitioners in support of their restoration application. He also reiterated his reasoning contained in earlier order that petition was liable to be dismissed on the ground that only one of the four petitioners had deposited the security amount of Rupees 500/- and on that ground alone without going into the merits the petition was liable to be dismissed. According to the learned Additional Commissioner, as the reasons stated in the application dated Jan. 19, 1980 were an afterthought they merited no consideration and therefore no sufficient or good reason was given for wilful default in appearance on Dec. 20, 1979 which was specifically fixed for recording evidence of the petitioner after a number of other earlier adjournments. In this view, which the learned Additional Commissioner chose to adopt, he rejected the petitioners' restoration application by his order dated Apr. 19, 1980. It is these two orders which have been challenged by the petitioners in the present petition filed under Arts. 226 and 227 of the Constn. praying that these

orders be set aside and the Election Petition No. 17/79 be restored and heard on merits.

10. The learned counsel for the petitioners Shri S. A. Deshmukh urged three grounds before us in support of the petition. Firstly, his main contention was that in the absence of any provision in the said Act or in the Rules framed thereunder the learned Additional Commissioner respondent No. 13 before whom the election petition was filed under the provisions of S. 144-T of the said Act had no jurisdiction to dismiss the election petition for non-appearance or for default. Secondly, he contended that the order passed by the learned Additional Commissioner forfeiting security deposit of Rs. 500/- on behalf of the petitioners was unwarranted, unjust and without any authority of law. Thirdly, he submitted that if the Rojnama was taken into consideration, the petitioners were not to be blamed for several adjournments and the returned candidates had in fact an understanding with the petitioners to ask for adjournment of the hearing of the petition which was fixed on Dec. 26, 1979 as both the parties were busy in canvassing of their respective parliamentary candidates contesting the parliamentary elections to be held in the first week of January 1980. The petitioners belong to the party of Congress (I), whereas the respondents — Returned candidates belong to the rival Congress i.e. Congress (U). It was, therefore, agreed between the parties to have the hearing of the election petition fixed after the result of the parliamentary elections were declared, and therefore, no formal application was made before the learned Additional Commissioner.

11. As against this the learned counsel Shri A. V. Savant appearing on behalf of the returned candidates has submitted that in law the respondent, which was Election Tribunal — Additional Commissioner before whom the election petition was to be filed, had the powers to dismiss the election petition for non-appearance or for default. According to him, though there was no provision in the Statute or the Rules, placing reliance on several decisions of various High Courts, he contended that the Tribunal had the power to dismiss such election petition for default.

12. The first question that falls for determination in this petition is whether the respondent No. 13 — Additional Commissioner could or could not have dismissed the election petition No. 17/79 for non-appearance or default of the petitioners or their advocate. Now, admittedly, the respondent No. 1 is a specified society within the meaning of S. 73 (v) of the said Act and Chap. XI-A

governs the election to such specified societies. Section 73 (G) reads as follows:—

"The election of the member of the committees (and the officers by the committees) of the Societies of the categories mentioned below shall be subject to the provisions of Chapter XI-A and shall be conducted in the manner laid down by or under that Chapter".

13. There is no dispute before this Court that respondent No. 1 is such a specified society. Chapter XI-A of the said Act provides for elections of committees and officers of certain societies. The said Chap. XI-A is inserted in the Act by Mah. Act 27 of 1969. The elections of such societies are to be held by the Collector and shall be conducted under his control by such returning officer as may be appointed by him in that behalf. Any dispute relating to election has to be referred to the Commissioner of the Division in which such an election is held or to an officer not below the rank of Additional Commissioner of a division referred to as a specified officer according to the provisions of S. 144-T. An election petition has to be filed by the aggrieved party within the period of two months from the date of declaration of the results and a petitioner presenting an Election Petition under S. 144-T shall pay a deposit not exceeding Rs. 500/-. Unless the petitioner deposits the said amount, the petition shall be summarily dismissed. Subject to such condition as may be prescribed at the time of deciding the petition, the Commissioner shall assess the costs of the hearing of the petition and shall require the petitioner or the respondents or both, as the case may be, to defray the whole or in such proportion as he thinks fit, the costs of the petition, including the deposit so made. The Commissioner is further required to credit to Government such sum as he assesses as the costs to Government of hearing the petition. The powers of the Commissioner under this Chapter XI-A in conducting the election petition are to be found in S. 144-T itself as well as in Ss. 144-S, 144-U and 144-W and in Election Rules from R. 73 to R. 94. Under Section 144-T, sub-sec. (3), in exercising functions conferred upon him under Chap. XI-A, the specified officer shall have the same power as vested in a Court in respect of—

- (a) proof of facts by affidavit;
- (b) summoning and enforcing the attendance of any persons and examining him on oath;
- (c) compelling discovery or the production of documents; and

(d) issuing commissions for the examination of witnesses.

Under sub-sec. (4) of the said section such election petitions shall be heard and disposed of by the specified officer as expeditiously as possible and the order made by the specified officer on such petition shall be final and conclusive. In order to appreciate these rival contentions that such specified officer as described in S. 144-T and others has no jurisdiction or is not empowered under the Statute as well as Rules to dismiss the election petition for non-appearance or for default, we have to appreciate the character of the powers conferred on the Additional Commissioner or other specified officer under the provisions of S. 144-T itself. In sub-sec. (3) of the said section, he has been conferred with the same powers as are vested in the Court itself in respect of items mentioned therein. That, however, in our opinion does not detract from incidental powers which Court possesses. If the Commissioner or the specified Officer under S. 144-T is vested and empowered to exercise certain powers of the Court, it follows that all such incidental and ancillary powers which a Court is empowered to exercise as is referred to in sub-sec. (3) of S. 144-T can also be exercised by the Commissioner or the Specified Officer. What is contended before us is that there is no provision either in the Act or in the Rules framed thereunder to confer such power on the Commissioner or the specified officer as to dismiss the petition for non-appearance or for default. The learned Additional Commissioner at one stage wanted to find out whether the application presented by the petitioner on Jan. 19, 1980 was an application for review or merely an application for setting aside an ex parte decision. There is a necessary distinction to be drawn between an application for review and application for setting aside an ex parte award. In this context, the petitioner contended that as there was no evidence led before the Commissioner in respect of the absence of any provision in the Statute or the Rules there is power to set aside an ex parte Award.

14. It is true that there are no provisions as stated above either under the Maharashtra Co-operative Societies Act or under the Rules framed thereunder to dismiss the petition for non-appearance or default. However, as observed by the Supreme Court in *Grindlays Bank Ltd. v. Central Government Industrial Tribunal*, (AIR 1981 SC 606) that it is a well-known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental

powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In the present case, if the entire spectrum of powers vested in the Additional Commissioner or the Specified Officer in conducting the election petitions is taken into account, we are of the view that the said Commissioner or the Specified Officer should be considered as invested with such incidental or ancillary powers and though there is no positive provision for dismissing election petition for non-appearance or default, there is neither an indication in the Statute nor Rules to the contrary. There is no statutory prohibition for dismissing the election petition for non-appearance or for default. On the contrary, the Commissioner or Specified Officer has been specifically conferred with powers under the Civil Procedure Code for limited purpose. For effectively discharging the duty of deciding the election petition, in our opinion, the incidental and ancillary powers can also be exercised by the Commissioner or the Specified Officer under the provisions of S. 144-T and other sections and relevant rules. It cannot be denied that the Commissioner or the Specified Officer, apart from specific powers conferred as are vested in the Court, has in deciding the election petition all the trappings of the Court and there could be no doubt that they exercise quasi-judicial functions. Such authorities being quasi-judicial in nature have the duty to determine objectively the matters referred to them under S. 144-T of the said Act and have to exercise their discretion in judicial manner without caprice and according to the general principles of law and Rules of natural justice. In our view, therefore, even in absence of specific provisions under the Act and the Rules, the Commissioner or specified Officer under Section 144-T of the said Act has the power to dismiss the election petition for non-appearance or default. It necessarily follows that this power of dismissal for non-appearance or for default also implies a power of restoration of such dismissed election petition.

15. We are fortified in the view we take regarding these powers of the Commissioner or the specified Officer under S. 144-T of the said Act and from the several reported decisions under the provisions of Representation of the People Act (1951), it would appear that the respondent No. 13 herein i.e. Election Tribunal (in this case Additional Commissioner or Specified Officer) certainly will have power to dismiss the election petition for default. Before we go to the several other decisions of various High Courts

on this point, we may refer to the decision of this Court though under the provisions of Rent Control Order reported in 1969 Mah. LJ 421 : (AIR 1969 Bom 393), (*Biwalibai v. Jai-kumar*). This was a case under the provisions of S. 13-(3)-(i) and (ii) of the Rent Control Order. After several adjournments, on the date fixed for evidence, both the petitioners and counsel remained absent. The Rent Controller therefore, closed the case for orders. In subsequent applications filed for setting aside the ex parte order, the question arose whether such an application for setting aside ex parte order was or was not tenable in law. This was raised as a preliminary objection on behalf of the landlords. The Rent Controller had observed that the reasons given by the petitioners for their absence have hardly any justification and it is nothing but a case of negligence and law could not come to help such parties who are negligent. When the said decision was challenged before the High Court, the learned single Judge of this Court was of the opinion that the jurisdiction to dismiss an application for default of appearance or to proceed ex parte against a party who fails to enter appearance is implicit in the jurisdiction to entertain and adjudicate upon the claims made before it by the parties in proceedings under the Rent Control Order. This jurisdiction is not traceable to its inherent powers but is implicit in the power to decide the case itself. If there is a power to dismiss an application for non-appearance of the applicant, it hardly needs to be emphasised to point out that there is a co-ordinate power to proceed ex parte against a party who fails to appear, but this power to dismiss in default or to proceed ex parte also implies equally a duty to restore an application dismissed for default or to set aside ex parte order if the defaulting party satisfies the authority that there was good cause for non-appearance. It is, therefore, clear that a Tribunal or Body which is required to act quasi-judicially has incidental powers apart from those which are specifically conferred on it. Such incidental or ancillary powers would include, in our opinion, power to dismiss for non-appearance, and therefore, power to restore dismissed petition also. This power though ancillary and incidental would appear to us as sine qua non to any judicial procedure which under the Act or the Rules framed thereunder is required to adjudicate upon disputes between the parties and this is a necessary rule of procedure that powers should vest during the proceedings of the Commissioner or the Specified Officer either to dismiss in default

of appearance of a party or to proceed *ex parte* against the defaulting party.

16. The Supreme Court as far back as in the case of *Dr. Sushila Balraj v. Ardnendu Bhushan*, (1965 Mah LJ 65) observed that granting of an adjournment was primarily a matter for the Tribunal to consider and decide in its discretion, that there was power in the Election Tribunal under the Representation of the People Act, 1951, to dismiss the petition for non-appearance in its discretionary powers. However, that power has to be exercised judicially. It was held by Gajendragadkar C. J. delivering the judgment for the Bench confirming the finding of the High Court, that there was no substance in the argument urged by the respondent that the Election Tribunal had no jurisdiction to dismiss the petition for non-prosecution. The learned Chief Justice also observed that in considering the scheme of the Representation of the People Act, what was to be borne in mind is that the election petition must be tried as expeditiously as possible. It is pertinent to note at this stage that sub-sec. (4) of S. 144-T of the said Act lays down that such election petition shall be heard and disposed of by a Commissioner or a specified Officer as expeditiously as possible. The reason is not far to seek. If these petitions are allowed to be conducted in a leisurely way and go on interminably, then the very object of permitting the remedy of challenging the validity of elections in good time would be defeated. That is why S. 144-T sub-sec. (4) lays down that every election petition shall be tried as expeditiously as possible. In determining whether the Commissioner or the specified Officer has the power to dismiss the election petition for non-appearance or for default, the provisions of sub-sec. (4) of S. 144-T cannot be ignored.

17. There are several decisions of various High Courts which support the view that the authority i.e. Election Tribunal deciding the election petition under the Representation of the People Act has power to dismiss the petition for default in appearance of the petitioner. It is also illogical to hold that the Tribunal has no power to restore the same. In *Duryodhan v. Sitaram* reported in AIR 1970 All 1, the Full Bench of Allahabad High Court had occasion to decide the very point and it has been held by the Full Bench that even in the absence of power conferred on the Election Tribunal, Section 98 does not only contemplate an order on merits alone and an order of dismissal for default would be an order dismissing the election

petition under Section 98 (a) of the Representation of the People Act. Three learned Judges of the Allahabad High Court, though for different reasons, held that the Election Tribunal did possess such powers, and procedure provided under Orders 9 and 17 was held applicable for dismissal for non-appearance or default as well as for restoration of such petition.

18. The Full Bench of Punjab High Court in the case of *Jugal Kishore v. Baldev Parkash* reported in AIR 1968 Punj 152 after reviewing several authorities also came to the conclusion that in prosecuting election petition though there is no specific provision laid down under the Act for application of provisions of Civil P. C., the Court has the power to dismiss the petition for default of the petitioner for non-appearance. Justice Grover who delivered judgment for the Bench observed that, where the petitioner chooses to simply absent himself from the Court or ceases to give any instructions to the counsel engaged by him, the Court will have no option but to dismiss the election petition under the provisions of the Civil P. C. which would be applicable to the election petitions in the absence of any express provisions in the Act. Referring to the judicial conflicts between some High Courts and after extensively referring to the decisions of various Courts, the learned Judge observed that there was no distinct provision under the Representation of the People Act laying down any particular or special procedure which is to be followed when the petitioner chooses to commit default either in appearance or in production of evidence or generally in prosecuting the election petition. Accordingly, it was held that the Court had powers to dismiss the petition for non-prosecution. The learned Judge in his observation relied on the decision of Patna High Court reported in the case of *S. B. L. Verma v. T. D. N. Singh* (AIR 1965 Pat 378). The learned Judge extensively referred to this judgment and held as follows (at pp. 158, 159):

"It has been repeatedly said that an election petition once filed is not a contest only between the parties thereto but continues for the benefit of the whole constituency. It is for that purpose that in the Representation of the People Act, 1951, provisions have been made in Ss. 112 and 116 relating to abatement of such a petition, the effect of which is that the petition cannot come to an end by the withdrawal thereof by the death of the petitioner or by the death or with-

drawal of opposition by respondent, but is liable in such cases to be continued by any person who might have been a petitioner. There is nothing in the entire Act providing or indicating that a similar procedure is to be followed in the event of a petitioner failing to prosecute the petition. Such failure can be due to various causes. The petitioner can, by force of circumstances, be genuinely rendered helpless to prosecute the petition. For instance, he may find that his financial condition has suddenly worsened and that he can no longer afford the expenses of litigation. He may even, owing to exigencies of business or vocation or profession, have to go to such a distant place from the seat of the High Court where the election petition is being tried that he may find it impossible to prosecute the petition in a proper manner. There would be two courses open to him and that will depend entirely on his volition. He can either file an application for withdrawal of the petition disclosing the circumstances which have brought about such a situation in which case there would be no difficulty in following the procedure laid down in Ss. 109 and 110 of the Act, or he may choose to simply absent himself from the Court or cease to give any instructions to the counsel engaged by him or fail to deposit the process fee in which case the Court will have no option but to dismiss the election petition under the provisions of Civil P. C. which would be applicable to the election petitions in the absence of any express provisions in the Act. The dismissal will have to be under the provisions contained in O. 9 or O. 17 of the Code."

18-A. Admittedly there are no specific provisions in Maharashtra Co-operative Societies Act, 1960 or the Election Rules. Rule 79 speaks of order of the Commissioner and lays down that at the conclusion of the trial of an election petition, the Commissioner shall make an order—

- (a) dismissing the election petition; or
- (b) declaring the election of all or any of the returned candidates to be void; or
- (c) declaring the election of all or any of the returned candidates to be void, and the petitioner or any other candidate to have been duly elected.

Rule 80 speaks of other orders to be made by the Commissioner which are to be passed at the time of making a final order under Rule 79. There is no specific provision in the said Rules for dismissing election petition for non-appearance or in default or for non-prosecution. As is provided in sub-sec-

tion (4) of S. 144-T, petitions are to be disposed of as expeditiously as possible. It, therefore, necessarily follows that since the Election Tribunal has been conferred with certain powers vested in the Court, we will have to read by implication such incidental and ancillary power in the Commissioner and specified officers for dismissing the election petition for default. Such a power is not only incidental or ancillary, but is necessary and is consistent with the object and the scheme of the Act as well as Rules framed thereunder. If petitioners for any reason choose to remain absent for considerable time, it cannot possibly be held that the Commissioner or specified officer in such circumstances cannot have the power to dismiss for default the election petition. As observed earlier, it has been held by various High Courts that such power does not (sic) vest in the Election Tribunal even in absence of specific provisions in the Act or in the Rules framed thereunder. This view is also supported by the decisions of the Rajasthan High Court reported in AIR 1969 Raj 75 (Keshari Lal v. Narain Prakash); Patna High Court reported in AIR 1965 Pat 378 (S.B.L. Verma v. T.D.N. Singh) and Jammu and Kashmir High Court reported in AIR 1968 J & K 91 (Bupa Singh v. Bishamber Singh).

19. Having held that the learned Commissioner did have the power to dismiss the petition for default, it now becomes necessary to examine whether the Commissioner was justified in dismissing the petition for default. In our opinion, the learned Additional Commissioner was perfectly justified to pass both the impugned orders and for good reasons. It is clear from the record of the case that the election results were declared on Nov. 21, 1978 and the petition is filed on Jan. 20, 1979 and the petition ultimately came to be dismissed for non-appearance of the petitioners or their advocate on Dec. 26, 1979. In between these two dates several adjournments were granted by the learned Additional Commissioner. We are not suggesting that for several adjournments the petitioners are to be blamed. However, it will be seen from the record that the petitioners themselves have asked for a number of adjournments and ultimately on Dec. 20, 1979 petitioners' evidence was to begin. On Dec. 20, 1979, in spite of this, all the petitioners as well as their advocate chose to remain absent. The learned Additional Commissioner waited till 4.40 P. M. on that day, but neither there was any intimation to the learned Additional Commissioner seeking an adjournment nor mentioning of the matter

before the learned Additional Commissioner as to why the petitioner could not remain present. According to the petitioners, they had sent a telegram dated Dec. 20, 1979 itself at about 12.45 P.M. Admittedly, this telegram reached the office of the Additional Commissioner on Dec. 21, 1979. In the petition itself what is stated is that the learned Additional Commissioner should have granted adjournment on the basis of this telegram. The matter was posted to Dec. 26, 1979 for passing final order. However, no enquiries were made by the petitioners or their advocate between 21st and 26th Dec., and therefore, the learned Commissioner passed the order on Dec. 26, 1979 dismissing the petition, as stated above.

20. In the application made by the petitioner for the restoration of the said election petition, a very strange case is made out that there was an understanding that the contesting respondents and the petitioners have reached an understanding to seek adjournment on Dec. 20, 1979 as both the parties were busy in canvassing for their respective candidates in Parliamentary elections. It was further stated that the petitioners as well as contesting respondents belonged to the different parties but not to disturb their work of election campaign, it was not possible to attend the proceedings before the learned Additional Commissioner on Dec. 20, 1979. As the respondents had agreed to this arrangement, petitioners informed their advocates, and therefore their advocate did not make separate application before the learned Additional Commissioner for adjournment and further date for hearing of the petition. The learned Additional Commissioner heard both the parties on this petition and came to the conclusion that reasons assigned in the application for restoration were an after-thought inasmuch as the contesting respondents had denied the claim made by the petitioners in the restoration. In fact the contesting respondents had opposed the petition being restored and denied the theory of mutual agreement on account of pre-occupation of the Lok Sabha Election Campaign in support of their respective candidates. According to the learned Additional Commissioner, he was duty bound to hear and dispose of the petition as expeditiously as possible, and therefore, order passed by him earlier on Dec. 26, 1979 was final and conclusive within the meaning of Sec. 144-T (4) of the said Act read with Rule 79 of the Election Rules 1971. The Additional Commissioner also reiterated his earlier stand that all the petitioners have not

separately credited security deposit of Rupees 500/- and without going into the merits of the petition, the petition, even otherwise, was liable to be dismissed. Having held this, the learned Additional Commissioner dismissed the restoration application by his order dated April 19, 1980.

21. We are of the opinion that in spite of the mandate contained in sub-section (4) of Section 144-T, the election petitions are to be heard and disposed of as expeditiously as possible. Hearing of this petition has gone on for a period of one year and there were several adjournments. In our opinion, petitioners have not made out good or sufficient grounds as to why they were absent on Dec. 20th, 1979. Even if they were busy in the election campaign, in our opinion, that is no reason as to why they or their advocate had chosen to remain absent before the learned Additional Commissioner. The learned Additional Commissioner was absolutely in the dark as to why the petitioners did not choose to remain present. It is true that he had received a telegram on the next day i.e. on Dec. 21, 1979, but merely sending a telegram was not sufficient enough and, in our opinion, this tendency on the part of the litigants to seek an adjournment by correspondence must be discouraged. Admittedly, from Dec. 21st to Dec. 26th, none of the petitioners or their advocate had chosen to remain present or had explained the reasons to remain absent from this day and we are inclined to observe that the learned Additional Commissioner was not in error in ultimately dismissing the election petition for non-appearance on Dec. 26, 1979. We are also of the opinion that the reasons assigned for the restoration application are clearly an after-thought and they do not amount either to good or sufficient grounds having been made out for restoration of the election petition. The contesting respondents having disclaimed any mutual understanding whatsoever, the Additional Commissioner was right in dismissing the restoration application also.

22. Before passing final order, however, we must examine other submissions made by the petitioners' counsel. Petitioners' counsel contended that the order passed by the learned Additional Commissioner, holding that election petition was liable to be dismissed because of defect of serious nature inasmuch as each of the petitioners had not separately credited Rs. 500/- by way of security deposit, is bad and unsustainable in the eyes of law is well founded. Under the

provisions of S. 144-U of the said Act, it is provided as follows :

“Deposit towards costs for hearing and power to award costs.

144-U. A petitioner presenting an election petition under the last preceding section shall pay a deposit not exceeding Rs. 500/- as the Commissioner may direct towards the costs for hearing the petition. Unless the petitioner deposits the same as aforesaid, the petition shall be summarily dismissed. Subject to such conditions as may be prescribed at the time of deciding the petition, the Commissioner shall assess the costs of the hearing of the petition and shall require the petitioner or the respondents or both as the case may be, to defray the whole or in such proportion as he thinks fit, the costs of the petition, including the deposit so made. The Commissioner shall credit to Government such sum as he assesses as the costs to Government of hearing the petition (but not exceeding Rs. 500/- in any case).”

In other words, a petitioner presenting an election petition u/s. 144-T of the said Act has to deposit an amount not exceeding Rs. 500/-. If this deposit is not made by the petitioner, the petition is liable to be summarily dismissed. The Additional Commissioner at the time of hearing of the petition shall assess the costs of hearing and shall require both the parties to deposit the whole or in such proportion as he thinks fit the costs of the petition including the deposit so made. In other words, the security deposit is made for defraying the costs to be assessed by the Additional Commissioner at the conclusion of the trial of the petition. It is a well known rule of construction that singular includes plural, and therefore, even though the word used in S. 144-U is “A petitioner” it shall include petitioners. Therefore, the expression “A petitioner shall deposit an amount not exceeding Rs. 500/-” is to be read to mean that by ordinary rule of construction that the singular in this section would include plural, and therefore, where there are two petitioners, the section would be read to include more than one petitioner. Such a construction is warranted upon the provisions of the General Clauses Act itself. In such a case even though there are more than one petition as long as one deposit is made for the election petition, it would be deemed to be made on behalf of all the petitioners and the only inescapable inference that would follow is that all the petitioners have complied with the requirement of Section 144-U.

23. Therefore, we are of opinion that in spite of the fact that the other petitioners have not deposited separately security deposit of Rs. 500/- at the time of presentation of the election petition, the petition would be maintainable and was not liable to be summarily dismissed as has been held by the learned Additional Commissioner. In our opinion, the learned Additional Commissioner's view that such a petition in absence of security deposit by the other three petitioners was liable to be dismissed in limine was wholly wrong and not sustainable in the eyes of law. We are fortified in the view we have taken inasmuch as this Court has taken a similar view in *Namdeo Chimnaji v. Govinddas*, reported in (1963) 65 Bom LR 843 : (AIR 1964 Bom 137 at p. 146), where it is held as follows :

“Though there may be more than one petitioner to an election petition, so long as one deposit is made for the election petition, the election petitioners would comply with the requirements of Sec. 117 of the Representation of the People Act.”

24. A similar view has been taken by the Judicial Commissioner, Goa, Daman and Diu in the case of *Yeshwant v. Jaisingrao*, reported in AIR 1974 Goa 4. In that case the election of successful candidate was challenged on several grounds. One of the preliminary contentions opposing the petition was raised to the effect that at the time of presenting an election petition only one deposit of Rs. 2,000/- was made by the petitioner and not by each of the several petitioners. Relying on the provisions of Section 117 of the Representation of the People Act, 1951, it was contended that each of the petitioners must deposit Rs. 2,000/-. Rejecting this contention, it was held that the deposit was for the security of costs of the petition. In joint petitions, though there are more than one petitioner, the petition being only one, the deposit of Rs. 2,000/- was payable. This decision is applicable to the facts of the present case with all force. Even if there is more than one petitioner in this case, since a joint petition by more than one petitioner is permissible we are of the opinion that deposit made by only one of the petitioners was valid one and the joint petition by others without paying deposit did not suffer from any infirmity whatsoever. We are of the opinion that the submission made by the learned counsel for the petitioners is sound as far as this finding of the learned Additional Commissioner is concerned.

25. In our view, the submission made by the learned counsel for the petitioner in respect of the order forfeiting the security deposit to the Government is also well-founded. We are of the opinion, that the said order of forfeiture of security deposit is palpably illegal, untenable and without any authority of law. There is no provision either in the Maharashtra Co-operative Societies Act, 1960 or Rules framed thereunder or even in the Election Rules of 1971 to sustain the said order. The only reference we found to forfeiture in the entire election rules is contained in R. 68 of the Election Rules which states that where a candidate has lost the election, his deposit shall be forfeited to the State Government if at an election the number of valid votes polled by him does not exceed one-eighth of the total number of valid votes polled by all the candidates. This obviously has nothing to do with the provisions relating to forfeiture of the security deposit which is deposited under Sec. 144-U of the said Act at the time of filing of the petition. As the order passed by the learned Additional Commissioner forfeiting this security deposit to the Government is wholly illegal, the same is liable to be quashed and set aside and we, therefore, set aside that part of the learned Additional Commissioner's order.

26. In view of this, the petition is partly allowed to the extent of setting aside the order of the Additional Commissioner, Pune Division, Pune forfeiting the security deposit of petitioner No. 2 to the State Government. As far as the petitioners' prayer for restoration of the Election Petition No. 17/79 is concerned, we are of the opinion that the petitioners have not made out sufficient and good grounds for the restoration of the case. This part of the order of the Additional Commissioner of Pune Division, Pune is hereby confirmed.

27. In view of the fact that we have partly allowed the petition granting a limited relief to the petitioners of refunding the security deposit of Rs. 500/-, the rule is partly made absolute. However, in the circumstances of the case, there would be no order as to costs.

Petition partly allowed.

AIR 1982 BOMBAY 421

KANIA, J.

Nagesh Waman Patil and others, Claimants
v. Special Land Acquisition Officer, Bombay,
Opponent.

Land Acquisition Ref. No. 86 of 1971,
D/- 23-6-1981.

(A) Land Acquisition Act (1 of 1894), Section 23 — Determination of market value — Agreement between claimant and acquiring body — Agreement can be taken as good evidence of market value but is not binding on Land Acquisition Officer. AIR 1946 PC 75; AIR 1971 SC 465 and AIR 1962 Pat 406, Rel. on.

(Para 6)

(B) Land Acquisition Act (1 of 1894), Section 23 — Payment of solatium — Agreement between claimant and acquiring parties fixing market value of property including all interests therein at Rs. 4.25 per sq. yard — Held solatium could not be regarded as interest in land and hence figure of Rs. 4.25 was not inclusive of solatium. (Para 6)

(C) Land Acquisition Act (1 of 1894), Sections 23 and 34 — Taking of possession means taking of possession by the authorities referred and interest is to be awarded from the time of taking of such possession.

(Para 9)

Cases Referred : Chronological Paras
AIR 1971 SC 465 4
AIR 1962 Pat 406 5
AIR 1946 PC 75 : 1946 All LJ 221 4

J. J. Bhat with J. D. Dwarkadas, for Claimants; S. P. Kanuga, Govt. Pleader with Advocate General, for Special Land Acquisition Officer.

ORDER :— This is a reference under Section 18, Land Acquisition Act, 1894 (hereinafter referred to as "the said Act") for the determination of compensation in respect of acquisition of certain lands situated at village Borla, in Kurla, Bombay.

2. The proceedings arise out of the acquisition of a large area of land admeasuring 30 acres 34 gunthas and 4 annas, equivalent to 1,49,344.25 sq. yards, situated at village Borla in Kurla. Three notifications under Section 4 of the said Act declaring the intention to acquire the said lands, were published on 27-11-1958. On 14-10-1960, an agreement was arrived at between the claimants and the Bombay Municipal Corporation, being the acquiring body, for whose purposes the aforesaid lands were being acquired under the said Act. The said agreement was arrived at between the claimants

as representing their families including certain minors and the Bombay Municipal Corporation as well as a confirming party. The recitals to the said agreement show that the Improvements Committee of the said Corporation by its resolutions, dated 8th Sept., 1950 and 22nd Dec., 1959 respectively had sanctioned, inter alia, the acquisition of certain lands situated at Borla village, admeasuring about 50 acres and 33½ gunthas i.e. 2,44,813.25 sq. yards described in the first and second schedules thereto and the said lands were notified under Sec. 4 of the said Act for acquisition under notification published in the Bombay Government Gazette (part 1) dated 27th Nov., 1958. The recitals further show that by the said resolutions, the Improvements Committee and the Corporation had also agreed to purchase the land situated at Borla village admeasuring 5 acres and 39 gunthas i.e. 28,919 sq. yds. or thereabouts which was also delineated on a plan annexed to the said agreement. There is a further recital in the agreement which runs as follows :

“And whereas the Corporation pursuant to the said resolutions proposed to acquire the said land belonging to the owners at the value of Rs. 4.25 per sq. yard inclusive of all interests in the land.”

As far as the clauses of the agreement are concerned, clause No. 1 records the consent of the owners and the consent of the Corporation to the acquisition of land admeasuring 50 acres and 23 gunthas which has been delineated on a plan annexed to the agreement and that the confirming party has confirmed such acquisition. Clause 2 runs as follows :

“It has been agreed between the parties that for the purpose aforesaid the market value of the said property including all interest therein shall be computed at the rate of 4.25 per sq. yard for the said piece of land under the terms and provisions of the Land Acquisition Act. No extra compensation will be given under the Act for timber or firewood or wells and the parties will request the Special Land Acquisition Officer to pass an award as per the terms and provisions of the Land Acquisition Act for the compensation of the acquisition of the said land as hereinbefore mentioned for the actual area of the land ascertained by a joint survey, ... ”

The rest of the clause is not material for the purpose of this reference. Clause 3 shows that the owners agreed to sell and the Corporation agreed to purchase pieces of land admeasuring 5 acres and 39 gunthas which

have been there, particularly described in the third and fourth schedules to the agreement at and for the price of Rs. 4.25 per sq. yard. Rest of the clauses are not material. The possession of the notified land was taken on the same day, namely, 14th Oct., 1960. Thereafter, Sec. 6 notification was issued and an award was made and declared on 5th Dec., 1970 in respect of the acquired land. The award makes somewhat interesting reading. In dealing with sales of lands between 1957 and 1959, the Land Acquisition Officer has pointed out that, in the background which he has referred to, only certain sales which are of the adjoining lands to the lands under acquisition need comparison and the price under these sales ranges from Rs. 5 to Rs. 6.60 ps. He has then stated that, taking into account all relevant aspects, the reasonable market value of the lands acquired would be Rs. 5.50 per sq. yard. He has further stated that the value as agreed upon will have, however, to be paid i.e. Rs. 4.25 per sq. yard. As far as the question of solatium, which is the only matter regarding which there is controversy in this reference, is concerned, the Land Acquisition Officer has stated as follows :

“The owners have claimed 15% solatium on the amount which may be awarded to them on the basis of agreed rate between them and the Bombay Municipal Corporation. It appears that the rate agreed to is inclusive of 15% solatium and, therefore, no solatium can be allowed on the agreed rate i.e. Rs. 4.25 per sq. yard. This rate is inclusive of 15% solatium.”

The Special Land Acquisition Officer, on the basis of this conclusion, rejected the claim of the claimants for solatium on the amount awarded to them. It may be mentioned here that the total compensation awarded by the Special Land Acquisition Officer was Rupees 6,34,713.10 ps. exclusive of solatium, regarding which the claim of the claimants was negatived as aforesaid.

3. In the reference before me, the only claim made by the claimants is that in addition to the compensation which has been awarded to them, they are entitled to the solatium at 15% as provided under sub-section (2) of S. 23 of the said Act. It was urged by Mr. Bhat that the agreement between the claimants and the acquiring body, namely, the Bombay Municipal Corporation, only pertained to what was the fair market value of the land acquired and in addition to the said market value, the Special Land Acquisition Officer was bound to award solatium to

the claimants at the statutory rate of 15%. It was submitted by him in the alternative, that the aforesaid agreement could not, in law, be regarded as binding on the Special Land Acquisition Officer in fixing the compensation for the land acquired and it could, at best, only furnish good evidence as to what was the market value of the said land. It is submitted by Mr. Bhat that the agreement showed that the fair market value was Rs. 4.25 per sq. yard and in addition to this, the Special Land Acquisition Officer was bound to award solatium at 15%. It was, on the other hand, contended by Mr. Kanuga, the learned Government Pleader that under the agreement, the claimants had given up their claim for solatium and agreed to accept Rs. 4.25 per sq. yard as the compensation for the acquisition of the said land and, in view of this, the Special Land Acquisition Officer was justified in awarding the compensation to them only at the rate of Rs. 4.25 per sq. yard and rejecting the claim of the claimants to solatium. In order to appreciate these contentions, certain provisions of the Act and certain decisions have to be taken note of. Section 4 of the said Act deals with the publication of a notification declaring that the land in any locality is needed or is likely to be needed for any public purpose. Section 6 deals with the declaration of intended acquisition. Section 11 deals with the making of an award and provides for the inquiry into the measurements, value and claims and the award by the Collector. Section 23 deals with the matters to be taken into consideration in the determination of compensation by the Collector. A perusal of clause 1 of sub-section (1) of S. 23 shows that the market value of the land at the date of the publication of the notification under Sec. 4, sub-section (1) is one of the factors which goes into the determination of the compensation payable to the claimants, whose land has been acquired. Sub-section (2) of Section 23 runs as follows:

"In addition to the market value of the land as above provided, the Court shall in every case award a sum of fifteen per cent on such market value in consideration of the compulsory nature of the acquisition."

4. In *M. Samiullah v. Collector of Aligarh*, AIR 1946 PC 75, the Judicial Committee of the Privy Council held that the Land Acquisition Officer, in awarding the amount of compensation under S. 11, is performing a statutory duty, a duty the exercise of which, in cases where land is to be acquired for a public purpose, concerns the public,

since it affects the expenditure of public money. In assessing compensation, he is bound to exercise his own judgment as to the correct basis of valuation and his judgment cannot be controlled by an agreement between the parties interested. This principle laid down by the Privy Council has been cited with approval by the Supreme Court in *Mathura Prosad v. State of West Bengal*, AIR 1971 SC 465 (see para 18 of the report). The Supreme Court, in this decision, after approving the aforesaid principle, has held that an agreement formally reached between the acquiring authority and the claimant agreeing to a certain amount to be paid as compensation for the land acquired is good evidence of the market value of the land. The correct position would thus be that an agreement, such as the one before me, although it cannot be regarded as binding upon the Land Acquisition Officer in determining the compensation for the land acquired, can be regarded as good evidence of the market value of the land acquired at the relevant time.

5. I next come to the case of *Surendra Nath v. State of Bihar*, AIR 1962 Pat 406. One Indian Aluminium Production Company on 20-2-1944, entered into an agreement with the claimants to purchase several acres of land in the Ranchi District. The interest of that Company passed to the Indian Aluminium Company which repudiated the agreement and requested the Government for the acquisition of the said land. A notification under S. 4 of the said Act was issued in August 1944 and the land ultimately was acquired. It was held by a Division Bench of the Patna High Court that the prior private agreement, in respect of the land proposed to be acquired, between the parties, should carry more weight in determining the market value of the land under Section 23 of the said Act than a value calculated somewhat arbitrarily on the basis of the deeds of transfer in respect of pieces of land which show highly varying sale rates. The Division Bench further held that the Court is bound to allow the statutory compensation of fifteen per cent on the market value of the land under S. 23 (2) of the L. A. Act, in consideration of the compulsory nature of the acquisition.

6. Keeping in mind the principles laid down in the aforesaid decisions, it appears to me quite clear that the Spl. Land Acquisition Officer has definitely proceeded on an unwarranted basis in determining the compensation in respect of the acquisition of the land in question. It seems to be the

settled legal position that an agreement, such as the one before me, although it furnishes good evidence of the market value of the said land, should not be regarded as binding on the Special Land Acquisition Officer in the determination of the market value. Curiously enough, in the present case, notwithstanding the said agreement, the Special Land Acquisition Officer has considered other sale instances and held that, taking into account all relevant aspects, the reasonable market value of the said land would be Rs. 5.50 per sq. yard; but, thereafter, he went on to hold that the value as agreed would have to be paid, namely, Rs. 4.25 per sq. yd. It may be pointed out that once he came to the conclusion that the market value of the said land was Rs. 5.50 per sq. yard, one fails to see how he could then hold that the value which would have to be paid was Rs. 4.25 per sq. yard. The award is, therefore, clearly erroneous. However, in the present case, the dispute is very narrow, because the claimants have not claimed any higher value than Rs. 4.25 per sq. yard in respect of the land in question, but merely claimed 15% solatium on the amount awarded to them. The question then is that, even if the agreement is to be regarded as best evidence of the market value of the land, what is market value as stated in the said agreement. In this connection, clause 2, the material portion of which I have already set out earlier, clearly shows that the market value of the said land including all interests therein has been computed at Rs. 4.25 per sq. yard. It is true that in the earlier recitals to which I have referred to Rs. 4.25 per sq. yard has been stated to be the value of the said land inclusive of all interests. Specific provisions of clause 2 of the said agreement leave no doubt that the value which was referred to in the recitals was intended to be "the market value inclusive of all interests in the said land". It is beyond dispute that a claim to solatium cannot be regarded as an interest in the land at all. In view of this, the submission of Mr. Kanuga that the figure of Rs. 4.25 per sq. yard included solatium, must be rejected. If that were intended, there was no reason to use the expression "market value" in clause 2 of the said agreement, which deals with the question of price. It could easily have been said that the compensation would be computed in respect of the said land at Rs. 4.25 per sq. yard or it could have been made clear that by the term "market value", what was meant was the market value inclusive of the claim to solatium. No such thing has been done in the present

agreement. Hence the term "market value" can be regarded as no more than the fair market value exclusive of solatium. It was next contended by Mr. Kanuga that under the agreement, the claimants have waived their claim to solatium and hence they are not entitled to claim the same in this reference. In my view, this contention also must fail. As I have already pointed out, there is nothing in the agreement to show that the question of solatium was one of the items dealt with in the agreement at all. There is nothing, in my view, in the said agreement which, on a correct construction thereof, can amount to giving up or waiving the claim of solatium.

7. In the result, the claimants succeed in the reference. It is common ground that the figure payable to the claimants by way of solatium would be Rs. 95,667/-, if they are held entitled to solatium.

8. There will, therefore, be an order directing the Special Land Acquisition Officer to pay to the claimants a sum of Rs. 95,667/- as solatium.

9. The next question which has to be considered is whether the claimants are entitled to interest at 4 per cent per annum as claimed by them and from what date. Section 34 of the said Act states that interest is to be awarded at 4 per cent per annum from the time of taking possession of the land acquired, until it shall have been so paid or deposited. In the present case, the possession was handed over by the claimants to the Bombay Municipal Corporation even before the award was made. It is not in dispute before me that, normally speaking, possession would have been taken by the Special Land Acquisition Officer only after the award was made. The taking of possession referred to in Sec. 23 must be construed as the taking of possession by the authorities referred to therein. In these circumstances, I direct the Special Land Acquisition Officer to pay to the claimants the interest at 4 per cent per annum on the amount of solatium from 5-12-1970, being the date of the award, until payment or realisation whichever is earlier.

10. The Special Land Acquisition Officer to pay to the claimants costs of the reference. The fees of the claimants' advocates to be calculated in accordance with R. 606 of the High Court Rules (Original Side) irrespective of any work which might have been done in the reference prior to 1st Jan., 1977. Costs to be on the basis of one advocate.

Order accordingly.

AIR 1982 BOMBAY 425

SHARAD MANOHAR, J.

Vasudeo Raghunath Kulkarni, Appellant
v. Yashodabai and others, Respondents.

Writ Petn. No. 2115 of 1980, D/- 23-3-1982.

Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 13 (1) (i) — Eviction under — Suitable alternative accommodation acquired by tenant — Notice of termination of tenancy given by landlord — Acquired premises transferred by tenant to name of daughter and son-in-law on receipt of notice — Held, landlord's right to recover possession u/s, 13 (1) (i) was not lost, since transfer was effected with a view to defeat his claim. Judgment in Special Civil Appln. No. 299 of 1967, D/- 31-7-1968 (Bom), Refd. (Para 10)

Cases Referred: Chronological Paras
(1968) Spl. Civil Appln. No. 299 of 1967,
D/- 31-7-1968 (Bom) 10

Mahabaleshwar N. Morje, for Appellant;
B. R. Naik with Y. R. Naik, for Respondents.

ORDER:— This writ petition is filed by the tenant against whom a decree for eviction has been passed concurrently by both the Courts below on identical grounds.

2. The facts, though very few, are of quite a tell-tale character. For the sake of convenience, the parties will be referred to hereafter as the 'landlord' and 'tenant'.

(a) The suit premises consists of two rooms in a building called 'Sri Nivas' situate at 29, Prarthana Samaj Road, Vile Parle (East), Bombay. They admeasured 369 sq. ft. The premises were let out by the original landlord to the tenant about 40 years ago. The building in which the premises are situate is a ground plus one floor structure. The tenant had been paying Rs. 40/- per month as rent to the landlord.

(b) In the year 1969, the tenant booked a flat admeasuring 450 sq. ft. in a building being constructed by the 'Archis Co-operative Housing Society', at Mahant Road Extension, Vile Parle. The flat was booked by the tenant in the name of his son, who was admittedly a minor at the time of the booking. Admittedly, the amount of money for the purchase of flat was paid entirely by the tenant himself. It is admitted by the tenant that he got even the possession of the said flat in June, 1970.

(c) On 25-6-1970, original landlord Shri J. N. Belsare gave a notice to the tenant ter-

minating his tenancy and demanding possession of the suit premises mainly on the ground that the suit premises were required by him bona fide for his personal occupation. On 8-7-1970, a reply was given by the tenant to the said notice denying the landlord's claim. On 26-7-1970, a letter was written by the landlord to the tenant almost by way of a rejoinder to his reply and in the said rejoinder, he mentioned the fact that the tenant had acquired suitable alternate accommodation, viz. the above mentioned flat in the Co-operative Society building where he could conveniently shift. It was stated in the said rejoinder that in the eviction suit that the landlord proposed to file against the tenant, the said fact would be relied upon as an additional ground for eviction. To this rejoinder-letter, a reply was sent by the tenant on 24-8-1970. What is stated in the reply is of some significance and relevance in this case. In the said reply, he did not deny the fact that he had acquired suitable alternate accommodation. Further, he did not deny the fact that the flat was, in fact, purchased by him. All that he stated was that the flat was meant for his son and not for himself. Having given this reply on 24-8-1970 after receipt of the second notice-cum-rejoinder dated 26-7-1970, the tenant hit upon a device which he no doubt thought to be extremely ingenious. On 12-10-1970, he made an application to the Society for transfer of the flat from his son's name to the name of his daughter and son-in-law. There is some dispute as to whether the application for transfer was made by the tenant himself or whether it was made technically by his son in whose name the flat was supposed to be standing. However, I will assume that the actual application for transfer was made not by the tenant himself but by his son. The tenant has, however, made no secret about the fact that after the construction of the building was completed in the year 1970, he himself got possession of the flat in June 1970. This clearly means that his son was a mere benamidar and the real owner of the flat was he himself. If that is the position, then the mere fact that the actual application for transfer was made by his son and not by himself is of no legal consequence whatsoever. The fact thus stands out that after receiving the notice for delivery of possession on the ground mentioned in S. 13 (1) (i) of the Rent Act, the tenant managed to have the flat in the society transferred to the name of his son-in-law. The actual transfer, however, has taken place as late as on 4-2-1973. This means

that the transfer had been effected during the pendency of the litigation.

(d) The present suit was filed by the original tenant (landlord?) on 28-1-1971. The grounds for eviction mentioned were the landlord's bona fide personal requirement contemplated by S. 13 (1) (g) of the Rent Act and the fact that the tenant had secured suitable alternative accommodation, the ground mentioned by S. 13 (1) (l) of the Rent Act. After the filing of the suit, original landlord Shri J. N. Belsare died and his widow and two sons were brought on record as his heirs and legal representatives. The tenant filed his written statement (by way of points of defence) on 22-9-1971. The relevant point of defence consisted of a mere denial of the plaintiff's claim u/ss. 13 (1) (g) and 13 (1) (l) of the Rent Act.

(e) To complete the chronology of the event, it may be mentioned that it is long after filing of the written statement that the flat in question situate in the Co-operative Society Building was transferred by the Society to the tenant's daughter and son-in-law on 4-3-1973. It may be mentioned here further that although the flat now stands technically in the name of Gautams, the defendant's daughter and son-in-law, the entire consideration in respect of the flat has flown from the pockets of the defendant-tenant. It follows that either it is a case of benami transaction or it is a gift by the tenant to his daughter and son-in-law after he received the notice of eviction.

3. It is in the context of these admitted fact or facts found on record that the trial Court held that the defendant-tenant was liable for eviction having regard to the provisions of S. 13 (1) (l) of the Rent Act. The trial Court also found no reason to reject the evidence led by the plaintiff showing that the plaintiff had the first floor admeasuring 778 sq. ft. of area in his possession which was extremely inadequate for his grown-up and growing family. The Court, therefore, found that the plaintiff had established the bona fide character of his requirement vis-a-vis the suit premises. Further, having regard to the fact that the defendant-tenant had acquired the said flat in the Co-operative Society, the learned Judge also held that the question of balance of convenience had got to be decided in favour of the plaintiff-landlord. The plaintiff's suit for eviction was, therefore, decreed by the trial Court.

4. In appeal, filed by the tenant, the Appellate Bench of the Small Causes Court found it impossible to find any fault, legal or factual, in the judgment of the trial Court.

The decree passed by the trial Court was, therefore, confirmed by the Appeal Court and the tenant's appeal was dismissed by him. That's why the tenant has approached this Court in its jurisdiction under Art. 227 of the Constitution of India.

5. I have narrated the facts above and have mentioned that they are of a tell-tale character. The facts leave no room for doubt that it was precisely with a view to get over the difficulty about the provisions of Section 13 (1) (l) of the Rent Act that the tenant had managed to get a transfer of his own flat in the Co-operative Society's Building and put it into the possession of his daughter and son-in-law. His reply to the notice dated 8-7-1970 shows that he had purchased the flat for the sake of his son. This means that the flat belonged to himself, but he had proposed to keep it at the disposal of his son; but it is evident that he had a guilty mind and hence what he has actually done is that he forgot everything about the future needs of his growing son. The moment he received notice from his landlord on 26-7-1970, he stealthily managed to have the flat transferred to the name of his daughter and son-in-law. He has admitted that he himself got possession of the flat in June 1970, but still he manoeuvred to transfer the possession to his daughter and son-in-law. It cannot be contended, and, in fact, it has not been contended, that his son-in-law and his married daughter, were ever the members of the petitioner's family as such. It is, therefore, nobody's case that now the flat in the Co-operative Society's Building is being occupied by any bona fide members of the tenant's family. Even assuming that it was in possession of a bona fide member of the family, the fact remains that it belongs to the tenant himself. The legal title of the flat does not transfer itself by this convenient device of transfer of the flat in the name of some other person. This is what is noticed by the Courts below and hence both the Courts have held that so far as the conditions contemplated by S. 13 (1) (l) were concerned, they stand fully fulfilled in favour of the landlord in the instant case. Both the Courts have further found that the landlord's family is a growing family. Further, it is the tenant's own contention that the landlord's family is quite an affluent family. If that is so, their need for additional premises can hardly be construed to be devoid of bona fides. Both the Courts have recorded concurrent findings of fact in this behalf and I find no reason whatsoever to interfere with the same.

6. The only question then remains is as to whether the question of balance of convenience can be said to be tilting in favour of the tenant. Both the Courts have held that since the tenant is the owner of the other premises in the Co-operative Society's Building, it would not lie in his mouth to contend that balance of convenience should be seen in favour of the tenant and not in favour of the landlord. The suit premises admeasures 369 sq. ft. It just consists of 2 rooms. It is doubtful whether it is a self-contained flat. In any event, the other premises admeasures 450 sq. ft. and admittedly that is a self-contained flat. If that is so and if the fact stands established that the legal title of the flat vests in the defendant-tenant, it could hardly lie in his mouth to contend that greater hardship would be caused to him by virtue of a decree against him, than would be caused to the landlord by refusal to pass any such decree.

7. Mr. Morje, the learned Advocate for the petitioner-tenant, however, advanced a four-fold argument before me to contend that the concurrent decrees passed by both the Courts below are vitiated in Law. His first contention was that Issue No. 3 framed by the trial Court was framed in an erroneous manner. Issue No. 3 runs as follows :

"Does plaintiff prove that the defendant has acquired a suitable residence?"

According to Mr. Morje the wording of Section 13 (1) (i) does not admit of such wording for the issue.

I fail to see any justification for such contention. In the first place, substance of the ground relied upon by the landlord provided for him by S. 13 (1) (i) of the Rent Act has been sufficiently stated in the issue. It does not at all appear that the defendant-tenant ever made any grievance about the phraseology of the issue. My attention was not invited to any prejudice being caused to the tenant by virtue of the said phraseology of the issue. I repeatedly called upon Mr. Morje to point out to me as to when and where he had urged the said point in either of the Courts below. He was unable to throw any light upon that aspect. The point is nothing but a figment of his own imagination stemming from the inspiration dawning upon him at the time of the hearing of this petition in this Court. It is hardly necessary to deal with the point any further.

8. Next, it was argued by Mr. Morje that the lower Courts have misread the provisions of S. 13 (1) (i). According to Mr. Morje, the flat in the Co-operative Society's

Building belonged either to the tenant's son or tenant's son-in-law. In either of the events it did not belong to the tenant and in any event it was not in his possession. If that was so, the provisions of S. 13 (1) (i), according to him, did not come into operation at all. In this connection, Mr. Morje tried to invite my attention to the other provisions of S. 13 (1) of the Act where, according to him, distinction is made between the requirements of the tenant himself and the requirement of the members of the tenant's family in addition or in the place of the requirements of the tenant. According to Mr. Morje if Sec. 13 (1) (i) refers to the acquisition of tenant alone, the acquisition by or possession of any member of his family of the alternative flat is of no relevance at all.

To my mind, this argument stems from the presumption that the flat in the Co-operative Society's Building booked by the tenant himself did not belong to him. Both the lower Courts have recorded the concurrent findings that the flat was, in fact, purchased by the tenant with his own monies. In fact, it is not disputed before me at all that the entire amount of the consideration of the flat came from the pockets of the defendant-tenant. All that is sought to be urged is that initially it was purchased in the name of the son and that subsequently it was transferred to his son-in-law. Nothing was brought on record to show even that the son-in-law has paid any consideration for the transfer of the flat. I do not for a moment suggest that even if such transfer of consideration was proved, the tenant's case would have been on a higher level of justification. But the absence of any such plea or proof takes the case beyond any pale of doubt. Fact just stares in the face that the legal title in the other alternative flat vested in the tenant at the relevant time. He tried to mislead the Court after the receipt of the notice dated 26-7-1960 by engineering the transfer of the flat to the name of his daughter and son-in-law. The contention of Mr. Morje, therefore, must be rejected.

9. Another feeble attempt was made to satisfy me that the flat, in fact, belongs to the tenant's son-in-law. But in view of the position stated above, I find it impossible to take the view that at the relevant time the legal title in the alternative flat vested in the son-in-law. Even the possession of the flat was with the tenant at all the relevant time, it was he himself who went into possession of the flat in June 1970 and evidently he delivered the possession of the flat to his

daughter and son-in-law after he received the notice for delivery of possession from the landlord.

10. This brings me to the last contention urged by Mr. Morje inspired by the belief that it was supported by the judgment of a learned single Judge of this Court in Special Civil Appln. No. 299 of 1967 decided by Bal J. on 31st July, 1968. In that case, the tenant had purchased certain other flat which he subsequently sold. He thereafter received a notice from the landlord presumably on the ground of bona fide personal requirements as also on the ground mentioned in Section 13 (1) (i) of the Act. It was in the context of these facts that it was argued before this Court that the premises acquired by the tenant must be available to him for occupation at the date of the notice and on the date of the suit and must be continued to be available till the date of the decree. It appears that his contention was accepted by this Court with certain qualifications. Mr. Morje would want me to hold that the decision was applicable to the facts of this case; but what he forgot to notice in the said judgment is that while broadly accepting the above mentioned legal proposition, the learned Judge observed in so many words as follows:

"I may make it clear that different consideration may arise if a tenant had acquired possession of a suitable residence when the landlord gave him notice terminating his tenancy or when the suit was filed but dishonestly parts with the possession thereof with a view to defeat the landlord's claim." Evidently, it would not lie in the mouth of the tenant in such a case to say that the premises acquired by him are no longer in his possession. This is what Bal J. was driving at when he made the above observation. That observation squarely covers the facts of the present case. The decision relied upon by Mr. Morje is thus squarely against him so much so that the decision perhaps could have been said to have been given with the specific facts of the present case in mind.

11. Moreover, I have no doubt that the defendant-tenant has indulged in manoeuvring evidently with a view to throw dust in the eyes of the Court. I have my own doubt as to whether this Court should entertain his petition in exercises of its jurisdiction under Art. 227 of the Constitution. This jurisdiction is after all analogous to the equity jurisdiction and one who comes to equity must come with clean hands. It is difficult to find any cleanliness in the hands of the

petitioner-tenant. I will, however, make it clear that I am restricting my decision not to the above aspect at all. I find that no defect is brought to my notice either in the conclusion arrived at by both the Courts below or in the reasoning of the Courts upon which the conclusion is based.

The petition, therefore, fails and the same is dismissed with costs. The rule earlier issued stands discharged.

Petition dismissed.

AIR 1982 BOMBAY 428

DESHPANDE, C. J. AND Smt. SUJATA MANOHAR, J.

Bandra Green Park Co-operative Housing Society Ltd. and another, Appellants v. Mrs. Dayadasi Kalia and others, Respondents.

Appeal No. 334 of 1980, D/- 25-3-1982.*

(A) Maharashtra Co-operative Societies Act (24 of 1961), S. 91 — Dispute touching the business of society — Co-operative Housing Society — Bye-laws contemplating possession of flats by members except for temporary period due to some exigencies — Member required to leave Bombay due to exigencies of her husband's employment letting out flat on leave and licence basis — Dispute raised by member against licensee for possession of flat on husband's retirement — Is a dispute touching the business of the society, notwithstanding that the Society has joined the dispute on the member's undertaking to bear all litigation expenses. Misc. Petn. No. 1258 of 1976, D/- 23-4-1980 (Bom), Reversed.

Where the Society constructs a building for housing its members, and the flats therein are intended for their occupation only, the Society is recipient of several concessions in the matter of allotment of plots, securing of the controlled building materials, stamp duty etc. The builders constructing buildings and selling flats as part of their business may not be recipient of all such benefits even though they are under a statutory obligation to form a co-operative society of such purchasers of the flats, to ensure achievement of the same object. The ownership of the flats in such cases vests partly in the society and partly in the members, who are entitled to the possession of the flats as an incidence of their membership and shareholding in accordance with the scheme of

*Against judgment of Mody J. in Misc. Petn. No. 1258 of 1976, D/- 23-4-1980.

GZ/GZ/C891/82/HR/RSK.

the bye-laws of such Society. The business of the Society in all such cases does not come to an end merely on construction of the building and putting the members in possession of the flats therein. The common problems created by co-existence of several members in a Society's building make the continuance of the supervision and intervention by the Society indispensable as also the assertion of its ownership whenever it becomes necessary in terms of the bye-laws. The provisions of the bye-laws requiring the members to remain in possession of the flats and permitting possession thereof by non-members only with the permission of the Society for a limited period, require constant supervision and interference by the Society to prevent their evasion. (Para 7)

Held, no doubt the plaint did not contain any express averment about the occupation of the licensee being in breach of any bye-laws. It was, however, expressly pleaded that the flats in the Society were intended (1) for the occupation of the members and (2) that the flat was given by the member to the licensee for occupation due to exigencies of employment of her husband. These averments, if found true, at the trial, could not but make the Society an interested disputant in the same manner in which the member seeking possession for her own occupation could be said to be ensuring possession of the flat by the member and eviction of the non-member could not but be held to be touching the business of the Society. The Society joining the dispute on the member's undertaking to bear the expenses by itself could not run counter to the existing interest of the Society in the flat and its obligation to ensure compliance and observation of the bye-laws and regulations in this behalf. The fact thus that a member happened to be a co-disputant or non-disputant turned out to be a beneficiary thereof even when he happened to be himself guilty of the breach of the bye-laws, could not make any difference whatsoever. The averments in the present case showed that occupation by the licensee was necessitated due to the exigencies of the employment of the member's husband and that such occupation was with the permission of the Society. This implied that the member herself was not guilty of any breach of the bye-laws. Breach by the member also could not be said to be an ingredient of the cause of action in every such case. (1974) 76 Bom LR 718, AIR 1981 Bom 244 (FB), (1965) 67 Bom LR 306, AIR 1980 Bom 374, AIR 1969 SC 1320 and (1982) 84 Bom LR 1, Rel. on; Misc. Petn.

No. 1258 of 1976, D/- 23-4-1980 (Bom), Reversed. (Paras 10, 11)

(B) Maharashtra Co-operative Societies Act (24 of 1961), S. 2 (16) — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Ss. 5 (3), 5 (4A), 5 (11) (bb), 14 and 15-A — Landlord and tenant relationship — Co-operative Housing Society permitting member to induct licensee on premises — Does not become the landlord of the licensee — At best, the licensee can claim to be a tenant of the member. AIR 1980 SC 374, Rel. on. (Para 12)

(C) Maharashtra Co-operative Societies Act (24 of 1961), Ss. 93 (1), 152 (4) — Maharashtra Co-operative Societies Rules (1961), R. 76 — Decision in regard to 'satisfaction' u/s. 93 (1) about existence of dispute is of a prima facie nature — No notice to non-disputants is necessary at this stage — Such decision is neither final nor can it prevent the Co-operative Court from trying any issue as to dispute being covered by S. 91 or not. 1982 (1) Bom CR 186, Overruled.

Section 93 (1) consists of two parts: The first part requires the Registrar's "satisfaction" as to the dispute being covered by Section 91, by reference to the subject-matter and the parties involved. The second part requires him to decide if he would dispose of the dispute himself or refer it for disposal to the Co-operative Court. The decision on this point is always in favour of reference as he and his assistants can hardly get time even to read the plaint raising dispute for the first part of satisfaction. The section itself does not contemplate any notice to the non-disputants at this stage. The required "satisfaction" thus does not contemplate any trial of any issue as such, the disposal of the entire dispute with all its requirements and trappings being reserved for the subsequent stage. The stage of "satisfaction", on the face of it, is preliminary and contemplated "satisfaction" is of a prima facie nature. The next stage being of the decision either to try the dispute himself or refer the same for trial to the Co-operative Court, every aspect of the dispute remains untried at the stage of satisfaction including the truth of the averments made, which ultimately go to determine the jurisdiction. Requirement under R. 76 of recording decision and reasons for satisfaction is aimed merely at ensuring the application of mind by the Registrar and elimination of casual approach. Ordinarily, trial of the "dispute" should include trial of every aspect thereof including the issue of jurisdiction. This indeed is the

rule, splitting of one case into two stages and trial thereof by two different persons being an exception. The section does not contain clearer words to that effect and it cannot be a matter of ready inference.

(Para 16)

Such a satisfaction and following the decision to refer the dispute for disposal, themselves not affecting anybody's rights in the same way in which affecting of rights is understood in the legal sense, any question of implying obligation to hear the "affected" parties cannot arise. The absence of provision of notice also is reflective of the same legislative intent. It is, therefore, difficult to see why any obligation to issue notice at this stage should be implied, when such satisfaction is not intended to affect anyone in any real sense, and issues involved therein ordinarily can be tried by the Co-operative Court as part of the trial of the dispute. Such notice is implied in the absence of express provision when there is a danger of a person being affected unheard. Any contrary view would involve trial within trial, resulting in unnecessary prolonging of the life of the litigation without any corresponding benefit and service to the cause.

(Para 17)

No doubt, under Rule 76, the word 'decision' and also the obligation to record the reasons under R. 76 do create an impression as if the "satisfaction" required under the first part of Sec. 93 involves the regular trial. However, a close examination of the Rule and its object would demonstrate how this could not be the intendment. In the first place, no rule can enlarge the scope of any section. The rule, therefore, cannot be understood to require any trial of any part of the dispute when the section, for the working out of which the rule is framed, itself does not contemplate it. The words "decision" and "reasons" in R. 76 shall have to be read down to bring them in conformity with the requirements of S. 93. Secondly, the recording of reasons and decision of "satisfaction" is intended to furnish proof of the Registrar having applied his mind. This is what the last sentence of the rule itself expressly indicates. Such a rule of proof or evidence can never be exalted to any substantive provision to require trial and override the provision of the section itself.

(Para 18)

Again the wording of S. 152 (4) is wide enough to suggest as if the "decision" as to "satisfaction" of the Registrar required before any reference u/s. 93 and recorded in compliance with R. 76, also is so final and

immune from reconsideration by the Co-operative Court. Two factors, however, militate against any such conclusion. Firstly, the nature of the order is also a determining factor, in ascertaining if the legislature could have intended to make it so final. Under the scheme of the Act contemplated "satisfaction" is of a prima facie nature intended to be recorded at a preliminary *ex parte* stage merely by reference to the plaint raising dispute. An order made at this stage, on averments open to disproof at the trial of the dispute, could never have been intended to be final. Secondly, Section 91 (2) and S. 152 (4) co-existed in the statute for a long time. The legislature could not have felt the need to declare the Registrar's order u/s. 93 to be final u/s. 91 (2), had it intended to cover the same by sub-section (4) of Sec. 152. This is a conclusive answer to the reliance on S. 152 (4). Deletion of sub-section (2) from S. 91 by Act 27 of 1969 is clearly aimed at stripping "satisfaction" of its finality.

(Para 21)

To sum up, the "decision" in regard to "satisfaction" u/s. 93 is of a prima facie nature. No notice to the non-disputants is necessary at this stage. Such "decision" is neither final nor can it prevent the Co-operative Court from trying any issue as to dispute being covered by S. 91 or not. 1979 Bom CR 79 and ILR (1975) Bom 849, Refd.; 1982 (1) Bom CR 186, Overruled.

(Para 24)

Cases Referred :	Chronological	Paras
1982 (1) Bom CR 186		15
(1982) 84 Bom LR 1		11
AIR 1981 Bom 244 : 83 Bom LR 299 (FB)		7
AIR 1980 Bom 374	8, 11.	12
1979 Bom CR 79		23
ILR (1975) Bom 849		23
(1974) 76 Bom LR 718 : 1974 Mah LJ 908		7
AIR 1969 SC 1320		9
(1965) 67 Bom LR 306 : 1965 Mah LJ 523		9, 19, 20

D. R. Dhanuka with J. P. Devadhar, for Appellants; V. K. Punwani (for No. 1) and A. R. Shinde (for No. 2), for Respondents.

DESHPANDE, C. J. :— Respondent No. 1 (hereinafter referred to as "the licensee") filed a Miscellaneous Petition in this Court under Art. 226 of the Constitution of India challenging the validity of "reference" of the dispute made by respondent No. 2, Deputy District Registrar, u/s. 91 of the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as "the Act") to respondent No. 3, the Co-operative Court,

raised jointly by appellant No. 1, a Co-operative Housing Society and appellant No. 2 its member.

2. The disputant raised this dispute on 15th Sept., 1975, for possession of Flat No. 6, held by the member in the building owned by the Society, and compensation for its use against the licensee. The flat was purchased by the member from the builders in or about the year 1964 before the Society was incorporated in 1965 and conveyance of the building was executed in its favour. The member was required to leave Bombay due to the exigencies of her husband's employment and the flat came to be occupied by the licensee on leave and licence basis under an agreement dated 1st Sept., 1972. It was initially for 11 months with option to the licensee to renew it for further periods of eleven months twice. The husband retired from the service and the member required the flat in dispute for her and her family's occupation. The application raising the dispute did aver how the flats in building were intended for the occupation of members and how the restoration of possession was necessary for this purpose. This dispute was referred, as indicated above, on 17th Sept., 1975.

3. The licensee submitted her written statement before the Co-operative Court. Amongst other defences, she challenged its jurisdiction on two points. She firstly claimed to be the tenant of the member (1) on the true interpretation of the agreement and also (2) because of the licensee having become tenant with effect from 1st Feb., 1973 on the amendment of the Rent Act under Act No. 17 of 1973. The dispute thus was alleged to be triable by the Court under the Rent Act. She secondly alleged that the dispute, essentially being between the member and her licensee, did not touch the business of the Society to attract Section 91 of the Act. It was also alleged that the Society was an idle party, it having no interest in the possession of the flat and it having lent its name to the dispute merely to attract the jurisdiction of the Co-operative Court under Section 91 of the Act. It was also indicated that the standard rent fixation application was already filed by the licensee in the Court of Small Causes under the Bombay Rent Act.

4. At the instance of the licensee the question of jurisdiction was tried by the Co-operative Court as a preliminary issue without recording any evidence. The Co-operative Court held that on averments, the So-

ciety cannot be held to be an idle party, and as such the dispute did touch its business to attract S. 91 of the Act and it had jurisdiction to try the dispute.

5. The validity of this order was challenged in the Miscellaneous Petition in this Court. By an order dated 23rd April, 1980, Mody J. upheld the contention of the licensee and quashed the reference. The learned Judge held that the business of the Society to construct building and allot the flats therein to its members came to an end with the members being put into the possession thereof. The subsequent act of restoration of possession from the licensee to the member could not touch its business. Merely lending the name by the Society without indicating any breach of the bye-laws cannot touch its business to attract S. 91 of the Act.

6. Mr. Dhanuka, the learned advocate appearing for the appellants, contends that under the bye-laws, the Society is as much interested in the restoration of possession to its member, as the member himself or herself can be. It is a part of the business of the Society to ensure that flats in its building are occupied by the members, excepting when due to certain exigencies, the same are permitted to be occupied by strangers for some limited period. He drew our attention to para 12 of the plaint raising the dispute and expressly pleading that the building of the Society "is meant to house the members of the disputant No. 1 Society and no others". Mr. Dhanuka therefore, contends that mere omission to plead breach of bye-laws expressly should not be so fatal.

7. In our opinion, Mr. Dhanuka's contention is well founded. A dispute between a member of a Society and his licensee does not touch the business of the Society and does not, therefore, attract S. 91. A Division Bench of this Court in *Kalawati Ramchand v. Shankerrao Patil* (1974-76 Bom LR 718) holding so and the Full Bench judgment in *Leong v. Smt. Jinabai G. Gulrajani* (1981-83 Bom LR 299) : (AIR 1981 Bom 244) affirming the same deal with several points involved in such a case including when the Society can or cannot be held to be an idle party. Disputes filed after *Kalawati's* case are invariably raised by the Society and the member jointly against the licensee excepting cases where the Society feels that even the member is liable to be evicted. The disputants have not made any secret of the fact that the Society has become a co-disputant on the member agreeing to bear all the expenses of the litigation. This, to our mind, cannot make any differ-

ence whatsoever to the Society's interest in the dispute, if, in fact, it has such an interest. It is not disputed that the bye-laws of the Society do contemplate possession of the flats by members except for temporary period due to some exigencies. In all such cases, where the Society constructs a building for housing its members, and the flats therein are intended for their occupation only, the Society is recipient of several concessions in the matter of allotment of plots, securing of the controlled building materials, stamp duty etc. The builders constructing buildings and selling flats as part of their business may not be recipient of all such benefits even though they are under a statutory obligation to form a co-operative society of such purchasers of the flats, to ensure achievement of the same object. The ownership of the flats in such cases vests partly in the Society and partly in the members, who are entitled to the possession of the flats as an incidence of their membership and shareholding in accordance with the scheme of the bye-laws of such Society. The business of the Society in all such cases does not come to an end merely on construction of the building and putting the members in possession of the flats therein. The common problems created by co-existence of several members in a Society's building makes the continuance of the supervision and intervention by the Society indispensable as also the assertion of its ownership whenever it becomes necessary in terms of the bye-laws. The provisions of the bye-laws requiring the members to remain in possession of the flats and permitting possession thereof by non-members only with the permission of the Society for a limited period, require constant supervision and interference by the Society to prevent their evasion.

8. In a Division Bench judgment (decided by myself and Mody J.) dated 5th Feb., 1980 in *Contessa Knit Wear v. Udyog Mandir Co-operative Housing Society* (AIR 1980 Bom 374) this Court had an occasion to refer to this dual ownership of the society and the members, in such flats of the building owned by the Society, and its incidence. This is what is observed in paragraph 10:

"The occupation of flats (or blocks as the case may be) by several holders in one building held by such Societies raises some problems of such 'co-existence' inevitably giving rise to certain mutual rights and obligations requiring a machinery to regulate and enforce the same. Bye-laws to the above effect,

involving some mechanism for enforcement are framed as a part of the process of the registration of such Societies. This necessarily involves an abridgement of their property rights in such flats. One such incidence of such 'co-existence' is the indispensable dual ownership; management and authority to enforce the obligation being vested in the Society, while right of occupation subject to the Bye-laws being vested in the member. Another incidence is the indispensability of restricting the right of occupation to the member himself, for whose occupation it is intended from its very inception and who alone is liable to comply with such obligations and as a corollary thereto, his disability to induct any third person therein, excepting with the permission of the society, in case of any temporary urgency. Yet another incidence is the restriction on his right of transfer of his interest in the society including the incidental right of occupation."

Para 10A of the judgment indicates how even the builders are under an obligation to form a society of the purchasers of the flats and execute a conveyance in respect of the building in favour of such society.

9. Earlier, another Division Bench of this Court had also an occasion to highlight the role of such a society in the affairs of the occupants of the Society building even after the flats are allotted to such members. In *I. R. Hingorani v. Pravinchandra* (1965-67 Bom LR 306), this is what the Division Bench (Chainani, C. J. and Gokhale, J.) has observed at page 311:

"The Regulations of both the societies, to which the buildings in question belong, contain a similar Regulation. Consequently the flats now in occupation of the petitioner could not have been given to them for occupation without the permission of the societies. The object of a co-operative housing society being to provide housing accommodation to its members, it is the business of the society to see that such accommodation is occupied by its members or by persons approved by it and not by unauthorised persons. Every member is bound by the rules, bye-laws and regulations of the society. In respect of the common amenities provided by the society he has to pay certain charges and expenses to the society. A housing society is, therefore, vitally concerned with the question as to who occupies the accommodation provided by it. A dispute in regard to the occupation of such accommodation is, therefore, a dispute connected with the business of such a society. In any

case there can be no doubt that such a dispute will touch the business of the society." It is true that the ratio of this case has been partially overruled by the Supreme Court in the case of *Deccan Merchants Co-operative Bank v. Dalichand* (AIR 1969 SC 1320). The claim of the society to evict the non-members inducted in the building before its purchase by the society is held not to be touching the business of the society within its conception u/s. 91 of the Act. The ratio of *Hingorani's* case about the Society's claim to evict non-members inducted in the flats after its becoming owner, such as in the present case, remains unimpaired by the above Supreme Court judgment.

10. It is true that the plaintiff does not contain any express averment about the occupation of the licensee being in breach of any bye-laws. It is, however, expressly pleaded that the flats in the Society are intended (1) for the occupation of the members and (2) that the flat was given by the member to the licensee for occupation due to exigencies of employment of her husband. These averments, if found true, at the trial, cannot but make the Society an interested disputant in the same manner in which the member seeking possession for her own occupation can be said to be. Ensuring possession of the flat by the member and eviction of the non-member cannot but be held to be touching the business of the Society in terms of the ratio of the two judgments and several other cases decided by this Court.

11. Mr. Punwani, the learned advocate appearing for respondent No. 1, did try to distinguish the ratio of the judgment in *Contessa's* case (AIR 1980 Bom 374) on the ground that the disputant-Society therein was claiming possession both from the member and, the licensee, because of the breach committed after the cancellation of the member's membership on account of such a breach. The member and the licensee were both non-disputants. This, to our mind, cannot make any difference of substance to the ratio. The question whether the dispute touches the business of the Society or not, cannot depend on whether the membership is cancelled or whether the member is a disputant or non-disputant. It will depend on whether the occupation of the stranger happens to be in breach of the bye-laws or not. Nothing prevents the Society and the member joining their hands as long as the object is to ensure compliance with the bye-laws.

(see 1982-84 Bom LR 1, in this context). It is this breach and obligation to prevent it that touches the business of the Society and enables the Society to claim possession by invoking Section 91 of the Act. If para 10 in *Contessa's* case reflects the correct legal position, the Society, can be held to have real interest in the dispute even to ensure restoration of possession to the member and her continued possession of the flat. The Society joining the dispute on the member's undertaking to bear the expenses by itself cannot run counter to the existing interest of the Society in the flat and its obligation to ensure compliance and observation of the bye-laws and regulations in this behalf. The fact thus that a member happens to be a co-disputant or non-disputant turns out to be a beneficiary thereof even when he happens to be himself guilty of the breach of the bye-laws, cannot make any difference whatsoever. We must hasten to add that the averments in the present case show that occupation by the licensee was necessitated due to the exigencies of the employment of the member's husband and that such occupation was with the permission of the Society. This implies that the member herself is not guilty of any breach of the bye-laws. Breach by the member also cannot be said to be an ingredient of the cause of action in every such case.

12. Mr. Punwani then contends that the licensee had become the tenant, and the Court under the Rent Act, and not the Co-operative Court, can have jurisdiction to entertain the dispute. In this case, the Society and the member both are the disputants-claimants. The licensee does not claim to have become a tenant of the Society. The Society, no doubt, is claimed to have permitted occupation by the licensee. It is not known whether the terms of the agreement were also approved by the Society. Mere granting of permission to a licensee by itself cannot make the Society a party to the transaction. This apart, the averments in the plaint indicate grant of such permission by the Society only for the limited purpose and for limited period to suit the service exigencies of the member's husband. The Society itself not being a party to the transaction, the licensee cannot claim to be a tenant of the Society, even if the agreement of leave and licence is interpreted to be an agreement of tenancy or even if the licensee is held to have become a sub-tenant because of the amending provisions of the Rent Act enforced with effect from 1st Feb., 1973. At best, the licensee can claim to be a tenant of the member. The question whe-

ther a licensee of the flat held by a member in a Co-operative Society can or cannot be a tenant of the Society itself, did come up for consideration in the Contessa's case (*supra*). The point is discussed at great length. The Division Bench has held that in view of the housing schemes contemplated under S. 2 (16) of the Act, the Society can never be the landlord of the licensee inducted by the member. Nor permission of permanent tenancy is compatible with the basic structure of such housing societies.

13. It is true that under the ratio of this very judgment, a licensee can claim to have become a tenant of the member provided, the licensee is not of the exempted category contemplated under S. 5 (4-A) of the Rent Act. The definition of the word "licensee" in the said section excludes the licensee inducted in the premises to meet the service exigencies of the licensor. In the present social life, ordinarily, the wife is required to live with her husband and exigencies of the husband's employment become part of her life also. The plain averment that the licensee was inducted in the flat in dispute due to such service exigencies excludes her from the purview of the word "licensee" as contemplated under the Rent Act as also from the benefits of tenancy contemplated to be conferred on such licensees. It is not possible to accept the contention of the licensee to have become a tenant at this stage when the facts have yet to be investigated. The defence that here the licence agreement is, in fact, intended to be tenancy agreement also cannot be accepted without trial and proof.

14. Mr. Punwani then contends that in either case, the plaint suffers from misjoinder of parties and the Co-operative Court can claim to have no jurisdiction to try the dispute as long as the claim of the member to get possession from the licensee-tenant is excluded from its jurisdiction. As discussed earlier, firstly, this point can arise only after the trial, if it is found that the licensee is a tenant. Secondly, this question can be considered in its true perspective only at the trial and cannot be raised at this stage, when such points are not tried at all. Nothing also prevents the disputants or either of them from exercising their choice and getting one of them transposed from the array of disputants to the array of non-disputants to prevent the ouster of jurisdiction of the Co-operative Court.

15. Mr. Punwani then challenged the jurisdiction of the Co-operative Court on ac-

count of the reference itself being void. His argument is twofold: Firstly, that the reference order passed without any notice and any opportunity to the non-disputant to have her say is void. Secondly, that the order is made mechanically without any application of mind. No such point is raised in the written statement before the Co-operative Court though raised before the learned single Judge in a writ petition. Mr. Punwani contends that it was unnecessary to raise it before the Co-operative Court, the order of reference being final and the Co-operative Court being incompetent to go behind the reference order. He relied on the judgment of Jahagirdar J. delivered on 21st December, 1981 in the case of Mario Miranda v. Pilot Bunder Co-operative Society, (Writ Petn. No. 2541 of 1981*). The ratio of the judgment, no doubt, supports Mr. Punwani on all these points. The learned Judge has analysed the requirements of such reference in para 5 of his judgment by reference to Ss. 93 and 152 (4) of the Act and R. 76 of the Rules thereunder and upheld the contention to the above effect in an exhaustive judgment.

16. With respect, however, the view of the learned Judge does not appear to us to be correct. Section 93 (1) of the Act, so interpreted by the learned Judge, reads as follows:

"93 (1) If the Registrar is satisfied that any matter referred to him or brought to his notice is a dispute within the meaning of Section 91, the Registrar shall, subject to the rules, decide the dispute himself, or refer it for disposal to a Co-operative Court." This section consists of two parts. The first part requires the Registrar's "satisfaction" as to the dispute being covered by S. 91, by reference to the subject-matter and the parties involved. The second part requires him to decide if he would dispose of the dispute himself or refer it for disposal to the Co-operative Court. The decision on this point is always in favour of reference as he and his assistants can hardly get time even to read the plaint raising dispute for the first part of satisfaction. The section itself does not contemplate any notice to the non-disputants at this stage. The required "satisfaction" thus does not contemplate any trial of any issue as such, the disposal of the entire dispute with all its requirements and trap-pings being reserved for the subsequent stage. The stage of "satisfaction", on the face of it, is preliminary and contemplated "satisfaction" is of a *prima facie* nature. Several enactments contemplate such stages of *prima facie* "satisfaction" before the adjudicative

* Reported in 1982 (1) Bom CR 186.

machinery is set into motion. The next stage being of the decision either to try the dispute himself or refer the same for trial to the Co-operative Court, every aspect of the dispute remains untried at the stage of satisfaction including the truth of the averments made, which ultimately go to determine the jurisdiction. Requirement under R. 76 of recording decision and reasons for satisfaction is aimed merely at ensuring the application of mind by the Registrar and elimination of casual approach. Ordinarily, trial of the "dispute" should include trial of every aspect thereof including the issue of jurisdiction. This indeed is the rule, splitting of one case into two stages and trial thereof by two different persons being an exception. The section does not contain clearer words to that effect and it cannot be a matter of ready inference.

17. Such a satisfaction and following the decision to refer the dispute for disposal, themselves not affecting anybody's rights in the same way in which affecting of rights is understood in the legal sense, any question of implying obligation to hear the "affected" parties cannot arise. The absence of provision of notice also is reflective of the same legislative intent. We are, therefore, unable to see why any obligation to issue notice at this stage should be implied, when such satisfaction is not intended to affect anyone in any real sense, and issues involved therein ordinarily can be tried by the Co-operative Court as part of the trial of the dispute. Such notice is implied in the absence of express provision when there is a danger of a person being affected unheard. Any contrary view would involve trial within trial, resulting in unnecessary prolonging of the life of the litigation without any corresponding benefit and service to the cause.

18. Reliance is placed on R. 76 of the Rules introduced in 1973 to demonstrate that "satisfaction" is intended to have a trial. It reads as follows:

"76. Registrar's satisfaction regarding existence of a dispute.—

Where any reference of a dispute is made to the Registrar or any matter is brought to his notice, the Registrar shall, on the basis of the reference (if any) made to him in form 'P' and the relevant records and statements submitted to him, record his decision together with the reasons therefor whether he is or is not satisfied about the existence of a dispute within the meaning of S. 91. Such recording of decision shall be sufficient proof of the Registrar's satisfaction that the matter is or is not a dispute, as the case may be."

The word "decision" and obligation to record the reasons do create an impression as if the "satisfaction" required under the first part of S. 93 involves the regular trial. A close examination of the Rules and its object would demonstrate how this could not be the intent. In the first place, no rule can enlarge the scope of any section. The rule, therefore, cannot be understood to require any trial of any part of the dispute when the section, for the working out of which the rule is framed, itself does not contemplate it. The words "decision" and "reasons" in R. 76 shall have to be read down to bring them in conformity with the requirements of S. 93. Secondly, the recording of reasons and decision of "satisfaction" is intended to furnish proof of the Registrar having applied his mind. This is what the last sentence of the rule itself expressly indicates. Such a rule of proof or evidence can never be exalted to any substantive provision to require trial and override the provision of the section itself.

19. Strong reliance is placed on the ratio of the Division Bench judgment in Hingorani's case (1965-67 Bom LR 306) (supra). The ratio is based entirely on the wording of S. 91 (2) of the Act as it then stood. It read as follows:

"(2) When any question arises whether for the purposes of the foregoing sub-section, a matter referred to for decision is a dispute or not, the question shall be considered by the Registrar, whose decision shall be final." Section 93 obviously was required to be read with this provision. The conception of "satisfaction" and its content were required to be moulded to make it accord with the scheme of S. 91 (2) of the Act. The "satisfaction" was raised under this provision to the level of a decision. It was secondly declared to be "final". Thirdly, decision was left exclusively to the Registrar excluding the same from reference. It clearly indicated the legislative intent to make such a decision conclusive and binding even on the non-disputants, behind their back. The Division Bench had to imply obligation to give notice to the non-disputants for the trial of the issue involved before it became final and binding on them. As observed in the judgment itself (at page 310), all advocates had to concede to the need of such notice and adjudication. That this would result in anomalous splitting of the trial of the dispute" and inevitably but unnecessarily prolong the life of the litigation appears to have been present to the mind of the learned Judges. They, therefore, suggested suitable amendment in the concluding part of the judgment.

20. Section 91 (2) of the Act has been deleted by Maharashtra Act 27 of 1969 presumably in compliance with this suggestion. Any doubt on this point can be dispelled by reference to the Statement of Objects and Reasons published in the Maharashtra Government Gazette, Part V Extraordinary, dated 25th Mar., 1969. It expressly shows how such deletion was necessitated to overcome the ratio in Hingorani's case and eliminate the consequential delay. The "satisfaction" required to be reached under Section 93 now stands stripped of the finality and ceases to be of any binding nature. The Registrar's exclusive jurisdiction on this point also is now taken away which really prevented the Co-operative Court from trying it. Rule 76 is not a substitute for S. 91 (2). What is sought to be so eliminated by the legislature by expressly deleting sub-sec. (2) of Sec. 91 cannot be assumed to have been imported back by the executive by introducing R. 76 by requiring the Registrar to record "decision" and give "reasons". No "Rule" can ever be introduced to override any provision of the section. We have seen what the real object is. Reliance of Hingorani's case now thus appears to us to have been misplaced.

21. Reliance was also placed on the wording of S. 152 (4) of the Act. The section expressly provides for appeals against orders under certain sections of the Act. Orders under other sections are indicated to be subject to the revisional jurisdiction. All such orders are declared to be "final" subject to an order in such appeals and revisions. The wording of the section is wide enough to suggest as if the "decision" as to "satisfaction" of the Registrar required before any reference under S. 93 and recorded in compliance with R. 76, also is so final and immune from reconsideration by the Co-operative Court. Two factors, however, militate against any such conclusion. Firstly, the nature of the order is also a determining factor, in ascertaining if the legislature could have intended to make it so final. We have seen how under the scheme of the Act contemplated "satisfaction" is of a prima facie nature intended to be recorded at a preliminary ex parte stage merely by reference to the plaint raising dispute. An order made at this stage, on averments open to disproof at the trial of the dispute, could never have been intended to be final. Secondly, S. 91 (2) and S. 152 (4) co-existed in the statute for a long time. The legislature could not have felt the need to declare the Registrar's order under Section 93 to be final under S. 91 (2), had it intended to cover the same by sub-sec. (4)

of S. 152. This, to our mind, is a conclusive answer to the reliance on S. 152 (4). Deletion of sub-sec. (2) from S. 91 is clearly aimed as stripping "satisfaction" of its finality.

22. Mr. Punwani relied before us not on Section 152 (4) but on the finality adverted to under Section 163 (3) of the Act. The section is aimed at ousting the jurisdiction of the civil and revenue courts as its marginal note indicates. Immunity from interference by the civil and revenue Courts in this context cannot cover immunity from adjudicative machinery created under this very Act itself for the trial of the very dispute. The object of S. 163 (3) is in a way really to ensure finality on the orders of the Co-operative Court subject to appeal and not to restrict the sphere of their operation. Reliance on both these sections is thus ill-founded.

23. Two unreported judgments of this Court point to the same view taken earlier. The learned Judge (Jahagirdar J.) has referred to the judgment of S. K. Desai J. dated 4th Aug., 1977 in Miscellaneous Petition No. 570 of 1975.* He has distinguished it on the ground that the powers of the Registrar to record satisfaction under S. 93 also were delegated to such Officer on Special Duty. Suffice to note that the ratio of this case, unlike in the case of the Co-operative Court, is not so expressly based on such a distinction. One of us (myself) was a party to the second judgment of a Division Bench dated 16th Dec., 1971 in Spl. Civil Appln. No. 1446 of 1971** (Smt. Chandra Chetanram Shivdasani v. Chander Shekar Sheth). This does not appear to have been brought to the notice of the learned Judge. The point, however, arose in that case incidentally and not directly.

24. It is true that the reference order contains admittedly two factual errors of clerical nature. It assumes the said "society" to be non-disputant and as if para 14 and not paragraph 12 of the plaint contains recitals about the cause of action. This betrays casual approach and is highly objectionable and is breach of the Rule 76. Its effect may be relevant in some other context but cannot by itself invalidate the reference. Invalidation results in the punishments of the litigants who have to face the agony of the prolonged trial and who have no control over the authors of the errors. Such errors can have no relevance, once it is found that the Co-operative Court itself can try the question

* Since reported in 1979 Bom CR 79.

** Since reported in ILR (1975) Bom 849.

whether the dispute is covered by S. 91 of the Act. To sum up, the "decision" in regard to "satisfaction" under S. 93 is of a *prima facie* nature. No notice to the non-disputants is necessary at this stage. Such "decision" is neither final nor can it prevent the Co-operative Court from trying any issue as to dispute being covered by S. 91 or not.

25. We agree with the learned Judge that the Act should be amended and litigants be permitted to file their disputes directly in the Co-operative Court. The power of "reference" by the Registrar is a relic of the past when the Registrar himself could dispose of the majority of the disputes and was required to refer only a few of them for want of time. Today the Registrar and his aides are burdened with enormous administrative functions. Defective references demonstrate how they cannot find time even to comply with R. 76. This archaic provision has ceased to serve any purpose whatsoever. Authority to the Co-operative Court to receive the disputes directly would eliminate unnecessary litigation and also waste of time on preliminaries.

26. We accordingly allow the appeal, set aside the order of the learned trial Judge and direct the Co-operative Court to dispose of the dispute in accordance with law. Costs of both Courts, costs in the cause.

Appeal allowed.

AIR 1982 BOMBAY 437

BHARUCHA, J.

Nana Tukaram Jaikar, Appellant v. Sonabai and others, Respondents.

Second Appeal No. 718 of 1975, D/- 15-2-1982.

(A) Civil P. C. (5 of 1908), S. 11 — Res judicata — Finality of decree — Decree against which appeal is preferred does not operate as res judicata between parties. AIR 1931 PC 263, Followed. (Para 4)

(B) Civil P. C. (5 of 1908), S. 11 — Res judicata — Suit dismissed with adverse finding against defendant — Finding does not operate as res judicata. AIR 1920 Bom 335, Followed. (Para 6)

(C) Civil P. C. (5 of 1908), O. 41, R. 22 — Appeal — Respondent may without filing cross-objections support decree on grounds decided against him by lower court. (Para 8)

(D) Transfer of Property Act (4 of 1882), S. 58 — Mortgage by conditional sale or sale with condition of repurchase.

The deed did not create, expressly or by implication, the relationship of debtor and creditor, nor was the amount paid by the transferee to the transferor made a charge on the land. There was no provision in the deed in regard to interest. Possession of the land was handed over to the transferee. Municipal taxes were made payable by the transferee. A period was stipulated, viz., five years, within which the transferor may purchase the land after making payment of the amount for which it was originally transferred.

Held, the statement in the deed that if the amount was not paid within the stipulated period the deed was to be treated as a permanent sale deed and the transferee could thereafter enjoy the land forever without the transferor and his successors claiming any ownership emphasised that the condition of repurchase was to operate only within the stipulated period and no further. These were clear indications of a sale with a condition of repurchase. (Paras 11, 13)

Cases Referred :	Chronological	Paras
AIR 1960 SC 301		10
AIR 1954 SC 345 : 1954 All LJ 546		10
AIR 1931 PC 263 : 1931 All LJ 833		4
AIR 1920 Bom 335 : (1920) ILR 44 Bom 321		6

R. N. Dhorde for A. V. Savant, for Appellant; P. N. Joshi for M. L. Dudhat, for Respondents.

JUDGMENT:— This is a second appeal directed against the judgment and order of the District Judge, Ahmednagar sitting in appeal on the judgment and order of the Joint Civil Judge, Junior Division, Ahmednagar.

2. On 3rd May, 1950 the 10th respondent (the original 1st plaintiff) executed a deed in favour of one Madhav in respect of the land in suit. On 18th Nov., 1957 Madhav transferred the rights conferred upon him by the deed in favour of the 5th respondent. In 1957 one Sohanlal, the holder of a decree against the first plaintiff, purchased the land in suit in execution of the decree through a Court sale. On 13th June, 1958 the sale was confirmed. In 1966 the 1st plaintiff filed a suit for redemption alleging that the deed was a mortgage by way of conditional sale and that the mortgage amount had been repaid by virtue of the rent collected. The 5th respondent was impleaded as a defendant (the 5th defendant) in the redemption suit. He pleaded that the deed was a deed of sale with a condition of repurchase. In 1967 Sohanlal filed a suit for possession of the land making the 1st plaintiff and 5th defendant in redemption suit defendants to his

suit. On 28th Nov., 1967 the appellant before me purchased the land from the original 1st plaintiff. He was thereafter impleaded as the 2nd plaintiff in the redemption suit. On 4th Nov., 1969 the redemption suit was dismissed, it being held that the deed was a deed of sale with a condition of repurchase. On 28th Nov., 1969 Sohanlal's suit was dismissed, reliance being placed upon the judgment dated 4th Nov., 1969 in the redemption suit. Sohanlal did not proceed further. Against the dismissal of the redemption suit an appeal was filed. In appeal a remand was ordered. On remand the trial Court held on 30th Mar., 1972 that the deed was a deed of sale with a condition of repurchase and that the sale in execution in favour of Sohanlal conferred upon him no title to the land. The trial Court, therefore, dismissed the redemption suit. The plaintiffs preferred an appeal. In the appeal it was held that the deed was a deed of mortgage by way of conditional sale but that the plaintiffs' title to the property had been extinguished by virtue of the sale in execution in favour of Sohanlal and the plaintiffs were, therefore, not entitled to redeem. Against the dismissal of the appeal this second appeal is preferred by the 2nd plaintiff.

3. It was contended on behalf of the only contesting respondent, the 5th respondent, that the finding in Sohanlal's suit that the deed was a deed of sale with a condition of repurchase was binding upon the appellant by reason of *res judicata*. The 1st plaintiff in the redemption suit (from whom the appellant before me claims title) and the 5th defendant in the redemption suit (the 5th respondent before me) were defendants in Sohanlal's suit. The point as to whether the deed was a deed of mortgage by way of conditional sale or a deed of sale with a condition to repurchase was in issue that was decided in that suit. There are, however, three reasons why the decision in Sohanlal's suit does not operate as *res judicata* against the appellant.

4. First, it is apparent from a reading of the judgment in Sohanlal's suit that the Court relied upon the judgment in the redemption suit of the trial Court of 4th Nov., 1969 to hold that the deed was a deed of sale with a condition to repurchase. That judgment in the redemption suit was effaced when the appeal Court ordered a remand. It cannot then be said that the decision in Sohanlal's case operates as *res judicata* against the appellant. Reference may be made in this connection to the judgment of the Privy Council in *S. P. A. Annamalai Chetty v. B. A. Thorn-*

hill, AIR 1931 PC 263. The Privy Council held that no decree from which an appeal lay and had in fact been taken was final between the parties so as to form *res judicata*. Where an appeal lay and was taken the finality of the decree was qualified by the appeal and the decree was not final in the sense that it formed *res judicata* between the same parties.

5. Secondly, the conclusion about the character of the deed in Sohanlal's suit cannot be said to be based upon merits since the Court relied upon the conclusion arrived at on 4th Nov., 1969 in the redemption suit.

6. Thirdly, it will be noted that the finding in Sohanlal's suit that the deed was a deed of sale with a condition of repurchase was a finding adverse to the appellant, who was a defendant in that suit, but Sohanlal's suit was dismissed. The appellant had, therefore, no opportunity to appeal against the finding. The finding in Sohanlal's suit cannot then be said to be finally decided against the appellant and cannot operate as *res judicata* against him. In that behalf a decision of this Court in *Bai Nathi v. Narshi Dullabh*, (1920) ILR 44 Bom 321 : (AIR 1920 Bom 335), may be referred to. The Court said, "we think that the finding of the Court in the previous suit was not final, inasmuch as . . . there could be no appeal against it, because the decree was in favour of the party against whom the finding was recorded."

7. It was contended by Mr. Joshi, learned counsel for the 5th respondent, that it was not open to the appellant to seek to redeem the mortgage, assuming the transaction to be such, because it had been held in Sohanlal's suit that he had no equity of redemption. This is but another way of putting the same argument. It can be answered slightly differently. Sohanlal sought to establish his title to the land and obtain possession of it. His suit was dismissed. He went no further. It does not lie in the mouth of a mortgagee or his assignee (the 5th respondent) to set up title in another (Sohanlal) to destroy the mortgagor's or his assign's (the appellant's) equity of redemption. In that sense, once a mortgage always a mortgage. The 5th respondent obtained the land from Madhav, who obtained it from the 1st plaintiff under the deed. The 5th respondent is still in possession of it. If the deed is a deed of mortgage by way of conditional sale it is, in these circumstances, not open to the 5th respondent to plead that no equity of redemption exists.

8. It was urged on behalf of the appellant that, since the Court in first appeal had

held the deed to be a deed of mortgage by way of conditional sale, it was not open to the 5th respondent to challenge that finding before me because he had not filed cross-objections. It is well settled that a respondent to an appeal may without filing cross-objections support the decree on grounds decided against him by the lower Court. It is, therefore, open to the 5th respondent to plead here that the deed is a deed of sale with a condition of repurchase and not a deed of mortgage by way of conditional sale.

9. The principal question, then, to be decided in this second appeal is whether the deed is a deed of mortgage by way of conditional sale or a sale with a condition of repurchase. The deed was not on record. Counsel have submitted an agreed translation of it upon which, by consent, I place reliance. The deed, as translated, reads thus :

"Conditional sale-deed of house in Nagpur (Nagar?) city for Rs. 2,000/- dated 3rd May, 1950.

M. B. Saidare	...	Executor
K. M. Kothar	...	Executant

Received Rs. 375/- before eight days Rs. 1,625/- I will receive (Sixteen hundred twentyfive only) before the Sub-Registrar, Anagar.

Total Rs. 2,000/- Received Rupees Two thousand for the marriage of daughter and family expenses.

In exchange thereof, the house which was inherited by me as my ancestral property as my share which is without any incumbrance : description

As per the said above description the house and the land on which it is constructed and the things appurtenant thereto is sold to you conditionally for five years. The same has been given completely in your possession. Hence till the stipulated limit you should pay the municipal tax and enjoy the property, within that period I will repurchase the property after making payment. If the amount is not paid within stipulated period this deed will be treated as permanent sale deed. Thereafter you should enjoy the property forever so that myself and my successors will not claim any ownership."

10. For construing the deed reliance was placed upon the judgments of the Supreme Court in *Chunchun Jha v. Ebadat Ali*, AIR 1954 SC 345 and *Bhaskar Waman Joshi v. Shrinarayan Rambilas Agarwal*, AIR 1960 SC 301. In the former judgment it was held that each such question has to be decided upon its own facts and that the intention of the parties as shown by the document was

the determining factor. *Prima facie*, an absolute conveyance, containing nothing to show that the relation of debtor and creditor was to exist between the parties, did not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulated that he had a right to repurchase. If the sale and the agreement to repurchase were embodied in separate documents then the transaction could not be a mortgage, whether the documents were contemporaneously executed or not. But the converse did not hold good. If the condition of repurchase was embodied in the document that effected or purported to effect the sale, then it was a matter for construction which was meant. In the later judgment the Supreme Court said that the question whether by the incorporation of a condition of sale a transaction ostensibly of sale could be regarded as a mortgage was one of the intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The definition of a mortgage by conditional sale postulated the creation by the transfer of a relation of mortgagor and mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there was no relation of debtor and creditor nor was the price charged upon the property conveyed, but the sale was subject to an obligation to retransfer the property within the period specified. What distinguished the two transactions was the relationship of debtor and creditor, the transfer being security for the debt.

11. In the instant case, the deed does not create, expressly or by implication, the relationship of debtor and creditor, nor is the amount paid by the transferee to the transferor made a charge on the land. There is no provision in the deed in regard to interest. Possession of the land is handed over to the transferee. Municipal taxes are made payable by the transferee. A period is stipulated, viz., five years, within which the transferor may purchase the land after making payment of the amount for which it was originally transferred. The statement in the deed that if the amount was not paid within the stipulated period the deed was to be treated as a permanent sale deed and the transferee could thereafter enjoy the land forever without the transferor and his successors claiming any ownership emphasises that the condition of repurchase was to operate only within the stipulated period and no further. These, as I see it, are indications of a sale with a condition of repurchase.

12. Mr. Dhorde placed reliance upon the recital in the deed that the amount had been received by the transferor for the marriage of his daughter and family expenses. He submitted that this was indicative that the transaction was a transaction of mortgage by way of conditional sale. This recital is not indicative either way. A man may, when he is in need of money, sell his property or he may mortgage it. Mr. Dhorde also submitted that it was the appellant's case that the property had been transferred at an under-valuation, which was indicative of a mortgage, but the trial Court rejected that contention. It had done so quite rightly since it was sought to be established by nothing more than the appellant's bare word.

13. In the result, I am inclined to take the view, having regard to the text of the deed interpreted in the light of surrounding circumstances, that it is a deed of sale with a condition of repurchase.

14. In that view of the matter the appeal must fail and is dismissed. Having regard to the tortuous litigation to which I have earlier made reference, the fair order is that the parties shall bear and pay their own costs.

Appeal dismissed.

AIR 1982 BOMBAY 440

MASODKAR AND BHARUCHA, JJ.

L. Y. Lagoo, Appellant v. The Special Land Acquisition Officer (2), Pune and another, Respondents.

First Appeal No. 634 of 1975, D/- 6-2-1982.

(A) Land Acquisition Act (1 of 1894), Section 23 — Assessment of compensation — Belting system — When applicable — Large area of land acquired in heart of city having potentiality for both commercial and residential purposes — Acquired land a compact parcel surrounded by roads and sub-roads that met main busy street — On facts, held, although area acquired was large, belting system could not be applied for working out compensation — Same had to be determined on basis of what a willing purchaser might pay in the context of market rate.

Held, it was not possible to apply belting system for the purpose of valuation of the market rate in the present case. The acquired property lay in the heart of the city. It was a commercial as well as residential locality and had a potentiality for both commercial as well as residential purposes. It was a compact parcel of land surrounded by

roads and sub-roads that met the main busy street. In such a situation there was no possibility that any area could be evaluated by reason of its location or any of its particular feature made the difference so as to form a distinct belt of property. In such matters the central consideration was the willing purchaser notionally conceived ready to pay a price in the context of the market rate. Belting could be useful only from that angle when depth and remoteness of areas affected economic considerations and indicated possible variations in prices. Though, therefore, the area acquired was large, the effort to divide it in parcels of belts for different rates by the Assessing Valuers did not appear to be fair. Belting system if applied would not further the ends of justice so as to afford relief of just and equitable compensation.

(Para 5)

(B) Land Acquisition Act (1 of 1894), Section 23 — Market value — Assessment of from sale instances — Large area of land acquired in heart of city having potentiality for both commercial and residential purposes — Market value may be determined on basis of bona fide sale transactions, notwithstanding that transactions relate to smaller areas and area acquired is a large one.

Held, the sale instances could not be brushed aside by observing that they related to smaller areas. When the acquired land lay in the heart of the city and particularly when the area was being used for commercial and residential purposes, even such smaller pieces, unless there were some special distinguishing features, could be indicative of the ruling market rate. It was not as if that all those sales were not voluntary or that they were the result of some compulsive circumstances. On the other hand, the transactions indicated that they were bona fide purchase transactions. Therefore, the sale instances could not be rejected merely because the area in each case happened to be smaller area and the area under acquisition was a large one. This factor could be kept in mind only while assessing the fair valuation.

(Para 8)

K. J. Abhyankar, for Appellant; M. R. Kotwal, Govt. Pleader with N. P. Hombalkar, Asstt. Govt. Pleader, for Respondents.

MASODKAR, J.:— This appeal questions the order made by the Land Acquisition Court, i.e. the Court of the Joint Judge, Pune, under Section 18 of the Land Acquisition Act, 1894, deciding the compensation payable to the present appellant. It may be mentioned, at the outset, that the Land Acquisition Officer granted the rate of Rs. 8/-

per sq. ft. on the basis of the instances cited on behalf of the appellant as well as the instances collected during the course of the enquiry. He awarded the compensation at the flat rate, the area being 16,839 sq. ft. There existed a structure, which is valued at Rupees 6,000/- as compensation. In the compensation reference under S. 18 of the Land Acquisition Act, 1894, the learned trial Judge, by the impugned judgment, found against the appellant, holding that the land should be valued by applying belt system and he granted three rates of compensation. It is surprising to observe that, for the third block or belt the learned trial Judge was pleased to even reduce the rate and fix it at Rs. 5/- per sq. ft. even much lower than the one granted by the Land Acquisition Officer. In the view of the learned trial Judge, this method of belting indicated that the market value of the land in belt No. 1 in Block No. 2 was Rs. 11/- per sq. ft., while that in belt No. 2 was Rs. 7/- per sq. ft. and the value of the land in block No. 1 was Rs. 5/- per sq. ft. We were at pains to understand as to how the learned trial Judge reduced the compensation awarded at a flat rate by the Land Acquisition Officer, being Rs. 8/- per sq. ft., and then, calculating the totals at the lower rates, came to the conclusion that nothing was payable to the appellant. Suffice it to observe that unless the rate of compensation granted by the Land Acquisition Officer was challenged by the State or the acquiring body, in any manner, such a recourse was not available. The trial Court was bound to proceed on the basis that the rate offered was the minimum to which the appellant was entitled and that the only issue that arose concerned with its inadequacy. Unless this salutary position and principle is kept in view, it is likely to work unfair results in references seeking orders for enhanced compensation. The right conferred by S. 18 is in favour of an aggrieved party so as to seek enhancement and not to have the appellate adjudication with regard to the rate which has been already awarded. If, in a given case, the claimant does not establish the inadequacy, he fails; but that is no reason for the Court to hold that the Land Acquisition Officer should have awarded lesser rate for a piece and then by working out totals to reject additional fair compensation. As we see, the dispute related to the rate at which fair compensation was required to be worked out and there arose no other question for consideration.

2. In fact, in the present case by following belting system, for one belt the Court

considered higher rate as would be adequate and for others lower rates than given by the Award. In such case, the claimant would be entitled to additional compensation for the first belt along with whatever awarded for other belts. Surely, the claimant seeks the fair value for each part and parcel as makes the entirety of the land. Belting, if permissible, is a method of parcelling for valuation and that cannot lead to the result of refusing additional compensation by totalling the belts. On the other hand, each belt, by very nature, would be specific parcel to be valued as such. The error thus is apparent on the face of record.

3. On merits, Mr. Abhyankar, the learned Counsel for the appellant, submitted that because of erroneous approach even the eventual result is affected. He took us through the evidence that consists of oral statements of the witnesses, being Vishnu Vinayak Deshpande (C. W. 1), Sadu Genu Chavan (C. W. 2), Vishwanath Waman Agashe (C. W. 3) and Babulal Tulshiram Gupta (C. W. 4) and so also the evidence of Gangadhar Dattatraya Karkare (C. W. 1) examined for the State. Apart from the oral evidence, there are statements showing the sale instances relied upon by the appellant and also by the acquiring body.

4. Mr. Hombalkar, Asstt. Govt. Pleader, on the contrary submitted that there was no cause for interference, firstly contending that the learned trial Judge was entitled to apply belting method and, secondly, that the area being large, the sale instances for smaller areas should not be treated as comparable for determining the reasonable rate payable to the appellant.

5. After considering the evidence and the submissions of both the learned Counsel, we are of the view that it is not possible to apply belting system for the purpose of valuation of the market rate in the present case. It is undisputed that the acquired property lies in the heart of Pune city. It is a commercial as well as residential locality and has a potentiality for both commercial as well as residential purposes. It is compact parcel of land surrounded by roads and sub-roads that meet the main busy street called 'Laxmi Road'. In such a situation there is no possibility that any area could be evaluated by reason of its location or any of its particular feature makes the difference so as to form a distinct belt of property. In such matters the central consideration is the willing purchaser notionally conceived ready to pay a price in the context of the market rate.

Belting may be useful only from that angle when depth and remoteness of areas affect economic considerations and indicate possible variations in prices. Though, therefore, the area is large, being 16,839 sq. ft., the effort to divide it in parcels of belts for different rates by the Assessing Valuers does not appear to be fair. It appears to us that belting system if applied would not further the ends of justice so as to afford relief of just and equitable compensation. The evidence of the valuers proceeds on the assumption and not on any good reason. We are not impressed by the evidence of witness Karkare that the area should be divided into two blocks for the purpose of evaluation. It is significant to observe here that even the Land Acquisition Officer, who made the Award, eventually offered a flat rate or average rate of Rs. 8/- per sq. ft. We, therefore, reject the approach of applying belting patterns for the purpose of working out the compensation in the present case.

6. Once this aspect is so decided then the narrow controversy is, what should be the reasonable rate of compensation? Section 4 notification has been issued, in the present case, on Nov. 18, 1965. The admitted evidence shows that in this area the property fetches in the open market quite a higher rate than the one granted to the appellant. At Appendix 'A', which is not in dispute, the instances are granted in two parts and consists of statement of sale instances collected by the appellant as well as the sale instances available on the office record of the Land Acquisition Officer. There is an instance of previous acquisition having reference to the date April 23, 1964. These instances, for the purpose of the present appeal, are not seriously in dispute. In fact, they were not in dispute even before the Land Acquisition Officer. The oral evidence of the Vishnu Deshpande shows that he seeks to have Rs. 15/- per sq. ft. The evidence of Sadu Chavan shows that he purchased CTS No. 371 from Sadashiv Peth, Pune, for a sum of Rs. 29,100/- for the purpose of starting a flour mill. His cross-examination shows that he was in need of the land as he wanted to shift his flour mill to the plot so purchased by him. Vishwanath Agashe, who is Engineer and Valuer, has spoken how he worked out the value of the front area at Rs. 15/- per sq. ft. and the land under structure at Rs. 10/- per sq. ft. The evidence of Babulal Gupta is with regard to plot No. 362-C of Sadashiv Peth, Poona, which is purchased in 1964 for Rs. 25,000/-, and he has spoken of the bidding, in the cross-examination, that

was given before the Court of Wards and the lowest being Rs. 11,500/-. The evidence of expert Gangadhar Karkare, examined by the Land Acquisition Authority, is on the basis that the land could be divided in blocks and belts.

7. The oral evidence, therefore, is not that much satisfactory, but as we have stated above, the undisputed sale instances clearly go to indicate the position of the market rates at which available properties were sold and purchased during the relevant time and even before 1965. Turning to Appendix 'A' and the instances therein, we have the instance of first of May 30, 1960, involving 702 sq. ft. which fetched Rs. 17,000/- at the rate of Rs. 24.22 per sq. ft. Then we have the instance of Sept. 14, 1962 of CTS No. 773 (old), where the rate works out to Rs. 6.56 per sq. ft. Then, there is land acquisition compensation paid for portions CTS Nos. 894 to 897 vide notification under Section 4 of the Land Acquisition Act, 1894, of April 23, 1964 and the compensation awarded ranged from Rs. 13/- per sq. ft. to Rs. 15/- per sq. ft. Those lands were situate at Bajirao Road and Tulsibag Road, and it appears that front portions were acquired. Then the two pieces of 1914 sq. ft. being CTS No. 361/1 (old) and CTS No. 361/D (old), appear to have been sold on Oct. 16, 1964 and Dec. 21, 1964 respectively, and the rates paid by the purchaser were Rs. 13/- per sq. ft. and Rs. 15-20 per sq. ft. The instances, which were collected during the enquiry, are four and they show that for a piece of 505 sq. ft. (CTS No. 346) (old) sold on Dec. 21, 1962 the rate paid was Rs. 11.88 per sq. ft., for 783 sq. ft. (CTS No. 765) (old), the rate paid on Mar. 28, 1963 worked out to Rs. 12.77 per sq. ft. For 810 sq. ft. (CTS No. 570-A) (old) purchased on Aug. 28, 1964, the rate worked out to Rs. 18.51 per sq. ft. and for 1386 sq. ft. (CTS No. 729/B) (old) purchased on Oct. 8, 1964, the rate worked out to Rs. 11.18 per sq. ft. It may be mentioned that along with the structures these rates were paid and for the land the rates worked out, even according to the official calculation, between Rs. 9/- and Rs. 10/- per sq. ft.

8. These sale instances cannot be brushed aside by observing that they relate to smaller areas. Suffice it to say that, in the heart of city like Pune and particularly when the area is being used for commercial and residential purposes, even such smaller pieces, unless there are some special distinguishing features, may be indicative of the ruling market rate. It is not as if that all these sales were not

voluntary or that they were the result of some compulsive circumstances. On the other hand, the transactions indicate that they were bona fide purchase transactions with regard to areas as were available in Sadashiv Peth in Pune town. We do not accept the approach that all these sale instances should be rejected only because the area in each case happens to be smaller area and the area under acquisition is large one. We can only keep this factor in mind while assessing the fair valuation.

9. Therefore, these instances unmistakably show that a willing purchaser, wanting to purchase land in the year 1964, was willing to pay not less than Rs. 10/- per sq. ft. for the land and, if it had any structure, the rate could even rise to Rs. 15/- or Rs. 18/- per sq. ft.

10. Once this position is available, we have to work out reasonable rate that should be made available by way of compensation in the year 1965. After considering the evidence, the potentiality of the area and the location, we think that the rate of Rs. 12/- per sq. ft. would be a fair compensation of the value of the land.

11. There is a structure and that has been valued at Rs. 6,000/-. For the appellant, no serious grievance is made with regard to that valuation.

12. In the result, therefore, the present appeal is allowed. The impugned judgment is set aside and it is adjudged that, apart from the compensation of Rs. 6,000/- for the structure, the appellant was entitled to compensation for the land at the rate of Rs. 12/- per sq. ft. Respondent No. 1, therefore, is directed to pay additional compensation of Rs. 67,356/- and the solatium of Rupees 10,103-50 p., the total being Rs. 77,459-50 p. and the interest at 4% p. a. from the date of taking possession till payment. Though the appeal thus succeeds, there would be no order as to costs in the appeal.

Appeal allowed.

AIR 1982 BOMBAY 443 SAWANT AND

Mrs. SUJATA MANOHAR, JJ.

M. Mohammed and etc. etc., Appellants v. Union of India and others, Respondents.

Appeals Nos. 215, 207, 214, 216 and 217 of 1979 in Misc. Petns. Nos. 1016, 1022, 1023, 1017 and 1021 of 1973, D/- 29-4-1982.

(A) Civil P. C. (5 of 1908), S. 151, O. 41, R. 27 (1) (a) and (b) — Production of addi-

GZ/GZ/C990/82/RSK

tional evidence — Evidence sought to be let to prove correspondence about leases of flats — Respondents accidentally coming across old files containing lease deeds — Question involved was whether leases had complied with requirements of S. 175 (3) of Government of India Act, 1935 — Held it was in the interests of justice that if documents existed, they should not be shut out. AIR 1957 SC 912 and AIR 1975 SC 479, Ref.

(Para 8)

(B) Constitution of India, Art. 299 (1) — Government of India Act (1935), S. 175 (3) — Execution of contracts — Non-compliance with requirements of Art. 299 or S. 175 — Effect.

The law on the subject can be summarised thus: (a) a formal deed or document of contract is not necessary; (b) a contract can be inferred from correspondence; (c) a mere tender and acceptance is sufficient to constitute a valid contract; (d) the contract must be entered into by an authorised person. However, a contract entered into by an unauthorised person can be ratified by the Government particularly if it is for the benefit of the Government; (e) neither S. 175 (3) nor Art. 299 (1) prescribes any particular mode in which authority has to be conferred. Normally such conferment is by a notification in an Official Gazette. But it can also be ad hoc on any person and when it is established, the requirements must be held to have been established. Further, an authority need not be given by rules expressly promulgated for the purpose. Even where an authority is given by rules, a special authority can always be validly given in respect of a particular contract to an officer other than the officer notified under the rules; (f) the sanction to the contract can be expressly or impliedly given and while inferring the sanction, the actions, apart from the execution of the document can be considered; (g) a contract entered into without complying with the requirements of S. 175 (3) of the Government of India Act, or Art. 299 (1) of the Constitution is void in the sense that it cannot be enforced by either party to the contract. However, it is not void for all purposes and it can be taken into consideration and looked into for collateral purposes. The contract can be said to exist validly for such purpose. Such a contract is only relatively void i.e. void between the parties but not absolutely void i.e. void for all purposes. Case law discussed. (Para 12)

(C) T. P. Act (4 of 1882), S. 107 — Contract by Government creating a monthly lease — Contract is required to be in writing

and must comply with requirements of Article 299. Misc. Petn. No. 1016 of 1973 (Bom), Reversed.

When Government is a party to a contract the question to be considered is not whether a general statute such as the T. P. Act or the Contract Act permits a contract in a particular form, but whether the contract is in compliance of the mandatory provisions laid down in that behalf by the fundamental statute. Such provisions stand superimposed on the general law and have to be satisfied in addition to the requirements of the ordinary law. Hence it could not be said that the contracts in the present case being of monthly tenancy could be oral because S. 107 of T. P. Act permits them. Misc. Petn. No. 1016 of 1973 (Bom), Reversed. (Para 14)

(D) Constitution of India, Art. 226 — Authorities under Public Premises (Eviction of Unauthorised Occupants) Act, 1971, coming to conclusion that premises were taken on lease by the Government — They get jurisdiction to enquire under the Act without examining question of validity or otherwise of the leases — High Court cannot interfere with assumption of jurisdiction where existence of jurisdictional facts is not denied.

The Estate Officer appointed under S. 3 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, as well as the Appellate Authority under S. 9 thereof have only to satisfy themselves that the facts giving rise to their jurisdiction have been established. Once those facts are established it is not open for them to go into the validity of those facts. Not only that but their finding that such facts do exist and therefore give them the jurisdiction can only be challenged by the procedure laid down in the said Act and not in a separate proceeding. If a Tribunal appointed under an Act is vested with jurisdiction to try cases arising out of the said Act, the Tribunal is also vested with the power to decide the existence or non-existence of facts giving rise to such jurisdiction, and the Tribunal's finding thereon even if wrong can be assailed only before the authorities if any under the Act. Unless such finding is without any evidence on record or perverse or contrary to the evidence it is not liable to be questioned in a separate proceeding such as the writ petition under Arts. 226 and 227 of the Constn. AIR 1950 SC 222, AIR 1955 SC 661 and AIR 1961 SC 1549, Rel. on.; AIR 1970 SC 672, AIR 1973 SC 1362, AIR 1974 SC 125. Spl. Civil Appln. No. 112 of 1962, D/- 14-9-1962

(Bom) and Spl. Civil Appln. No. 665 of 1975, D/- 30-6-1976 (Bom), Disting. (Para 21)

(E) Public Premises (Eviction of Unauthorised Occupants) Act (40 of 1971), S. 2 (e) — Words "belonging to the Central Government" — Do not mean the same thing as "owned by" — Premises taken on lease by government and allotted to others are public premises.

The expression "belonging to" does not mean the same thing as "owned by". The two expressions have two different connotations. The expression "belonging to" will take within its sweep not only ownership but also rights lesser than that of ownership. The expressions used in the statute are to be interpreted and given meaning in the context in which they are used. The present Act has been placed on the statute book to give a summary remedy to the Government to evict persons in occupation of public premises to obviate the long ordeal of trial in a Civil Court and of further proceedings thereafter. Hence a wider meaning will have to be given to the expressions used in the Act for defining the concept of public premises. So viewed there is no reason why the premises of which possession for the time being vests in the Government and which are allotted by the Government to others while so in possession should not be held to be public premises. AIR 1965 SC 1923, AIR 1951 Bom 205 and AIR 1977 Bom 220, Rel. on.

(Para 22)

Cases Referred :	Chronological	Paras
AIR 1977 SC 151		11
AIR 1977 Bom 220		22
(1976) Spl. Civil Appln. No. 665 of 1975, D/- 30-6-1976 (Bom), Dr. K. E. Sopariwalla v. M. K. Vaswani		21
AIR 1975 SC 479		8
AIR 1974 SC 125		19
AIR 1973 SC 1362 : 1973 Tax LR 684		19
AIR 1972 SC 915		11
AIR 1970 SC 672		19
AIR 1967 SC 203		11
AIR 1965 SC 1923		22
AIR 1963 SC 1685		11
AIR 1962 SC 110		11
AIR 1962 SC 113		11
AIR 1962 SC 779		11
(1962) Spl. Civil Appln. No. 112 of 1962, D/- 14-9-1962 (Bom), State of Maharashtra v. J. S. Bagayatkar		21
AIR 1961 SC 1549 : 1961 (2) Cri LJ 720		19
AIR 1957 SC 912 : 1957 All LJ 921		8
AIR 1955 SC 661		19
AIR 1954 SC 236		11

AIR 1951 Bom 205 : 52 Bom LR 688 22
 AIR 1950 SC 222 19
 AIR 1947 FC 38 : 48 Cri LJ 886 11
 (1888) 21 QBD 313 : 36 WR 776 : 53 JP
 84, Queen v. Commrs. for Special Purposes
 of the Income-tax 19
 (1859-61) 8 Moo Ind App 529 (PC) 11
 D. S. Parikh with R. K. Sargurch, C. C.
 Chhaya, N. H. Gursahani with H. H. Advani
 and A. A. Irani, for Appellants; B. A. Desai
 with L. K. Chatterjee, for Respondents.

SAWANT, J.:— These are five appeals against the decision of the learned single Judge in five different Miscellaneous Petitions, under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (hereinafter referred to as the said Act). The appellants in Appeals Nos. 214 to 217 of 1979 were the members of the Defence Services and the appellants in Appeal No. 207 of 1979 are the heirs and legal representatives of one M. K. Kapoor who was a member of the Defence Services. The premises which are the subject-matter of the appeals were admittedly allotted by the Central Government to these members of the Defence Services because they were in its service and on the condition that they would vacate the same after they retired from service. However, in spite of their retirement, they refused to vacate the same. Hence under the Act proceedings for evicting them were started against them before the Estate Officer. In the proceedings, they took the plea that the premises in question were not "public premises" within the meaning of the said Act and therefore the authority under the said Act had no jurisdiction to entertain the said eviction proceedings. This plea failed before the Estate Officer. The petitioners preferred appeals before the appellate authority under the Act. The appellate authority i.e. the Principal Judge, City Civil Court, Bombay dismissed their appeals. The petitioners then filed writ petitions on the Original Side of this Court under Art. 226 of the Constitution. The writ petitions were dismissed by the learned single Judge. Hence the present appeals.

2. The only question that falls for consideration in all these appeals is whether the premises in question are "public premises" within the meaning of S. 2 (e) of the said Act. Admittedly, the premises in question are not owned by the Central Government nor are they requisitioned by them. However it is the case of the Government that they are "public premises" firstly because they have been taken on lease from their owners and secondly because in any event, they "belong to the Central Government".

According to them further the appellants who are either the allottees from them or claiming under the allottees have no right to challenge the basis on which the Government came in possession of the same. On the other hand, it is the contention of the appellants that there is no valid lease in favour of the Government nor has the Government an absolute right of user of the said premises and hence the proceedings under the said Act are not maintainable against them. Since in all these appeals the contentions raised are the same they are being disposed of by this common judgment.

3. It is necessary to state the relevant facts peculiar to each of these appeals in order to appreciate the respective contentions of the parties.

Appeals Nos. 207, 214 and 217 of 1979 relate to the flats in a building called "Reviera" situate at Marine Drive, Bombay. These flats were taken by the Central Government on lease on Aug. 1, 1942 and the rent of the same is being paid by the Government from that date.

The appellants in Appeal No. 207 of 1979 are the wife and children of the late Wing Commander M. K. Kapoor. The premises in question are Flat No. 22 in the said building. Kapoor was in Air Force Service and retired from the Government service on 3-10-1968. In the meanwhile, he was sent on deputation to the Air India with effect from 26-9-1967 and till his death on 21-8-1975, he continued in service of the Air India as Pilot designated as Captain. He was allotted the said Flat No. 22 on 25-7-1967 and in spite of his retirement from service on 3-10-1968 he failed to vacate the same. Hence, by notice dated 22-11-1971 the Estate Officer who is the authority appointed under S. 3 of the said Act for the purpose, called upon him to vacate the same. Kapoor having failed to do so after holding an enquiry, he passed an order of eviction on 2-5-1972. Kapoor filed an appeal being Appeal No. 87 of 1972 which was dismissed on 2-8-1973. The writ petition filed under Art. 226 of the Constn. on the Original Side of this Court was dismissed by the learned single Judge by the impugned order dated 3-7-1979.

The appellant in Appeal No. 214 of 1979 is Major H. S. Grewal. The premises in his occupation are Flat No. 27 in the same building. He was in Military Service and retired from service in Nov. 1971. He was allotted the said flat first on 14-10-1963 and thereafter on 5-5-1970. After his retirement, he failed to vacate the premises and there-

fore, after giving notice on 17-2-1972 and holding an enquiry, the Estate Officer passed an order of eviction against him on 28-7-1972. The appeal filed by him being Appeal No. 108 of 1972 was dismissed on 2-8-1973. The writ petition filed by him was also dismissed by the learned single Judge by the impugned order dated 3-7-1979.

The appellant in Appeal No. 217 of 1979 is Ram Kumar Behl and is in occupation of Flat No. 2 in the same building. He was in the employment of the Union of India as Commanding Officer No. 1, (Maharashtra) Air Squadron, N. C. C. up to 1-6-1971. He was allotted the said flat on 19-7-1968. In spite of his retirement from service on 1-6-1971, he failed to vacate the flat and therefore the Estate Officer, after giving him notice on 22-11-1971 and holding enquiry passed an eviction order on 2-5-1972. The appeal against the said order being Appeal No. 89 of 1972 was dismissed on 2-8-1973. His writ petition was dismissed on 3-7-1979.

4. Appeal No. 215 of 1979 relates to a flat in a building called Heliopolis situate at Colaba, Bombay-5. This flat was also taken on lease by the Central Government from the owner of the building with effect from 1-1-1943. The appellant in this case is Lieutenant M. Mohammed. He was in the employment of the Union Government as Lieutenant in the Indian Navy and because of his employment he was allotted the said flat on 21-6-1968. He retired from service on and from 1-1-1970. He failed to vacate the said flat and hence the Estate Officer after giving notice and holding an enquiry passed an eviction order against him on 18-8-1970. The appeal filed against the said order being Appeal No. 81 of 1970 was allowed on 17-12-1971 on the ground that the Estate Officer was not competent to hold the enquiry as his appointment had not been notified in the Government Gazette as required under the provisions of S. 3 of the said Act. Thereafter the Estate Officer duly appointed served upon him a fresh notice on 7-1-1972 and after holding an enquiry passed an eviction order against him on 2-5-1972. The appeal filed by him being Appeal No. 86 of 1972 was dismissed on 2-8-1973. His writ petition against the appellate order was dismissed on 3-7-1979.

5. Appeal No. 216 of 1979 is in respect of a flat in a building called Krishna Kunj, situate at Walkeshwar Road, Bombay 6. The appellant in this case is one I. M. Dhaul. This flat was taken by the Central Government on lease from the owner of the building on 4-6-1965. The appellant was in the

employment of the Central Government as a Major in the Indian Navy and by virtue of the said employment, he was allotted the said flat on 15-7-1967. The appellant retired from service on 11-6-1971. On 8-11-1971 he was recalled for duty and was finally relieved from duty on 4-4-1972. In spite of his retirement, he failed to vacate the flat and therefore after giving notice and holding enquiry the Estate Officer passed an order of eviction against him on 4-9-1972. The appeal filed by him being Appeal No. 121 of 1972 was dismissed on 2-8-1973 and his writ petition was dismissed on 3-7-1979.

6. It will thus be noticed that the appellants in all these cases are the allottees from the Central Government in respect of the premises in question and they were allotted the premises because they were in service of the Government. Under the conditions of allotment they were required to vacate the premises on their retirement. In spite however, of their retirement, they have been continuing to occupy the same unauthorisedly for the last more than 10 years on the only plea that the Estate Officer has no authority to evict them because the premises are not "public premises" within the meaning of the said Act.

In order to appreciate the controversy as to whether the premises in question are public premises or not it will be necessary first to examine the definition of public premises given in the said Act. Admittedly the present premises are not covered by the definition of public premises given in sub-cl. (2) of Clause (e) of Section 2 of the said Act. Therefore the only definition that need be considered in the present case is the one given in sub-clause (1) of the said clause. That definition is as follows:

"S. 2(e) 'Public premises' means (1) any premises belonging to or taken on lease or requisitioned by, or on behalf of the Central Government, and includes any such premises which have been placed by the Government, whether before or after the commencement of the Public Premises (Eviction of Unauthorised Occupants) Amendment Act, 1980, under the control of the Secretariat of either House of Parliament for providing residential accommodation to any member of the staff of that Secretariat."

Here again we are not concerned with the latter and the inclusive part of the definition. On the contentions raised by the parties, the only part of the definition which is relevant for our purpose is:— "any premises belonging to or taken on lease or requisitioned by, or on behalf of the Central Government."

Since, further, admittedly the premises are not requisitioned or owned by the Central Government, ultimately the question that falls to be answered is whether the premises can be said "to belong to" the Central Government otherwise than as an owner or they are taken on lease by or on behalf of the Central Government.

7. Before we answer the questions raised before us, it would be instructive to recapitulate the contentions raised by the parties before the forums below and the answers given by them to the said contentions. In all these cases it was firstly the contention of the appellants that since the premises were not owned by the Central Government, they did not "belong to" them, and secondly since there was no deed of lease executed in accordance with the provisions of S. 107 of the Transfer of Property Act read with Section 175 (3) of the Government of India Act, 1935 or Art. 299 (1) of the Constn., they were also not premises taken "on lease by" the Central Government. In either case, according to them, therefore they were not public premises within the meaning of the said Act. As against this the contention on behalf of the respondents was twofold. Firstly it was contended on their behalf that the leases in respect of all the said premises were monthly and hence there was no need of a registered deed of lease under S. 107 of the Transfer of Property Act. The correspondence between the parties, the long occupation of the premises and the payment of rent as evidenced by the rent-receipts was a sufficient evidence of the written contract of monthly lease arrived at between the parties. * The second lap of their argument was that in any case, the Central Government was in absolute possession of the premises and therefore the premises "belonged to them" within the meaning of the said Act and it is on the basis of their said absolute possessory right that they had allotted the premises to the occupants. Hence the premises fell within the definition of public premises and hence the appellants were liable to be evicted from them.

The Estate Officer held that the appellants being allottees from the Government were estopped from disputing the title of the Government to the premises. He also held that the premises belonged to the Government as tenant and therefore they were public premises and therefore he had jurisdiction to pass the eviction orders in question. The Appellate Authority viz. the Principal Judge, City Civil Court, Bombay, dismissed the appeals of the appellants on three grounds. In

the first instance, he held that the appellants were estopped under S. 116 of the Evidence Act from challenging the title of the Central Government since they were admittedly let in the premises by the Government. Secondly, he held that the appellants had no locus standi to challenge the validity of the lease between the landlords and the Government even assuming that there was no compliance with the provisions of Art. 299 (1) of the Constn. (S. 175 (3) of the Government of India Act, 1935). Thirdly, he held that in any case the premises "belonged" to the Central Government since they were in possession of Government for a long time and the Government was paying rent of the premises. The Government exercised an absolute right of user of the premises. Hence the orders of eviction passed by the Estate Officer did not suffer from want of jurisdiction. The learned single Judge of this Court however held that since what was in issue was the jurisdiction of the Estate Officer to entertain the proceedings, the petitioners were not estopped from challenging the jurisdiction of the Estate Officer. The learned Judge did not deal with the contentions on behalf of the respondents that since the Government had an absolute right of user of the premises, the premises "belonged to" the Government within the meaning of the Act. He however held that the Government had a monthly lease in its favour since it was not in dispute that the Government was in possession of the premises and that monthly rent was being paid by the Government. The learned Judge further held that monthly lease in favour of the Government though oral was a valid one since it is permissible under S. 107 of the T. P. Act. According to him, the provisions of S. 175 (3) of the Government of India Act, 1935 or of Art. 299 (1) of the Constn. come into play only when an agreement was required to be in writing. He therefore held that there were valid agreements of lease between the Central Government and the landlords of the premises and the premises answered the definition of "taken on lease" by the Government and therefore they were public premises within the meaning of the said Act.

8. During the course of the hearing before us an application was made on behalf of the respondent-Union of India that an opportunity be given to them to produce certain documents in respect of the flats in Riviera to show that it was not a case of an oral lease but that there was correspondence between the parties showing a concluded written contract of lease. After hearing all

the parties, by our order dated 17-9-1981 we permitted the respondent-Union of India to lead evidence in that behalf in this Court instead of sending the matter to the Estate Officer for the purpose which would have delayed the matter still further. In that order we had indicated that we would give our detailed reasons in support of the said order at the time of this judgment which we hereby do.

The additional evidence was sought to be led to prove correspondence with regard to the lease in respect of the flats in the building Riviera. In support of this application it was stated that prior to Feb. 1980 the authorities were not aware that there existed the relevant documents. It was only accidentally that a Lower Division Clerk working in the Office of the Western Naval Command, Bombay, had come across the said documents while he was taking search of the old records for some other purpose in Office of the Military Estate Officer. In this connection it was pointed out that the executive duties connected with the buildings hired for use of Defence Services were earlier discharged by the Garrison Engineer and the same were transferred to the Military Lands and Cantonment Service with effect from 2-1-1968 and hence the records connected with the lands and buildings hired were also transferred to the said office after that date. The records being old were consigned to the record room of the Military Estate Office and till the said Lower Division Clerk stumbled upon the documents in question the authorities were not aware of their existence. Hence the same could not be produced in the proceedings earlier. It was also pleaded that for doing justice between the parties the documents in question may be allowed to be produced at this late stage. For this purpose, Shri Desai for the respondents relied on the provisions of O. 41, R. 27 (1) (a) and (1) (b) of the Code of Civil Procedure, 1908. The application was opposed on behalf of the appellants. The appellants contended that the said provisions of the Civil P. C. could not be invoked in the present case because it was not established that due diligence was exercised on behalf of the respondents for searching the said documents and yet the documents were not found and that to allow the respondents to lead additional evidence would amount to permitting them to fill in the lacuna in their evidence. It was also contended on behalf of the appellants that all along the case of the respondents was that there was an oral lease in respect of the said flats and therefore no

documents could now be allowed to be produced to prove the contrary viz. that there was a written lease. For this purpose reliance was placed upon two decisions of the Supreme Court viz. AIR 1957 SC 912, (State of U. P. v. Manbodhan Lal Srivastava) and AIR 1975 SC 479, (Soonda Ram v. Rameshwaralal).

According to us the respondents could be permitted to produce the documents in question for various reasons. In the first instance, we were satisfied that the documents which were 13 in number were old and were in the files for the years 1942, 1943, 1944 and 1945 pertaining to the said building Riviera. The files were offered for inspection. The respondents also undertook to prove that the documents were not within their knowledge and/or could not be produced earlier in spite of the exercise of due diligence on their part. Secondly, the only narrow question involved in the present petition is whether the lease in respect of the flats in the said building had complied with the requirements of the provisions of S. 175 (3) of the Government of India Act, 1935. It was therefore in the interests of justice that if there existed any documents to prove the said fact, they should not be shut out. It is true that the respondents have earlier described the transaction as one of an oral lease. However this was in ignorance of the true legal position on the subject viz. that although there is no formal document of lease, a concluded contract of lease can be inferred even from correspondence or by a mere offer and acceptance. It may be remembered that it was not the case of the respondents that there was no correspondence on the subject to show that there was an agreement of lease between the parties. What was stated on their behalf before the lower Courts was that there was no formal deed of lease and hence there was no written contract of lease. It is therefore incorrect to contend that since the respondents had admitted that there was only an oral lease, the correspondence on the subject should not be permitted to be produced. We were further of the view that in order to meet the ends of justice, and to prevent an abuse of the process of the Court, we should exercise our inherent powers and permit the production of the said documents. It is for this reason again that we were of the opinion that the reliance placed on behalf of the appellants on the two authorities of the Supreme Court was not well conceived. In fact, in AIR 1957 SC 912 (supra) the Court has in terms stated as follows:—

"It is well settled that additional evidence should not be permitted at the appellate stage in order to enable one of the parties to remove certain lacuna in presenting its case at the proper stage, and to fill in gaps. Of course, the position is different where the appellate Court itself requires certain evidence to be adduced in order to enable it to do justice between the parties." (Emphasis supplied).

As stated earlier according to us on the facts and circumstances of the present case to deny an opportunity to the respondents to produce the documents in question would not only have not done justice between the parties but would have resulted in injustice and reduced the judicial process to a ridiculous farce.

In AIR 1975 SC 479 (supra), the High Court had not permitted the tenants to adduce additional evidence at the second appellate stage in a suit for eviction, and the Supreme Court found that the High Court had committed no error of law in that regard. It was not a case where the High Court had permitted such evidence and the Supreme Court had discouraged the same. For all these reasons we were of the view that the additional evidence in the form of the said 13 documents should be permitted to be led even at this stage.

Accordingly, the Central Government led the evidence of the following witnesses:— (1) Vinayak Anant Mahajan, a Lower Division Clerk in the Office of the Western Naval Command, Bombay, who looks after the litigations in Courts as well as before the Estate Officer under the Act; (2) Tapeshwar Nath, Superintending Building and Roads in the Office of the Military Estate Officer, Bombay and Gujarat Circle, the Military Estate Officer being in actual charge of the hiring of immoveable properties and (3) Lt. Commander Sukhjinder Singh who is attached to Flag Officer, Commanding-in-Chief, Western Naval Command, Bombay, and who works under the Chief Staff Officer, Personnel and Administration. Through these witnesses, certain documents were produced and by our order dated 5-3-1982, we took on record some of the said documents for the reasons stated therein. The notes of evidence, the order dated 5-3-1982 and the documents taken on record under the said order form part of the present proceedings. Besides the other contentions it is also in the light of these documents that we have to decide whether there is sufficient evidence on

record to show that the premises in question were taken on a valid lease by the Central Government and if not whether otherwise the premises fall within the definition of "public premises" under the said Act.

9. Before we discuss the relevant documentary evidence and its effect, it is necessary to state the legal position on the subject viz. whether the Government can enter into an oral contract and if not, the requirements of law needed to be complied with by the Government before entering into a contract. The lease in the present case in respect of the premises in Riviera covered by Appeals Nos. 207, 214 and 217 of 1979 is admittedly of the year 1942. The lease in respect of the premises in Heliopolis covered by Appeal No. 215 of 1979 is of the year 1943 and the lease in respect of the flat in building Krishna Kunj covered by Appeal No. 216 of 1979 is of the year 1965. Therefore in the case of the first two leases it is the provisions of Section 175 (3) of the Government of India Act, 1935 and in the case of the lease of 1965 it is the provisions of Art. 299 (1) of the Constn. which would be applicable. However the two provisions are *pari materia* and nothing turns on the question whether one or the other provision applies to the respective leases.

10. One more question which we need answer before we examine the relevant authorities on the said Constitutional provisions is whether the leases in question require registration. Under S. 107 of the T. P. Act, "a lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument. All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession." In the present case there is no dispute that the rent of the premises was being paid monthly and the rent was not reserved yearly. There is also further no dispute that the lease was accompanied by delivery of possession. All the authorities below including the learned single Judge has taken the view that there is a monthly lease and not a lease for any term exceeding one year.

In the case of the building Heliopolis, (Appeal No. 215 of 1979), the written agreement dated 17-2-1943 clearly contemplates the creation of monthly tenancy since it states that the hiring will be on monthly basis and subject to termination of one calendar month's notice on either side. The rent reserved is also monthly at the rate of

Rs. 130. The rent receipts also show that the rent has been paid on monthly basis.

In the case of Krishna Kunj (Appeal No. 216 of 1979), the agreement dated 4-6-1965 mentions that the premises were in the occupation of the Government since Sept. 1945 under a lease dated 17-9-1945 and that these premises were to be demolished and in their place new premises were to be constructed and they were to be taken on a fresh lease to be executed in the form prescribed by Government and the lease was for a period of ten years with option to the tenant to renew the same for a further period of ten years. This agreement contemplates the execution of a formal lease. There is no record to show that any formal deed of lease was executed subsequently as per the said agreement. However, it is undisputed that after the premises were reconstructed, possession was taken by the Central Government and the appellant was allotted the same on 15-7-1967. The rent of the premises is also being paid on monthly basis since then. There is further no dispute that the old premises in the same building which were handed over for demolition were also on monthly rental basis. In the absence of any other document it is legitimate to presume that the lease has continued on the same old basis.

As regards the premises in building "Reviera" (Appeals Nos. 207, 214 and 217 of 1979) again, it is an admitted position that the rent is being paid monthly by the Government and there is no rent reserved yearly. Thus, we are of the view that in all these cases, the lease being monthly there was no need to register the same and therefore the lease agreement between the Government and the owners concerned, cannot be said to be invalid on that account. This is also the finding of all the authorities below and we see no reason to differ from the same much less to interfere with it.

11. Coming now to the question whether these leases can be said to be valid in the face of the provisions of S. 175 (3) of the Government of India Act, 1935 or Art. 299 (1) of the Constn. as stated earlier the provisions being similar, it will be sufficient if we quote the provisions of Art. 299 (1) of the Constn. which are as follows:—

"299 (1). All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the

Governor by such persons and in such manner as he may direct or authorise."

These provisions have been interpreted by the Supreme Court in various decisions. In AIR 1954 SC 236, (Chaturbhuj Vithaldas Jasani v. Moreshwar Parashram), the facts were that the contracts were not in proper form and not expressed to be made by the President and the contention was that on that account they were void. While dealing with this argument, after reviewing the earlier case law on the subject, the Court observed as follows:—

"In our opinion, this is a type of contract to which Section 230 (3) Contract Act would apply. This view obviates the inconvenience and injustice to innocent persons which the Federal Court felt in 'J. K. Gas Plant Manufacturing Co. Ltd. v. Emperor', AIR 1947 FC 38 at pp. 41, 42 (M), and at the same time protects Government. We feel that some reasonable meaning must be attached to Article 299 (1). We do not think the provisions were inserted for the sake of mere form. We feel they are there to safeguard Government against unauthorised contracts. If in fact a contract is unauthorised or in excess of authority it is right that Government should be safeguarded.

On the other hand, an officer entering into a contract on behalf of Government can always safeguard himself by having recourse to the proper form. In between is a large class of contracts, probably by far the greatest in numbers, which, though authorised, are for one reason or other not in proper form. It is only right that an innocent contracting party should not suffer because of this and if there is no other defect or objection we have no doubt Government will always accept the responsibility. If not, its interests are safeguarded as we think the Constitution intended that they should be.

In the present case, there can be no doubt that the Chairman of the Board Administration acted on behalf of the Union Government and his authority to contract in that capacity was not questioned. There can equally be no doubt that both sides acted in the belief and on the assumption, which was also the fact, that the goods were intended for Government purposes, namely, amenities for the troops. The only flaw is that the contracts were not in proper form and so, because of this purely technical defect, the principal could not have been sued. But that is just the kind of case that S. 230 (3), Contract Act is designed to meet.

It would, in our opinion, be disastrous to hold that the hundreds of Government offi-

cers who have daily to enter into a variety of contracts, often of a petty nature, and sometimes in an emergency, cannot contract orally or through correspondence and that every petty contract must be effected by a ponderous legal document couched in a particular form. It may be that Government will not be bound by the contract in that case, but that is a very different thing from saying that the contracts as such are void and of no effect. It only means that the principal cannot be sued; but we take it there would be nothing to prevent ratification, especially if that was for the benefit of Government.

There is authority for the view that when a Government officer acts in excess of authority Government is bound if it ratifies the excess: see 'Collector of Masulipatam v. Cavalry Venkata Narrainapah', (1859-61) 8 Moo Ind App 529 at p. 554 (N). We accordingly hold that the contracts in question here are not void simply because the Union Government could not have been sued on them by reason of Art. 299 (1)."

This decision therefore lays down, firstly, that an oral contract or a contract through correspondence is not void. Secondly, that even when a Government Officer acts in excess of authority the Government is bound by the contract if it ratifies the same and thirdly that the contract is not void for all purposes simply because the Union Government cannot be sued on it for non-compliance of the provisions of Art. 299 (1) of the Constn. The last proposition means that a contract which is unenforceable by the parties to the contract for non-compliance with the provisions of Art. 299 (1) can still be looked into as a valid contract for other purposes. In that case the Court was considering the effect of such a contract vis-a-vis Section 7 (d) of the Representation of the People Act. Section 7 (d) is in these terms:—

"A person shall be disqualified for being chosen as, and for being, a member etc.

(d) if by himself he has any share or interest in a contract for the supply of goods to the appropriate Government."

The argument advanced was that the contract in question being not in compliance with the provisions of Art. 299 (1) was void for all purposes and although the appellant there was a partner of the firm which had at all material times a contract for the supply of bidis to the Government, he did not incur disqualification for contesting election under the Representation of the People Act.

The Court held that the provision of Section 7 (d) did not require that the contracts should be enforceable against the Government. All that it required was that the contract should be for the supply of goods to the Government. The contract in question being just that, it was hit by that section. The Court therefore held that the Election Tribunal was right in disqualifying the appellant as a candidate.

In AIR 1962 SC 110, (State of Bihar v. Karam Chand Thapar and Brothers Ltd.) the question which fell for consideration was whether the person who had executed the contract on behalf of the Government had authority to do so or not. The Court held while construing the provisions of S. 175 (3) of the Government of India Act, 1935 which fell for consideration there, that the said provisions did not prescribe any particular mode in which authority has to be conferred. The Court observed that normally no doubt such conferment will be by notification in the Official Gazette, but there was nothing in the section itself to preclude authorisation being conferred ad hoc on any person, and when that fact is established, the requirements of the section must be held to have been satisfied. From the correspondence placed on record in that case, the Court found that the Executive Engineer concerned had been authorised by the Governor acting through his Secretary, to execute the agreement for a reference to arbitration. The Court found that the correspondence showed that it was the Secretary who from the very inception took the leading part in arranging for arbitration. He was throughout speaking in the name of and on behalf of the Government and he did so "as directed". The subject-matter of the arbitration was a claim which concerned the Government. The proposal at the earlier stages to amend a clause of the original contract so as to include an arbitration also showed that the intention of the parties was to treat the agreement for arbitration as part and parcel of the contract. Even after the agreement was executed, the Secretary made corrections and modifications in the agreement on the basis that it was the Government that was a party thereto. The conclusion from all this, according to the Court, was irresistible that the Executive Engineer had been authorised to execute the agreement. This decision therefore lays down firstly that whether an Officer had or had not an authority, can be gathered in each case from the facts of that case. Neither the section lays down, nor is it necessary to follow, a particular mode for conferring

such authority. Secondly, once it is established that the Officer acting on behalf of the Government had such authority the contract can be deemed to be in compliance with the Constitutional provisions.

In AIR 1962 SC 113, (*Bhikraj Jaipuria v. Union of India*), the Court while interpreting Sec. 175 (3) of the Government of India Act, 1935 held that the said provision in terms did not provide that the direction or authority given by the Governor-General or the Governor to a person, to execute contracts shall be given only by rules expressly promulgated in that behalf or by formal notifications. A special authority may validly be given in respect of a particular contract or contracts by the Governor to an officer other than the officer notified under the rules made under the said provision. This was stated by the Court while however observing that the contracts must show on their face that they are made on behalf of the State, i. e. by the Head of the State and executed on his behalf and in the manner prescribed and by the person authorised.

In AIR 1962 SC 779, (*State of West Bengal v. M/s. B. K. Mondal and Sons*), while interpreting the same provisions of S. 175 (3), and stating the consequences of a contract which did not comply with the requirements of the said section for the purpose of S. 70 of the Contract Act the Court made the following observations which are material for our purpose (Paras 14, 19 and 20):—

“Where a claim for compensation is made by one person against another under S. 70, it is not on the basis of any subsisting contract between the parties; it is on the basis of the fact that something was done by the party for another and the said work so done has been voluntarily accepted by the other party. In regard to the claim made against the Government of a State under Section 70 it may be that in many cases the work done or the goods delivered are the result of a request made by some officer or other on behalf of the said Government. In such a case, the request may be ineffective or invalid for the reason that the officer making the request was not authorised under Section 175 (3) of the Government of India Act or, if the said officer was authorised to make the said request the request becomes inoperative because it was not followed up by a contract executed in the manner prescribed by Section 175 (3) of the Government of India Act. In either case the thing has been delivered or the work has been done without a contract and that brings in Section 70.

It would not be reasonable to suggest that in recognising the claim for compensation under Section 70 the Court is either directly or indirectly nullifying the effect of S. 175 (3) of the Government of India Act or treating as valid a contract which is invalid. The fields covered by the two provisions are separate and distinct; there is no conflict between the two provisions. In the functioning of the vast organisation represented by a modern State Government officers have invariably to enter into a variety of contracts which are often of a petty nature. Sometimes they may have to act in emergency, and on many occasions, in the pursuit of the welfare policy of the State Government, officers may have to enter into contract orally or through correspondence without strictly complying with the provisions of S. 175 (3) of the Act. If, in all these cases, what is done in pursuance of the contracts is for the benefit of the Government and for their use and enjoyment and is otherwise legitimate and proper, Section 70 would step in and support a claim for compensation made by the contracting parties notwithstanding the fact that the contracts had not been made as required by S. 175 (3).”

Read with the concurring judgment delivered by Sarkar, J. for himself and Das Gupta J., the learned Judges have observed as follows (Paras 44 and 45):—

“We also feel no doubt that the work was done lawfully. It was work which the Government badly needed. We will assume for the present purpose, as the learned Advocate for the appellant said, that work done under a contract with the Government which is invalid in view of the provision of Section 175 (3) of the Government of India Act, is work unlawfully done. The learned Advocate contended that that would be because thereby Section 175 (3) of the Government of India Act would be evaded which is the same thing as doing that which the section forbids. Assume that is so. But that section does not say that if work is done for the Government without any contract or agreement at all and voluntarily, as was done in the present case, that work would not have been lawfully done. Government is free not to take the benefit of such work. There is no law, and none has been pointed out to us, which makes the doing of such work unlawful. No other reason was given or strikes us for saying that the work was not lawfully done. There is no law, as Bachawat, J. said, that Government cannot take any work except under a contract in respect of it made in terms of S. 175 (3) of

the Government of India Act. That section may forbid a Government to take work under a contract which is invalid because not in terms of it, but it does not make it unlawful for the Government to take the benefit of work done for it without any contract at all. We should suppose that if the doing of the work was unlawful the Government would not have accepted the benefit of it. In the present case, the Government needed the work badly and we do not see how then the Government can say that the work was not done lawfully. We therefore think that the work was done lawfully.

It was contended that the obligation under Section 70 of the Contract Act arises only in circumstances in which English law would have created an obligation on the basis of an implied contract or a quasi-contract and that there could be no implied contract or quasi-contract with the Government because a contract could be made with it only in accordance with S. 175 (3) of the Government of India Act. Now it has been repeatedly held that a resort to English law is not justified for deciding a question arising on our statute unless the statute is such that it cannot be reasonably understood without the assistance of English law. Indeed, there is good authority for saying that S. 70 was framed in the form in which it appears with a view to avoid the niceties of English law on the subject, arising largely from historical reasons and to make the position simple and free from fictions of law and consequent complications: see Pollock on Contracts (13th Ed.) p. 10. Furthermore, we do not see that S. 175 (3) in any way prevents a contract with the Government being implied or a Government from incurring an obligation under a quasi-contract. A contract implied in law or a quasi-contract is not a real contract or, as it is called a consensual contract and S. 175 (3) is concerned only with such contracts. The section says that 'all contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed' in a certain manner and 'shall be executed on behalf of the Governor-General or Governor by such person and in such manner as he may direct or authorise'. It therefore applies to consensual contracts which the Government makes and not to something which is also called a contract but which the law brings into existence by a fiction irrespective of the parties having agreed to it. Now by its terms Section 70 of the Contract Act must be applied where its requisites exist; if it is necessary to imply a contract or to contemplate the existence

of a quasi-contract for applying the section that must be done and we do not think that S. 175 (3) of the Government of India Act prevents that, nor are we aware of any other impediment in this regard. This argument must also fail."

It is clear from the aforesaid observations that although a contract which does not fulfil the requirements of S. 175 (3) is not a valid contract, the relationship created thereunder is not unlawful and the work done thereunder or the services or goods supplied under it do not become unlawful for the purpose of Section 70 of the Contract Act. The relationship so created by acceptance of the goods or services or of the work done can be recognised and a compensation claim can be based on the same. The observations also further reiterate the position that in the functioning of the vast organisation, officers have invariably to enter into a variety of contracts. Sometimes they have to act in emergency, and on many occasions, they have to enter into contracts orally or through correspondence without strictly complying with the provisions of Section 175 (3). If, in all these cases, what is done in pursuance of the contract is for the benefit of the Government and is otherwise legitimate and proper, Section 70 of the Contract Act would step in and the claim for compensation made by the contracting parties on the basis of such contracts is legitimate notwithstanding the fact that such contracts are not in compliance with the provisions of Sec. 175 (3). What is important from our point of view is the fact that the Court there has referred to its earlier decision reported in AIR 1954 SC 236 (*supra*) and has explained the said position by stating that the Court in the earlier case had held that a contract made in contravention of Art. 299 (1) of the Constn. could be ratified by Government if it was for its benefit and as such it could not take the case of the contractor outside the purview of S. 7 (d) of the Representation of the People Act. A contract which is void may not be capable of ratification, but, since according to the Court the contract in question could have been ratified it was not void in the technical sense. (Underlining ours). It was for this reason according to the Court that in that case the following observations were made: "The Government may not be bound by the contract but that is a very different thing from saying that the contract was void and of no effect and that it only meant that the principal (Government) could not be sued, but there will be nothing to pre-

vent ratification if it was for the benefit of the Government."

In AIR 1963 SC 1685, (*Union of India v. A. L. Rallia Ram*), the Court after referring to the decision in AIR 1962 SC 113 (*supra*) held that S. 175 (3) of the Government of India Act, 1935, did not in terms require that a formal document of contract executed on behalf of the Dominion of India alone is effective. In the absence of any direction by the Governor-General issued under that section prescribing the manner of executing contracts a valid contract may result from correspondence if the requisite conditions are fulfilled. The Court further held that although it was true that the said section used the expression "executed" that did not by itself contemplate execution of a formal contract by the contracting parties. A tender for purchase of goods in pursuance of an invitation issued by or on behalf of the Governor General of India and acceptance in writing which is expressed to be made in the name of the Governor General and executed on his behalf by a person authorised for the purpose would conform to the requirements of that section. The Court also further held on the facts of that case that the correspondence between the parties ultimately resulting in the acceptance note, amounted to a contract made by the Government and therefore by the Governor-General, because it was the Governor-General who had invited the tender through the Director of Purchases, and it was the Governor-General who through the Chief Director of Purchases accepted the tender of the respondent subject to the conditions prescribed therein. There were no rules made by the Governor-General requiring the Officer authorised in that behalf to describe himself as signing on behalf of the Governor-General of India. Although, therefore, in that case the Court held affirming its earlier decision reported in AIR 1962 SC 113 (*supra*) that the requirements of S. 175 (3) of the Government of India Act, 1935 were mandatory, the Court also held firstly, that the said provisions did not require a formal document to be executed between the parties and secondly, that a valid contract may result from correspondence, and thirdly that there is no need for the Officer authorised to enter into a contract, to describe himself as signing on behalf of the Governor-General of India in the absence of a direction to the contrary.

In AIR 1967 SC 203, (*K. P. Chowdhry v. State of Madhya Pradesh*), two questions arose for consideration. The first was whether the view taken by the High Court that

Art. 299 of the Constn. does not hit an implied contract and therefore the amount due under such contract was recoverable or not under S. 155 (b) of the Madhya Pradesh Land Revenue Code was correct, and secondly whether, if the view was not correct, the amount was recoverable under any other provision of law. While dealing with this question, the Court specifically referred to the aforesaid decisions and interpreted them in paras 6 to 9 of the judgment. While interpreting the decision in AIR 1962 SC 110 (*supra*) the Court stated that it was held there that the following three conditions had to be satisfied under S. 175 (3) of the Government of India Act, 1935 viz. (1) the contract must be expressed to be made by the Governor or the Governor-General, (2) it must be executed in writing, and (3) the execution should be by such persons and in such manner as the Governor or the Governor-General might direct or authorise. According to the Court, it was further held there that S. 175 (3) did not prescribe any particular form in which the authority must be conferred and where an ad hoc authority was conferred on any person, the requirement must be held to have been satisfied. AIR 1962 SC 113 (*supra*) was interpreted by the Court as laying down that if a contract was to bind the Government it had, (a) to be expressed to be made by the Governor or Governor-General, (b) to be executed on behalf of the Governor or Governor-General, and (c) to be executed by an officer duly appointed in this behalf and in such manner as the Governor or the Governor-General directed or authorised. AIR 1962 SC 779 (*supra*) was interpreted by the Court as laying down that the provisions of S. 175 (3) were mandatory. According to the Court, the decision in Art. 1954 SC 236 was explained in that case and it was held there that it should be confined to its own facts in the context of the Representation of the People Act. According to the Court further it was held in that case that Section 70 of the Contract Act could be invoked against the Government if the person invoking it could show that he had acted lawfully and had not intended to act gratuitously and that the State had enjoyed the benefit. AIR 1963 SC 1685 (*supra*) was held to have laid down that so long as all the requirements of S. 175 (3) of the Government of India Act were fulfilled and were clear from the correspondence, the said section did not necessarily require the execution of any formal document.

After reviewing the said decisions the Court stated in para 10 of the judgment, that firstly;

in view of Art. 299 (1) of the Constn. there can be no implied contract between the Government and another person since if such implied contracts were allowed, that would in effect make Art. 299 (1) useless and a person who had a contract with the Government could get away by saying that an implied contract should be inferred from the facts and circumstances of a particular case. Secondly, if the contract is not in full compliance with Art. 299 (1), it would be no contract at all and could not be enforced either by the Government or by the other person as a contract. In the case which fell before the Court for consideration, there was no contract as required by Art. 299 (1) and therefore the view taken by the High Court that there was an implied contract was not sustained. The Court did not answer the second question because whether the amount could be recovered under any other provision of law was not investigated by the High Court and remanded the matter to the High Court for determining the said question.

In AIR 1972 SC 915, (*Union of India v. N. K. Private Limited*) the Court held that though the words "expressed" and "executed" in Article 299 (1) might suggest that it should be by a deed or by a formal written contract, a binding contract by tender and acceptance can also come into existence if the acceptance is by a person duly authorised in this behalf by the President of India. A contract whether by a formal deed or otherwise by persons not authorised by the President cannot be binding and is absolutely void.

In AIR 1977 SC 151, (*Timber Kashmir Pvt. Ltd. v. Conservator of Forests, Jammu*), again while construing the provisions of Art. 299 (1), the Court observed that although a contract cannot be executed without sanction, nevertheless if the sanction could be either expressly or impliedly given by or on behalf of the Government, and if some acts of the Government could fasten some obligations upon the Government, the lessee could also be estopped from questioning the terms of the grant of the sanction even where there is no written contract executed to bind the lessee. When there is any question to be decided as to whether the Government had sanctioned the leases, its actions, apart from the execution of leases, could be considered. But, once there has been a valid execution of leases by duly authorised officers, the documents would be the best evidence of sanction also. That was one of the objects of prescribing a formal mode of execution

of instruments on behalf of the Government apart from the need to protect its interests against mala fide and other unauthorised acts of its servants or agents. This authority therefore lays down that a sanction could be expressed or implied and for enforcing such sanction, the actions, apart from the execution of the formal document can be considered when there is no formal document of contract.

12. We may now summarise the law on the subject which emerges from the aforesaid survey of the authorities as follows:— (a) A formal deed or document of contract is not necessary; (b) a contract can be inferred from correspondence; (c) a mere tender and acceptance is sufficient to constitute a valid contract; (d) the contract must be entered into by an authorised person. However, a contract entered into by an unauthorised person can be ratified by the Government particularly if it is for the benefit of the Government; (e) neither S. 175 (3) nor Article 299 (1) prescribe any particular mode in which authority has to be conferred. Normally such conferment is by a notification in an Official Gazette. But it can also be ad hoc on any person and when it is established, the requirements must be held to have been established.

Further, an authority need not be given by rules expressly promulgated for the purpose. Even where an authority is given by rules, a special authority can always be validly given in respect of a particular contract to an officer other than the officer notified under the rules; (f) the sanction to the contract can be expressly or impliedly given and while inferring the sanction, the actions, apart from the execution of the document can be considered; (g) a contract entered into without complying with the requirements of Section 175 (3) of the Government of India Act, or Article 299 (1) of the Constitution is void in the sense that it cannot be enforced by either party to the contract. However, it is not void for all purposes and it can be taken into consideration and looked into for collateral purposes. The contract can be said to exist validly for such purpose.

Such a contract is only relatively void i.e. void between the parties but not absolutely void i.e. void for all purposes.

13. For the last proposition we may also usefully refer to Chitty on Contracts, 24th Edition. In paragraph 17, the learned Author has discussed, "Unenforceable contracts" and has observed that "Unenforceable contracts are valid in all respects except that

one or both parties cannot be sued on the contract. Instances of unenforceable contracts in English law are afforded by certain contracts which are not evidenced by a signed writing as required by certain statutes; contracts in respect of which the right of action is barred by the Limitation Act 1939 and contracts with a foreign sovereign or ambassador. In most cases the defect of unenforceability is curable. Thus, if written evidence of a contract of guarantee or a contract for the sale of an interest in land comes into existence, the contract becomes enforceable, though it was made orally; a right of action barred by the Limitation Act, 1939 may revive if the defendant makes a written acknowledgment of his indebtedness, or a part payment; a foreign sovereign or ambassador may waive his immunity. An unenforceable contract may be indirectly enforceable by other means than bringing an action. Thus a statute-barred debt may be recoverable indirectly if the creditor has a lien on goods of the debtor which are in his possession. Sometimes the contract is enforceable by one party but not by the other. Thus a contract for the sale of an interest in land can be enforced by the party who has not signed the note or memorandum against the other who has. More often, however, the contract is enforceable by neither party."

In paragraph 250 while discussing the same subject, he has observed as follows:—

"Contract unenforceable. A contract which fails to comply with the statutory formalities is not void but only unenforceable. No action can be brought to enforce it directly. Nor can it be indirectly enforced by suing on some other cause of action. Thus if A orally agreed to allow B to dig for gravel on A's land and later turns B and his machinery off the land, B cannot sue A in trespass. But as the contract is not void, it can sometimes be relied upon as a defence. Thus in the above example B does not commit a trespass by entering on the land and digging for the gravel: the oral contract operates as a licence and excuses the trespass. But once A withdraws the licence B will become a trespasser if he does not leave within a reasonable time; and if A then sues B for possession B cannot, in this action, rely on the oral contract as a defence. A fortiori A is entitled to turn B out or to sue for possession if he withdraws the licence before B enters but B nonetheless makes a clandestine entry.

As the contract is not void, money or property transferred under it cannot be recover-

ed back; thus, if a purchaser pays a deposit under an oral contract, the vendor can retain the deposit, if the purchaser defaults. And a security given for the performance of the oral contract is not void for want of consideration merely because the oral contract is unenforceable; thus an action can be brought on a cheque given in payment of a deposit under the oral contract."

14. Taking into consideration the fact that the whole purpose of the provisions of the former Section 175 (3) of the Government of India Act, 1935, and the present Article 299 (1) of the Constn., is firstly, to safeguard the public interests by not saddling the Government with liabilities and obligations under unauthorised contracts and secondly, to protect the interests of the third parties who enter into contracts with the Government daily, according to us, on the authorities of the Supreme Court discussed above, it will be proper to hold, that the contracts which do not fulfil statutory requirements are only relatively void in the sense that they are not enforceable by the parties to the contract. However, if the parties to the contract accept the obligations under them or if the formal defects in them are curable by such as ratification, the contracts need not be held to be absolutely void and can be said to exist validly for all other purposes. In particular they can be said to exist validly when third parties challenge their validity. In cases such as the present one where the validity of a contract is questioned in a collateral proceeding and for a collateral purpose by persons who have benefited by such contracts, such as the present allottees, it will have to be held that such contracts do validly exist.

We may however add that the view taken by the learned single Judge that the contracts in the present case being of monthly tenancy can be oral because Section 107 of the T. P. Act permits them is erroneous and contrary to law. When Government is a party to a contract the question to be considered is not whether a general statute such as the T. P. Act or the Contract Act permits a contract in a particular form, but whether the contract is in compliance of the mandatory provisions laid down in that behalf by the fundamental statute. Such provisions stand superimposed on the general law and have to be satisfied in addition to the requirements of the ordinary law. We therefore do not agree with the said view of the learned Judge.

15. We may also in this connection refer to the additional submission made by Shri

Desai on behalf of the respondents. He submitted that for exercising statutory powers no sanction is necessary. This argument was necessitated because it was argued on behalf of the appellants that the Garrison Engineer who took the premises on lease had, firstly, not done so far and on behalf of the Government of India and secondly, even if he had, he had no authority to do so. We will presently point out, while discussing the contract of lease in each of the three cases, that the record shows that the leases were entered into by the Garrison Engineer for and on behalf of the Government of India. As regards the second point what is pointed out on behalf of the respondents is that the Regulations for the Military Engineering Services which are a part of the Defence Service Regulations have given an authority for the hiring and de-hiring of lands and buildings to the local Commanders and such hiring and de-hiring has to be done through the agency of the Military Engineer Services. The relevant portion of Paragraph 613 of the said Regulations is as follows:—

“The hiring and de-hirings of lands and buildings for the Army (excluding Farms and Ordnance Factories), Navy and Air Force is the responsibility of the local commanders and will be carried out through the agency of the MES”

Paragraph 683 of the said Regulations further gives power to fix the rental of the building to the Garrison Engineer unless it is otherwise fixed by the Government of India. The paragraph reads as follows:—

“Rules regarding assessment, rates of recovery and remission of rent, including rent for internal electrical installations are contained in ‘Quarters and Rents’. The GE is authorised to fix the rent of a building unless otherwise fixed by the G of I. Market rates of rent will be fixed by the GE, where necessary, after ascertaining the prevailing rents in the market for similar accommodation, in consultation with the appropriate local civil authorities. Buildings in Factory estates will be assessed by the Factory authorities concerned.”

The relevant portion of paragraph 4 of the “Quarters and Rents” rules referred to above further reads as follows:—

“Appropriation and hiring of houses for military officers and messes, etc.—

(a) Accommodation required for all military officers (including R. A. F. officers and departmental officers) and messes for units, etc., for which a mess allowance is laid down in Pay and Allowance Regulations or in other Government orders, may be appro-

priated under the Cantonments (House Accommodation) Act, No. VI of 1923 as amended by Act IX of 1930, or hired, except in a hotel, by the local M. E. S. officer concerned, under the orders of the O. C. Station, provided that suitable quarters owned or hired by Government are not available (but see exceptions mentioned in para 3 (b) (iii).)”

There is no dispute that the M. E. S. Officer referred to therein is the Garrison Engineer. Although therefore it is not clear from the copy of the “Defence Services Regulations — Regulations for the Military Engineer Services 1968” (which is reprint of the original Regulations) produced before us as to under what provisions the said Regulations were made, there is no difficulty in holding that these Regulations which are printed and published in a book form have been issued under the authority of the Government of India as is made clear from the preface of the said Regulations written by the Secretary to the Government of India, Ministry of Defence. It can safely be held that it is the Government of India in the exercise of its executive powers, which has given the necessary authority to the Garrison Engineer to hire and de-hire lands and buildings and to fix their rental and thus to enter into contracts of leases on its behalf.

16. It is in the light of the aforesaid position of law that we may now examine the contracts in each of the three cases. Before we narrate the facts in each of the cases, it is necessary to remember that it is not in dispute that in all these cases there is a contract of lease. What is disputed is that the contracts are according to S. 175 (3) of the Government of India Act, 1935 or Art. 299 (1) of the Constn. because, (i) there are no formal written leases, and (ii) it is not shown that the contracts have been entered into in the name of the Governor-General or the President of India and (iii) it has also not been shown that it has been entered into by an authorised officer. The facts to be examined will be in the light of the said three points of controversy.

I. In Appeal No. 215 of 1979 which pertains to the building Heliopolis, we have on record the letter dated 17-2-1943 written by the Office of the Garrison Engineer (Hirings), Bombay, to Mr. S. A. Patel, the landlord of the building. The relevant portions of the letter are as follows:—

“The Defence Department will hire the above flat for occupation by as from 1st January, 1943 on a monthly rental of Rs. 130/- which will be paid to you by the Government.

The flat will be inspected and formally taken over 11.30 hours on 23-2-1943 and it is requested that your representative be directed to attend."

Four things flow from this letter. Firstly it was the Defence Department which was to take the flat on lease. Secondly, the lease was to be a monthly one. Thirdly, the monthly rent was to be paid by the Government and lastly, the tenancy was to commence from 1st January 1943 although the possession of the flat was to be taken from 23-2-1943. There is no dispute that after this letter was written, the premises were taken possession of and were occupied as stated in the said letter. There is further no dispute that the rent is being paid by the Government from the Government treasury since that day. In view of the Military Engineer Services Regulations the Garrison Engineer had an authority to take the said premises on hire and that it was he who had taken the same for and on behalf of the Government of India and the rent was also being paid by him on their behalf. Although, therefore, there is no formal document of lease, these facts on record viz. letter dated 17-2-1943, the occupation of the flat from 23-2-1943, and rent receipts showing the payment of rent all along by the Government from its funds by an officer authorised for the purpose show that there was a contract of lease entered into between the landlord of the premises on the one hand and the Garrison Engineer on the other for and on behalf of the Government of India. This is therefore not a case of an oral lease but a lease spelt out from the documents on record.

II. In Appeal No. 216 of 1979 we are concerned with a flat in the building "Krishna Kunj". The document which is on record is the agreement dated 4-6-1965 entered into between the Trustees of the building and the President of India. The President of India has been described in that agreement as the tenant. This agreement recites that the tenant has been in occupation of the premises in question under a lease dated 17-9-1945 made between the Trustees and the tenant. This document therefore shows that there was a written agreement of tenancy entered into between the Trustees and the President of India as early as on 17-9-1945. The document further proceeds to recite that the Trustees have represented to the tenant that they will rebuild and reconstruct a new building on the same plot of land where the premises in question are now standing and that the Trustees

will give on lease to the tenant, two flats of the description as are now being occupied and held by the tenant. It also further states that at the request of the Trustees, the tenant has agreed to vacate the portion of the building held by him on the condition that the Trustees will carry out and complete the demolition of the premises and thereafter construct a new building and hand over the new premises to the tenant within a stipulated period of time. The document also shows that the new premises will be given by the Trustees on lease and at a rent to be fixed by the Bombay Municipal Corporation. The document also states that on the completion of the new building, a fresh lease agreement in the form introduced by the Government of India will be executed between the parties. However, it also further states that the fresh tenancy will commence from the date of occupation by the tenant of the new premises and the tenancy shall be for a period of 10 years from the date of such commencement with option to the tenant to renew the same for a further period of 10 years.

There is no dispute that pursuant to this agreement the old premises were handed over and thereafter the new premises were occupied from July 1967. There is also no dispute that the rent is being paid monthly by the Government from the Government funds even after its occupation of the newly constructed premises in July 1967. There is further nothing on record to show that any fresh agreement of lease as contemplated in the agreement was entered into between the Government of India and the Trustees. Therefore, it can be legitimately held that since July 1967, there is a monthly tenancy created in favour of the Government of India as evidenced by the rent receipts on the same terms and conditions as the original tenancy was created. This is further not a case where it can seriously be doubted that the monthly tenancy was for and on behalf of the Government of India, and the agreement for the purpose was entered into by the Garrison Engineer i.e. the officer authorised in that behalf. This again is not a case of no agreement. The old agreement of 17-9-1945, the new agreement of 4-6-1965, the rent receipts and the occupation of the premises continuously show that the contract of a monthly tenancy had come into existence validly between the parties.

III. In Appeals Nos. 207, 214 and 217 of 1979, which relate to the premises in building Riviera, there is no formal document of lease, although the correspondence on record,

the occupation of the premises and the payment of rent as evidenced by the rent receipts ever since their occupation from the year 1942 show that there is a validly concluded contract of monthly tenancy between the landlord and the Government of India. In the correspondence the first in the series of letters is a letter dated 13-4-1942 Exhibit 3 (a) which is addressed by the Flag Officer to the Commodore, informing him that the Government of India had given its sanction to the hiring of the premises at a monthly rental of Rs. 5,800/- on certain conditions. This letter further categorically states that the lease will be executed by the owner or his agent on his behalf and the Garrison Engineer, Bombay, on behalf of the Government of India, and if a stamped lease was required, the cost of the stamp would be met by the owner. The letter also states that the lease shall be for an initial period of three years, and it will be renewable month by month at the option of the Government at the same rent after the expiry of the period of three years. Three things are clear from this letter. Firstly, the Government of India had given its consent for taking the premises on lease. Secondly, the Government of India had also authorised the Garrison Engineer to execute the lease. This authorisation was in addition to the general authority under the Military Engineer Services Regulations referred to earlier. Thirdly, the payment of rent was monthly and the tenancy contemplated was a monthly one.

The next document is a copy of letter dated 16-4-1942 Exhibit 'A', from the Commodore, which states that the Government of India had given sanction for the hiring of the flats at a monthly rental of Rs. 5,800/-. The letter encloses a draft lease agreement which is Exhibit 'B' on record. This agreement shows that it was to be executed between the owner and the Garrison Engineer on behalf of the Government of India.

The third document is a letter dated 9-6-1942 Exhibit 20 on record which is written by Messrs Gilbert Lodge and Co., Solicitors of the owner to the Commodore, Royal Indian Navy, stating therein that the draft lease with corrections was being sent to the Commodore. It also mentions the fact that the landlord wished to execute the lease on or about the 20th of that month. It appears from the subsequent documents on record which are letters dated 18-6-1942 (Ex. 16), 25-6-1942 (Ex. 12), 9-7-1942 (Ex. 5), 20-7-1942 (Ex. 17), 1-8-1942 (Ex. 6), 27-8-1942 (Ex. 7) and 9-9-1942 (Ex. 18) that the drafts of the lease were exchanged between the

parties and the possession of the premises was taken by the Government of India on 31-7-1942. The latter fact is evidenced by the contents of letter dated 1-8-1942 (Ex. 6) written by the Solicitors of the owner to the Garrison Engineer. Further there is correspondence between the Bombay Municipal Corporation and the Garrison Engineer on the subject. It appears that by his letter dated 9-9-1942 (Ex. 8) the Assessor and Collector of the Bombay Municipal Corporation had made a query to the Garrison Engineer asking him to forward information with regard to the lease of the premises and the Garrison Engineer by his letter dated 11-9-1942 (Ex. 19) had informed the Assessor and Collector, that the tenancy commenced from 1-9-1942 and the monthly rent of the premises was Rs. 5,800/-. It therefore appears that although the premises were occupied on 31-7-1942, the tenancy had commenced from 1-9-1942. This it appears was because the premises were not ready for occupation in all respects as evidenced from the letters exchanged between the parties which are a letter (Ex. 12) dated 25-6-1942 from the Solicitors of the owners to the Commodore, Royal Indian Navy, and another letter (Ex. 17) dated 20-7-1942 from the Garrison Engineer to the Solicitors of the owners. We have also on record a letter dated 30-10-1942 (Ex. 9) from the Station Staff Officer, Head Quarters Bombay, to the Garrison Engineer (Hiring) informing him that sanction was accorded to the hiring of the said premises on a monthly rental of Rs. 5,800/- with effect from 1-8-1942. It further appears from the correspondence (Ex. C collectively) on record that till 1-3-1945, a formal lease agreement was not executed between the parties. Letter dated 24-2-1945 which is part of Ex. C (Colly.) and which is written by the Solicitors of the owner of the premises, mentions the fact that the building had been in the occupation of the officers belonging to the Royal Indian Navy on behalf of the Government since Aug. 1942 and laments that although more than one draft of the lease had been prepared and approved and reapproved even as late as on 26-8-1944 and it was stipulated that the Government would pay rent of Rs. 5,800/- per month for the entire building, the rent of only Rs. 5,000/- per month was being paid. It appears from this letter that there was some dispute going on between the parties with regard to the responsibility of the costs of repairs and maintenance. The Solicitors therefore had suggested some modifications in the agreement

under this letter. This was responded to on behalf of the Government by the Officer in charge of the Defence Accounts Department by letter dated 1-3-1945 by suggesting further amendments in the agreement. There are no further documents on record in respect of the said lease. However, it is not disputed before us that the premises concerned have been in occupation of the Government of India since 1-8-1942, that the rent is being paid monthly by the Government either from 1-8-1942 or from 1-9-1942. The correspondence also shows that the Garrison Engineer had received in addition to the general authority a special or ad hoc authority to enter into the contract of lease, that the Government has approved of the said contract of lease and had also sanctioned the main terms of the lease including the rental. There is further no dispute today between the landlord of the premises and the Government that a valid monthly lease exists between the parties. These facts therefore according to us are sufficient to establish a validly concluded monthly contract of lease in respect of the premises. This is again not a case of an oral lease but a lease as evidenced by the documents on record.

17. We are therefore of the view that in all the three cases viz. the premises in Hello-lopis, Krishna Kunj and Riviera, the correspondence and the relevant documents on record together with the rent receipts and the continuous occupation clearly establish that there have been valid leases of the premises between the Government of India and the landlords concerned. The validity of these leases further is not challenged by either of the parties to the contracts for the alleged failure to comply with the requirements of S. 175 (3) of the Government of India Act, 1935 or Art. 299 (1) of the Constitution as the case may be. In fact both the parties to the contract have accepted the leases as valid and have been fulfilling their respective obligations under them.

We are further of the view that assuming that there is some non-compliance with the statutory requirements in executing the said leases, in the first instance, the Government has not disowned the same and secondly it has every right to ratify them since it is for its benefit and the Government has ratified them. In fact, the Government has been pursuing proceedings against the allottees i. e. the present appellants on the basis that the leases are valid.

18. Assuming that we are wrong in the view we have taken that the statutory requirements have been complied with in res-

pect of the leases, there is no reason why in the present case, a presumption under Section 114 of the Evidence Act that the official acts have been regularly performed, should not be drawn. The provision of the said section enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relations to the facts of the particular case. Illustration (e) under the said section enables the Court to presume that the judicial and official acts have been regularly performed and Illustration (f) states that the Court may also presume that the common course of business has been followed in particular cases. In all the three cases, we have pointed out that it was the intention of the Government of India to take the premises on lease. Pursuant to this intention, the premises were taken possession of by the Government of India and ever since the date of such possession, the rents of the premises are being paid regularly from 1940 till today. None of the parties to the contract further, has ever disputed their validity and they have been fulfilling their obligations under them. Therefore, it will be legitimate to presume that the leases have been taken by and on behalf of the Government of India by the Officers authorised for the purpose and on the terms and conditions apparent on the record.

By virtue of S. 114 of the Evidence Act we will also be justified in presuming that the Military Engineer Service Regulations referred to earlier as stated in their preface have been framed in the normal course of business under the authority of the Government of India. Since the contracts have been entered into by the Garrison Engineer in exercise of his powers under the said Regulations, the provisions of S. 175 (3) of the Government of India Act, 1935 or that of Art. 299 (1) of the Constn. will not come into play. For all these reasons we are of the view that there is no defect whatsoever in the contracts of leases in question.

19. The next question that falls for our consideration is, assuming that the leases are invalid, can the authorities under the said Act enquire into their validity at the instance of the third parties such as the allottees and to what extent?

According to us, for the reasons stated hereafter, the Estate Officer appointed under S. 3 of the said Act as well as the Appellate Authority under S. 9 thereof have only to satisfy themselves that the facts giving

rise to their jurisdiction have been established. Once those facts are established it is not open for them to go into the validity of those facts. Not only that but their finding that such facts do exist and therefore give them the jurisdiction can only be challenged by the procedure laid down in the said Act and not in a separate proceeding. If a Tribunal appointed under an Act is vested with jurisdiction to try cases arising out of the said Act, the Tribunal is also vested with the power to decide the existence or non-existence of facts giving rise to such jurisdiction, and the Tribunal's finding thereon even if wrong can be assailed only before the authorities if any under the Act. Unless such finding is without any evidence on record or perverse or contrary to the evidence it is not liable to be questioned in a separate proceeding such as the Writ Petition under Arts. 226 and 227 of the Constn. We may in this connection refer to the relevant authorities.

In AIR 1950 SC 222, (Province of Bombay v. Khushaldas S. Advani) at page 242 in para 78 of the judgment the Court has observed as follows :—

“One other question arises in this connection and that relates to the second and alternative contention raised by the learned Attorney-General. When the legislature delegates powers to an authority, and lays down that the powers could be exercised only if a certain state of facts exists, obviously the authority cannot act if the condition is not fulfilled. If it wrongly holds or assumes that the condition exists although it actually does not exist, its assumption of jurisdiction would be unsupportable, and could be removed by a writ of certiorari. The Legislature however may entrust the authority with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists. In such cases even if the authority makes a wrong decision either of facts or law, it can be corrected by an appellate tribunal if there is any, but not by a writ of certiorari, as every authority if it acts within jurisdiction is competent to decide both rightly or wrongly, Per Esher L. J., in *Queen v. Commrs. for Special Purposes of the Income-tax*, (1888) 21 QBD 313 at p. 319.”

This authority therefore clearly lays down that where the Legislature entrusts an authority with a jurisdiction also to determine whether the preliminary state of facts exist, even if the authority makes a wrong decision either of fact or law, it can be corrected by an Appellate Tribunal if there is any, but not by a Writ of Certiorari, as every auth-

ority is competent to decide both rightly or wrongly so long as it is given jurisdiction to do so.

In AIR 1955 SC 661 (*Bengal Immunity Co. Ltd. v. State of Bihar*) which reiterates what is stated in the above case, it is observed in paragraph 144 as follows :—

“... .. We are not here concerned with a statute whose ‘vires’ is not in question, and which confers jurisdiction on any authority to take proceedings if certain facts exist and the enquiry directed by the authority is as to whether those facts exist. The determination in such a case is incidental to the effective exercise by the authority of its undisputed jurisdiction and if, as a result of that enquiry, it came to an erroneous conclusion, there is no error of jurisdiction, and it might well be contended in that case that the remedy of the party aggrieved was to resort to the machinery provided in the statute itself by way of appeal or revision, and that a writ of prohibition would be misconceived.”

In AIR 1970 SC 672, (*Shauqin Singh v. Desa Singh*) and on which much reliance was placed on behalf of the appellants, in para 6 of its judgment, the Court, while dealing with the jurisdiction of the Chief Settlement Commissioner under S. 24 (2) of the Displaced Persons (Compensation and Rehabilitation) Act 44 of 1954, has stated as follows :—

“... .. The Chief Settlement Commissioner has, therefore, power under subsection (2) to cancel an allotment if he is satisfied that the order of allotment of land had been “obtained by means of fraud, false representation or concealment of any material fact.” The power is judicial and by the use of the expression “is satisfied” the Chief Settlement Commissioner is not made the final arbiter of the facts on which the conclusion is reached. The jurisdiction of the Chief Settlement Commissioner arises only if an allotment is obtained by means of fraud, false representation or concealment of material facts. The relevant satisfaction is a jurisdictional fact on the existence of which alone the power may be exercised. A superior authority or the High Court in a writ petition would, therefore, be entitled to consider whether there was due satisfaction by the Chief Settlement Commissioner on material placed before him and that the order was made not arbitrarily, capriciously or perversely.”

It must be remembered that in the aforesaid case the Court was dealing with the exercise of jurisdiction by the Chief Settle-

ment Commissioner where the Commissioner had arrived at a finding without any evidence. This was not a case where the authority had come to the conclusion that it had jurisdiction on the basis of evidence placed before it. It is in these circumstances that the Court observed that the High Court in a Writ Petition would be entitled to consider whether there was due satisfaction by the Chief Settlement Commissioner on materials placed before him and that the order was made not arbitrarily, capriciously or perversely.

In AIR 1973 SC 1362, (*Raza Textiles Ltd., Rampur v. Income-tax Officer, Rampur*), the Court was dealing with the exercise of jurisdiction by the Income-tax Officer under Section 18 (3-B) read with S. 18 (7) of the Income-tax Act, 1922 which required the assessee to pay certain taxes on a sum remitted by him as selling-commission to a non-resident. The question involved was whether the firm to whom the remittance was made was resident or non-resident. It was the contention of the assessee that the firm was not a non-resident firm. The Income-tax Officer having held that the firm was non-resident and directed the payment of tax, the assessee went in appeal to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner rejected the appeal on the ground that the same was not maintainable since an appeal lay to him under Section 30 (1-A) only if the assessee had deducted the tax due from the non-resident in accordance with the provisions of sub-section (3-B) and had paid the sum so deducted to the Government. This order of the Appellate Assistant Commissioner was confirmed by the Tribunal. The appellant thereafter moved the High Court under Art. 226 of the Constn. The learned single Judge who heard the matter, came to the conclusion that the firm was not a non-resident firm and therefore the appellant was not required to act under Section 18 (3-B). The Revenue went in appeal against the order of the learned single Judge and the Division Bench allowed the appeal observing that the question before the Income-tax Officer was whether the firm was non-resident or not. There was material before him on this question and he had jurisdiction to decide the question either way. It could not be said that the officer assumed jurisdiction by wrong decision on the question of residence. It is while commenting upon this decision of the Division Bench that the Supreme Court observed that the Bench was under an impression that the Income-tax Officer was the sole Judge of the fact that

whether the firm in question was resident or non-resident. According to the Court further no authority, much less a quasi-judicial authority can confer jurisdiction on itself while considering a jurisdictional fact wrongly. The question whether the jurisdictional fact has been rightly decided or not is a question which is open for examination by the High Court in an application for a Writ of Certiorari.

In AIR 1974 SC 125, (*State of U. P. v. Anand Swarup*), the question which fell before the Court was one arising out of the provisions of U. P. Government Premises (Rent Recovery and Eviction) Act, 1952. The point at issue was whether the premises were requisitioned by the Government and, if by the District Magistrate, whether they were requisitioned by him in exercise of the powers validly delegated to him by the Government. This question arose in a suit which was filed by the occupant of the premises against the Government for a permanent injunction restraining the State and the District Magistrate who was made defendant in the case from recovering certain amount and from threatening to evict him from a portion of the premises. It was the contention of the plaintiff that the premises were not requisitioned. The Court came to the conclusion that on the material on record it was not possible to say that the premises in suit were a requisitioned property and therefore Government premises within the meaning of that Act because no notification containing the order of requisition had been produced either before the High Court or before the Court although an opportunity was offered by the Court in that behalf. Therefore the Court held that the said Act did not apply to the premises in question. This was again a case where there was no evidence on record to show that the premises were requisitioned.

The next case is reported in AIR 1961 SC 1549, (*Collector of Customs, Baroda v. Digvijaysinhji Spinning and Weaving Mills Ltd., Jamnagar*). In that case the point was whether the Chief Customs Authority while acting under Section 190 of the Sea Customs Act had power to commute the order of confiscation to a penalty not exceeding the value of the goods confiscated. Under the said section, the Authority had power to pass such an order subject to the conditions laid down in that section viz. that it should have obtained the consent of the party whose goods were confiscated. It is with reference to these facts that the Court observed that "in a case

like this when the validity of an order depends upon the fulfilment of a condition, the party relying upon the presumption in favour of the regular performance of an official act, should at least show that the order on the face of it is regular and is in conformity with the provisions of the statute." The Court further observed that "if the order of the Chief Customs Authority *ex facie* does not show that it was made under Section 190 of the Act, nor any proof is offered to establish that fact by necessary evidence, then it must be held that it has not been established that the Chief Customs Authority made its order under Section 190 of the Act with the consent of the owner of goods ordered to be confiscated." (emphasis supplied)

This authority therefore holds that the order must at least *ex facie* show that it satisfies the condition for the exercise of the power.

20. A scrutiny of these authorities shows that the Tribunal appointed under a special Act has to satisfy itself that it has jurisdiction to pass orders. The Tribunal is not the sole Judge of the question whether the jurisdictional fact has been rightly or wrongly decided. If the decision is without evidence, perverse, contrary to facts or without application of mind, it can be corrected. However no authority has gone to the extent of saying that although the jurisdictional facts are established, the Tribunal can enquire into their validity or otherwise. We are therefore of the view that once the jurisdictional facts are established it is not open for such Tribunal to conduct a collateral enquiry into the validity or otherwise of the said facts. In a case such as the present one, once the authorities under the Act satisfy themselves that the premises are taken on lease by the Government, the Tribunal is not required to go into the question of the validity of the lease.

21. On behalf of the appellants, two authorities of this Court were cited to show that the lease must positively be established to have been taken by and on behalf of the Government and unless it is done it cannot be held that the Government is a tenant of the premises. The first is an unreported decision of the Division Bench consisting of Chainani, C. J. and K. K. Desai, J. in Spl. Civil Appln. No. 112 of 1962, (*State of Maharashtra v. J. S. Bagayatkari*) decided on 14-9-1962. In that case the facts were that the Commissioner of Police had taken the premises on lease sometime in 1939, and the flat was allotted to a Sub-Inspector of Police who was the opponent No. 1 in that case in

1950. On 2-11-1950, the Commissioner of Police wrote a letter to the landlord in which he stated that from 25th Sept. onwards the rent would be paid to the landlord directly by the opponent. Since then the rent was all along being paid by the opponent and receipts for payment of rent were also issued in the name of the opponent. After the opponent retired from service in 1964, he was asked to vacate the premises. He did not do so and therefore the Commissioner of Police made an application to the competent authority for an order under the Bombay Government Premises (Eviction) Act, 1955. The competent authority passed an eviction order against the opponent. In appeal, the Principal Judge, City Civil Court, came to the conclusion that the premises had not been leased by the State Government. It is in these circumstances that the question which arose before the Division Bench was whether the premises were leased by the Government. On facts, the Division Bench came to the conclusion that the letter which the Commissioner of Police wrote to the landlord in 1939 showed that the premises had been leased by the Commissioner in his own name. The receipts were issued by the landlord in the name of the Commissioner of Police and not in the name of the State Government. The Court therefore held that the lease in the case was taken by the Commissioner of Police in his own name and therefore it was difficult to hold that the premises had been leased by the State Government. We have pointed out that in our case, the leases have all along been taken for and on behalf of the Government of India.

The next unreported decision relied upon is of a learned single Judge, Chandurkar J. in Special Civil Application No. 665 of 1975, (*Dr. K. E. Sopariwalla v. M. K. Vaswani*) decided on 30-6-1976. It must be remembered at the outset that the Trustees viz. the landlords of the premises had filed a suit for ejectment against the Military Estate Officer, on the ground that it was the Military Estate Officer who was the lessee of the premises. The defence taken by the Military Estate Officer was that the premises were taken on lease by the Government of India and not by the Military Estate Officer and therefore the suit was bad in law. (emphasis supplied).

The trial Court held that the lease was through the Government of India and therefore notice under Section 80 of the Civil P. C. was necessary and since no such notice was given, the suit was not maintainable. The Appeal Bench of the Small Causes Court held that there was no compliance with the

provisions of Art. 299 (1) of the Constn. and hence there was no valid contract of lease between the Government of India and the landlord. The Court therefore came to the conclusion that there was no lease in favour of the Government of India. However, the Court held that the Military Estate Officer against whom the decree was sought was not a legal entity and therefore no decree could be passed in the suit. The Appeal Court therefore dismissed the plaintiffs' suit. It is aggrieved by this decision that the plaintiffs came in writ petition under Art. 227 of the Constn. before this Court and while dealing with this situation, the learned single Judge took the view that it was not established on behalf of the defendant who was resisting the suit that the premises were taken on lease by the Government and not by the Military Estate Officer. It is for this reason that this Court decreed the plaintiff's suit which was filed against the Military Estate Officer. Incidentally, it may be stated that while coming to this conclusion the learned single Judge had an occasion to refer to the 1963 reprint of the Regulations for the Military Engineer Services, 1936. The learned Judge after referring to these Regulations observed that it was not shown that the document of lease entered into by the Garrison Engineer in that case was on behalf of the Government of India or was in the exercise of any executive authority as contemplated by Section 175 (3) of the Government of India Act, 1935. We have already pointed out that in our case there is no lis between the parties to the contracts of lease. In fact, both the parties to the contracts of lease accept the fact that the leases have been executed for and on behalf of the Government of India. Secondly, we have also held that in our case the Garrison Engineer has been authorised to enter into the lease-contracts. The ratio of the said two decisions therefore will be clearly inapplicable to the facts of our case.

We therefore hold that even assuming the leases are defective for non-compliance with the provisions of Section 175 (3) of the Government of India Act, 1935 or of Art. 299 (1) of the Constn., it is not open for the appellants to challenge the said leases and the Estate Officer or the Appellate Authority under the Act cannot go into the question of the validity or otherwise of the leases. Once the factum of lease is established which has been done in the present case the authorities under the Act get jurisdiction to enquire under the Act.

22. Assuming we are wrong in our aforesaid conclusions, we are of the view that

there is no reason why the present premises should not fall within the expression "belonging to the Central Government" in the definition of "public premises" in S. 2 (e) of the said Act. There is no doubt that the expression "belonging to" does not mean the same thing as "owned by". The two expressions have two different connotations. The expression "belonging to" will take within its sweep not only ownership but also rights lesser than that of ownership. It must be remembered in this connection that the expressions used in the statute are to be interpreted and given meaning in the context in which they are used. The present Act has been placed on the statute book to give a summary remedy to the Government to evict persons in occupation of public premises to obviate the long ordeal of trial in a Civil Court and of further proceedings thereafter. Hence a wider meaning will have to be given to the expressions used in the Act for defining the concept of public premises. So viewed there is no reason why the premises of which possession for the time being vests in the Government and which are allotted by the Government to others while so in possession should not be held to be public premises.

In AIR 1965 SC 1923, (Mahomed Amir Ahmad Khan v. Municipal Board of Sitapur), the Supreme Court was called upon to consider the expression "belonging to me" used by the tenant in an application to the Compensation Officer under Act 26 of 1948 for the Rehabilitation of Refugees. While commenting upon this in para 14 of the judgment the Court observed as follows:—

"Now to revert to paragraphs 2, 5 and 8 which the learned Judges considered amounted to a clear and unequivocal denial of the Government's title, they referred in para 2 to the words 'belonging to me' as constituting a disclaimer of the tenancy and a repudiation of the landlord's title. We do not agree that this is the only or proper construction which the words are capable of bearing. Though the word "belonging" no doubt is capable of denoting an absolute title, is nevertheless not confined to connoting that sense. Even possession of an interest less than that of full ownership could be signified by that word. In Webster 'belong to' is explained as meaning *inter alia* 'to be owned by, be the possession of'. The precise sense which the word was meant to convey can therefore be gathered only by reading the document as a whole and adverting to the context in which it occurs."

In Stroud's Judicial Dictionary at page 269 the word "belonging" has been defined as follows :—

"Property 'belonging' to a person, has two general meanings, (1) ownership, (2) the absolute right of user: 'A road may be said, with perfect propriety to belong to a man who has the right to use it as of right, although the soil does not belong to him'."

Therefore where a person has an absolute right to user i.e. right of user even against the owner, it can be said that the property belongs to him. It must be remembered that the absolute right of user is distinct from the possessory title which a person has against the whole world except the true owner. In the present case, in the first instance there is no dispute between the landlord and the Government that the Government is the monthly tenant of the premises in question. Secondly, even under the Bombay Rent Act, by virtue of Section 4 (1) thereof, the Government's tenancy is protected. Therefore, it can legitimately be held that the Government has an absolute right of user of the premises in question. If this is so, then the premises can properly be said to "belong to" the Government. Since we have already observed that the expression "belonging to" does not merely include the right of ownership but also something less than that and since further the premises of which the absolute right of user vests in a person can be said to belong to him, the present premises will squarely be embraced by the definition of public premises within the meaning of the said Act.

We may usefully refer, in this connection, to two authorities. In (1950) 52 Bom LR 688 : (AIR 1951 Bom 205), (*Laxmipat Singhania v. Larsen & Toubro Ltd.*), the facts were that the plaintiff had filed a suit for eviction against the defendants who were a Company to whom a portion of the building was let out. The plaintiff's predecessor had taken on lease the land from the Port Trust for constructing the building. After constructing the building, he had let out a portion of the same to the defendants. The question was whether the building belonged to the Port Trust or to the plaintiff. If it belonged to the Port Trust the Rent Court had no jurisdiction in view of S. 4 (1) of the Bombay Rent Act. While holding that the building belonged to the plaintiff the Court observed as follows (at p. 209 of AIR) :—

"These decisions in my opinion establish that there may be in relation to property a dual ownership for a limited period of time;

and it would be possible to say in such cases that even a person who was not the absolute owner but had a right of ownership limited to that period was a person to whom the property belonged. No doubt these cases related to moveable property; but I do not conceive that the principle is any different when we are dealing with immoveable property. The tests as to whether for a limited period of time a temporary ownership has been created is according to the cases (1) whether there is a demise of the property, (2) whether there is full dominion and control over the property in the demisee and (3) whether the risk of the property falls on the demisee, or the absolute owner.

Applying these principles to the case of a lease of land together with the building for a limited period of time — particularly a period as long as 99 years — it appears to me that if the lease demises the land with the building and confers on the transferee full dominion and control over the property, the transferee taking the risk of the property, then, for that limited period, the lessee is the owner of the property and the property can be said to belong to him. Ownership is nothing more than a bundle of rights in relation to property. The aggregate of rights constitutes absolute ownership. It may be that during a stated period some of these rights are vested in one person and some in others. In the case of a lessor and a lessee such as we are considering, the lessee has the right of reversion which of course is not tangible immovable property, but an intangible thing. He has also a right of re-entry under the terms of the lease and he has further a right by covenant to claim the building upon termination of the lease or upon its determination in any other manner provided by the lease. With regard to all other rights in the property, these vest completely in the lessee for the limited period of time. It seems to be that it is the lessee who is under the circumstances the owner qua at any rate those to whom he has let or sublet such premises. It is consistent with dual ownership that qua the lessee it may be that the lessor is the owner of the property; and in any proceedings between the lessor and the lessee it would be possible to say that the premises belonged to the lessor and not to the lessee. That is not the case before me. The case here arises between the lessee and those to whom he has let the premises. I have no doubt in my mind that qua the defendants in these two suits the premises in suit belong to the plaintiff and to nobody

else so long as the lease is subsisting. That being so, those premises are not excluded from the operation of the Bombay Rents, Hotel and Lodging House Rates Control Act, and this Court has therefore no jurisdiction to entertain or try either of these suits."

In AIR 1977 Bom 220 (S. R. B. Kaikwad v. Union of India), what fell for consideration was the status of the Central Government as the lessee when the lease is determined and the Government becomes a statutory tenant under the Bombay Rent Act. While construing the meaning of public premises in this context, the Court observed as follows :—

"Even where the lease in favour of the Central Government is determined and the Central Govt. becomes a statutory tenant under the Bombay Rent Act, 1947 the premises do not cease to be public premises within the meaning of Section 2 (e). The Act is not so much concerned with the title as with the possessory rights vested in the Central Government and Section 2 (e) only indicates the sources by which such right to possession can be acquired, one such being, the taking of the premises on lease from its owner. The definition thus is descriptive of the source or origin of the possessory rights acquired by the Central Government. It is the continuance of the vesting of this possessory right in Government and not so much the origin thereof, that makes any premises, a public premises under the Act. The contract of lease, no doubt, gives rise to the estate and interest of the lessee in the property, bare right to possession being only a part of such estate and interest. The determination of the lease, no doubt puts an end to the contract and such interest and the estate. However, provisions of the Bombay Rent Act afford some protection to the tenants against eviction and prevents such determination of lease from having its full effect. In spite of the determination of the lease and incapacity of the tenant and the landlord to enforce the terms of the contract, the ex-tenant actually happens to enjoy still, what once was the fruit and the product of the same contractual lease. In other words, the entire interest covered by the possessory right created by the contract does not come to an end with the determination of the lease but part of it, at any rate, i.e., the bare right to remain in possession still survives and is protected by the Rent Act. The right to possession acquired by the Central Government under the lease on taking the same on lease, thus continues to exist and is protected, though the

lease interest and the estate comes to an end. The premises do not cease to have been "taken on lease" as the phraseology is merely descriptive of how the possessory right originated. The loss of contractual security, and the substitution thereof by the cover of the protection under the Rent Act does not affect, at any rate, the kernel, i.e. the possessory right which also was the creature of the contractual lease. It is difficult to see how the premises cease to be public premises when in spite of the determination of the lease, possessory right created thereunder continues to be vested in the Government."

The aforesaid observations reinforce the conclusion that where a person has an absolute right to user i.e. the right of user even against the owner, it can truly be said that the premises belong to such person though he is not the owner of the same. In the present case therefore, on the facts discussed earlier it can validly be held that the premises belong to the Central Government. Even assuming therefore that we are wrong in our conclusion that the premises are leased to the Central Government, the premises will be public premises within the meaning of the said Act and therefore the orders passed evicting the appellants are valid in law.

23. The Appellate Authority viz. the Principal Judge, City Civil Court, Bombay, has also held that by virtue of the possessory title of the Government, it can be said that the premises "belong to" the Government and therefore they are public premises. The nature of the possessory title as explained earlier is that a person in possession is entitled to remain in possession as against the whole world except the true owner. Even the owner cannot dispossess him except by due process of law. If this is so and if the present appellants have come into the premises under the cover of the possessory title of the Central Government, there is no reason why the phrase "belonging to" should not be construed to include such possessory title. We have our own doubts as to whether the phrase "belonging to" would include a mere possessory title. However it is not necessary for us to express any final opinion on the same either way. In the view that we have taken viz. that the premises are leased to the Central Government and in any case they belong to the Central Government on account of its absolute right of user of the same, according to us the appellants are liable to be evicted from the said premises. Although therefore we are unable to agree with the learned single Judge that an oral lease is a sufficient compliance with the pro-

visions either of S. 175 (3) of the Government of India Act, 1935 or of Art. 299 (1) of the Constitution, we are of the view that in the circumstances there is no substance in these appeals and they will have to be dismissed.

24. In the result, the appeals fail and are hereby dismissed with costs.

25. The appellants apply for leave to appeal to the Supreme Court. Leave is refused for according to us there is no substantial question of law of public importance involved in the case which requires to be determined by the Supreme Court.

26. The appellants are given time to vacate the premises in their occupation till 31st July, 1982.

Appeals dismissed.

AIR 1982 BOMBAY 467

FULL BENCH

M. N. CHANDURKAR, D. M. REGE AND
B. C. GADGIL, JJ.

M/s. Hirjee Veerjee and Co., Appellant v. Smt. Saroja Narayan Shetty and others, Respondents.

First Appeal No. 78 of 1974, D/- 15-4-1982.

Fatal Accidents Act (13 of 1855), Ss. 1-A, 2 — Determination of compensation — Mode of — Receipt of insurance amount — Not the whole of it but only the value of acceleration is to be excluded. 1972 Acc CJ 334 (Punj and Har), 1975 Acc CJ 56 (Delhi), AIR 1980 Him Pra 16 and AIR 1982 Delhi 1, Dissented from.

The principle to be followed in determining the pecuniary loss to the dependants of the deceased is that the actual extent of the pecuniary loss to the dependants has to be determined and this can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which, from whatever source, comes to them by reason of the death, that is, the balance of loss and gain to a dependant by the death must be ascertained. 1942 AC 601, 1951 AC 601, 105 Commonwealth LR 569 and AIR 1962 SC 1, Rel. on.

(Para 28)

The only benefit which has to be valued in terms of money, which accrues to the heirs in the case of a policy of insurance on the life of the deceased is the benefit of acceleration. Such benefit may fairly be taken to be represented by the interest on the life insurance moneys received for the period of acceleration which would be the difference

between the age up to which the deceased would normally be expected to have lived and the age at which he died as a result of the fatal accident. The rate of interest will, of course depend on the relevant facts in each case. Hence it could not be said that the entire amount of life insurance is liable to be deducted. (1888) 13 AC 800, (1942) AC 601, 1975 Acc CJ 396 (Delhi) and 1977 Acc CJ 72 (Kant), Rel. on.; AIR 1978 Bom 239, Explained, 1972 Acc CJ 334 (Punj and Har), 1975 Acc CJ 56 (Delhi), AIR 1980 Him Pra 16, AIR 1982 Delhi 1, Dissented from. (Para 37)

If the liability has to be determined by striking a balance between the pecuniary loss and the pecuniary benefit, then the mere fact that in a given case at the foot of such a balance-sheet the amount is zero or less than the insured amount, will not in any way affect the merits of the question as to whether the insurance amount, in law, is liable to be deducted in whole or in part at all.

(Para 40)

The nature of compensation which is made payable under the Fatal Accidents Act is not punitive. The damages are really of a compensatory nature and if in arriving at such compensation the necessary factors which have now been crystallised by the decisions have to be taken into account, then the mere fact that in a given case, the liability of the wrongdoer is reduced, will not be very relevant. (Para 41)

Cases Referred: Chronological Paras
AIR 1982 Delhi 1 37-A
AIR 1980 Him Pra 16 : 1980 Acc CJ 1

37-A
AIR 1978 Bom 239 1, 11, 12, 15, 16,
18, 19, 42

1977 Acc CJ 72 : (1976) 2 Kant LJ 372 38
AIR 1977 Raj 121 15

1975 Acc CJ 56 : 1975 Rajdhani LR 172
15, 37-A

1975 Acc CJ 396 : 1976 Rajdhani LR 52
38

AIR 1974 Madh Pra 181 15
AIR 1973 Guj 216 15, 37-A

1973 Acc CJ 319 (Orissa) 15
AIR 1973 Pat 129 15

1973 Acc CJ 414 : 75 Pun LR 715 (Punj and Har) 15

1972 Acc CJ 334 : ILR (1974) 1 Punj & Har 677 37-A

AIR 1971 SC 1624 15
1969 Acc CJ 286 : ILR (1969) Delhi 603

15, 16
(1969) 1 All ER 555 : 1969 Acc CJ 363 :
(1969) 2 WLR 821 (HL), Parry v. Cleaver

15, 21, 37-A
AIR 1962 SC 1 15, 19, 23, 28

1951 AC 601 : (1951) 2 All ER 448 : (1951) 2 TLR 137 (PC), Nance v. British Columbia Elect. : Railway Co. Ltd. 23, 28, 36
 (1951) 2 All ER 910 : (1951) 2 TLR 929 : (1952) 1 KB 26, Payne v. Railway Executive 24
 1942 AC 601 : 111 LJKB 418 : 167 LT 74 (HL), Davies v. Powell Duffryn Associated Collieries Ltd. 23, 26, 28, 35
 (1922) 1 KB 361 : 91 LJKB 392 : 126 LT 482, Baker v. Dalgleish Steam Shipping Co. 25
 (1888) 13 AC 800 : 58 LJPC 1 : 59 LT 679 (PC), Grand Trunk Railway Co. of Canada v. Jennings 15, 16, 30, 31, 34, 38
 (1874) LR 10 Exch 1 : (1874-80) All ER Rep 195 : 23 WR 48, Bradburn v. Great Western Rly Co. 11, 15, 20-A, 21, 24, 37-A
 (1863) 4 B & S 396 : 32 LJQB 377 : 122 ER 508, Pym v. Great Northern Ry. Co. 25, 35
 (1857) 4 B & S 403n : 122 ER 510, Hicks v. The Newport, Abergavenny and Hereford Ry. 30, 31, 34
 (1854) 15 CB 365 : 3 WR 116 : 139 ER 465, Dalby v. India and London Life Assurance Company 20-A
 (1818) 1 Murr 413, Forgie v. Henderson 21
 105 Commonwealth LR 569, National Insurance Company of New Zealand Ltd. v. Espagne 28
 Mahendra Shah with N. K. Pillai, for Appellant; S. T. Tijoriwala with A. P. Vaze, George Murian and G. A. Trivedi, for Respondents.

CHANDURKAR, J.— This appeal by defendant No. 1 against the judgment and decree of the Civil Judge, Senior Division, Thane, awarding compensation of Rupees 1,49,400/- under the Fatal Accidents Act, has been referred to the Full Bench by the Division Bench consisting of Dharmadhikari and S. J. Deshpande, JJ. as they felt that the decision of another Division Bench of this Court in Jaikumar v. Mary Jerome D'Souza, AIR 1978 Bom 239, in so far as it took the view that the amount received from Life Insurance Policy on the death of the deceased was liable to be deducted from the compensation to which the plaintiffs were entitled, required reconsideration.

2. Since the whole appeal has been referred to the Full Bench, it becomes necessary to briefly state the facts leading to the present appeal.

3. The original plaintiffs Nos. 1 to 5 are the legal representatives of deceased Narayan Shetty. Plaintiff No. 1 is the widow of deceased Narayan. Plaintiff No. 2, who was then a minor, is his son. Plaintiffs Nos. 3

and 4 are his daughters and plaintiff No. 5 is the mother of the deceased. It is not now in dispute that on 7th December, 1969 at about 10 a.m. when the deceased was driving his motor vehicle No. MRC 3011 and was proceeding from Thane on Agra Road towards Bhiwandi side, there was a collision with a motor lorry of the appellants which was driven by driver Damodar from the opposite direction. The motor car was heavily damaged. Narayan Shetty sustained serious injuries and he succumbed to these injuries on the same day at 1.30 p.m. in the Civil Hospital at Thane. Narayan Shetty was about 45 years of age at the time of his death. He had taken technical education in Germany in 1965 and in 1966 had started his own industry called Rubber Products Pvt. Ltd., of which he was a Managing Director and was drawing a salary of Rs. 2,500/- per month. In addition, he was earning commission on sales.

4. In the suit filed by the plaintiffs for compensation under the Fatal Accidents Act, the plaintiffs claimed Rs. 2,50,000/- as damages under different heads specified in Schedule A to the plaint, with which we are not concerned at this stage. Out of the amount of Rs. 2,50,000/-, the pecuniary loss to the estate of the deceased was estimated at Rs. 2,30,000/- and Rs. 20,000/- were claimed on account of pain and suffering prior to the death and shortening the expectation of life.

5. The defendants, namely, the present appellant and defendant No. 2 Messrs South India Insurance Co. Ltd. Bombay, contested the claim of the plaintiffs that the accident was a result of rash and negligent driving by the driver of the lorry of defendant No. 1 and their case was that the accident occurred due to the negligence of the deceased himself and the appellant company in fact claimed to be entitled to Rs. 5,199.41 as damages caused to their lorry by the car of the deceased. Defendant No. 2, the Insurance Company pleaded that it was not liable to pay anything to the plaintiffs in excess of Rs. 20,000/- which was the statutory limit.

6. On evidence given before the trial Court it was found that the defendant No. 1's driver Damodar had driven the lorry rashly and negligently and thereby he knocked the car which was driven by the deceased Narayan. The plea of contributory negligence of the deceased was negatived. While dealing with the question of determination of quantum of compensation, the trial Court found that if the deceased was alive, the net gain of the members of the family would have been

Rs. 1,000/- per month or Rs. 12,000/- per year. Holding that deceased Narayan would have led active earning life till 60 years and on the finding that the age of the deceased Narayan at the time of death was 45 years and that he was a healthy man with a robust constitution, the trial Court found that the deceased's family had lost the benefits of the financial contribution by the deceased for 15 years and the total loss was thus estimated at Rs. 1,80,000/-. In so far as the claim under Section 2 of the Fatal Accidents Act, 1855, was concerned, the trial Court took the view that the claim of Rs. 20,000/- was excessive, though the plaintiffs were entitled to be granted some amount under that head. Finding that deceased Narayan had died within two hours of the accident and was unconscious and had never regained consciousness, the trial Court granted Rs. 1,000/- as damages for pain and suffering of the deceased and Rs. 9,000/- for loss of expectancy of life. The total amount of compensation payable to the plaintiffs was thus computed at Rs. 1,90,000/-.

7. After the death of deceased Narayan, the company of which the deceased was the Managing Director had paid to plaintiff No. 1 a sum of Rs. 1,000/- per month for two years in pursuance of a resolution of the company which stated that the amount was being paid in consideration of meritorious services rendered and sacrifices made by deceased Narayan in building up the company and raising it to its unique position. Holding that the said amount of Rs. 24,000/- was received by plaintiff No. 1 because of death of Narayan Shetty and further holding that though the amount was in consideration of meritorious services, it would not have been paid but for the death of Narayan, the trial Court took the view that the amount of Rs. 24,000/- should be deducted from the amount of Rs. 1,90,000/-. Thus the amount of compensation payable to the plaintiffs came to Rs. 1,66,000/-.

8. A further deduction of 10% was made as the plaintiffs got the compensation amount in a lump sum. The amount of deduction came to Rs. 16,600/- and finally the plaintiffs were entitled to recover in lump sum Rupees 1,49,000/- as pecuniary loss caused to them by the death of Narayan. The defendant No. 1's claim for set off of Rs. 5,199.41 on account of damages caused to the lorry of defendant No. 1 was negated.

9. In so far as the liability of defendant No. 2 insurance company was concerned, it was held that the liability should be limited to Rs. 15,000/-.

10. The amount of damages was apportioned between the several plaintiffs as follows:—

Plaintiff No. 1 Smt. Saroja	Rs. 50,000/-
Plaintiff No. 2 Master Shantaram	Rs. 50,000/-
Plaintiff No. 3 Smt. Sarala	Rs. 15,000/-
Plaintiff No. 4 Smt. Savita	Rs. 15,000/-
Plaintiff No. 5 Smt. Kusu Lokayya Shetty	Rs. 19,400/-

Interest was awarded at 6% p.a. from the date of suit till recovery. The plaintiffs were granted proportionate costs of the suit on Rs. 1,49,000/-, subject to the limit that the costs to be recovered from defendant No. 2 should not exceed the costs on Rs. 15,000/-. This judgment and decree is now challenged only by defendant No. 1.

11. When the appeal came up for hearing before the Division Bench, the Division Bench confirmed the finding that the defendant No. 1's driver Damodar had driven the lorry rashly and negligently. With regard to the quantum of damages, it was contended on behalf of the appellant before the Division Bench that in view of the decision of the Division Bench of this Court in Jaikumar's case cited (AIR 1978 Bom 239) (supra), if the amount received by the widow of Narayan Shetty, the first plaintiff, from the Life Insurance policies was deducted, then no decree for compensation could be passed in the present case. The Division Bench found that the decision in Jaikumar's case supported the contention of the appellant. But, according to the Division Bench, that decision required reconsideration. The Division Bench took the view that there was a clear distinction between the benefit received on account of death and those that were merely payable on the death of a person. It was said that the former arose out of death and would not have been available without it, while the latter were benefits which were available independently of death but were payable on death. A passage from Munkman on Damages for Personal Injuries and Death, 6th Edition, page 77, was quoted extensively. We shall refer to this passage later. It is at this stage sufficient to point out that the passage quoted was under the heading "Accident insurance" wherein it was stated on the authority of the decision in Bradburn v. Great Western Rly. Co., (1874) LR 10 Exch 1, that money received under an accident insurance policy is not deducted or taken into account in any way in assessing damages for personal injuries. A passage from "The Quantum of

Damages" by Kemp and Kemp, Volume I, page 221, dealing with acceleration, in which the learned authors have stated that where a sum has been paid to a dependant solely by reason of death, the sum is to be taken into account, but if the payment or part thereof is likely to be made to some dependant at some future date, in any event, the dependant's benefit as a result of the death is not the whole amount of such payment but the value of the acceleration of that payment plus the certainty of its receipt, was also referred.

12. Before the Division Bench an application for leading additional evidence under O. 41, R. 27 of the Code of Civil Procedure was also filed by the respondents-plaintiffs in order to show that although the major portion of the amount received by the plaintiffs was under policies covered under Women's Property Act and became payable after the death of Narayan Shetty, it could not be said that the first plaintiff became entitled to receive the amount by reason of Narayan Shetty's death alone. The Division Bench, however, did not feel inclined to deal with the argument that the amounts covered by these policies could not be deducted having regard to the nature of the policies since the Division Bench felt inclined to refer the appeal to a larger Bench. One of the reasons which seems to have weighed with the Division Bench while making the reference was that in the present case, the total compensation awarded was less than Rs. 1,50,000/- and the widow-plaintiff No. 1 had received an amount of Rs. 1,50,000/- towards the insurance policies and, therefore, she would not be entitled to get a single pie as compensation. As a natural consequence, according to the Division Bench, even the insurance company would be absolved from its statutory liability under Ss. 95 and 96 of the Motor Vehicles Act. "This will have the startling results", said the Division Bench. Finally the Division Bench expressed a sentimental view that compensation payable under the Motor Vehicles Act or the Fatal Accidents Act was not full reimbursement for the life lost and that a precious life cannot be valued on the basis of artificial mathematical formula. The Division Bench felt that the benefit from the savings of a prudent man, meant for his benefit as well as for the benefit of his family under a contract, should not go to the tortfeasor or wrongdoer, who by his negligent act has caused the death of a person. Finally pointing out that the benefit under the insurance policy is available independently of death but is payable only on

death, the Division Bench found that the view taken by this Court in Jaikumar's case (AIR 1978 Bom 239) required reconsideration. That is how this appeal has now come up before this Full Bench.

13. The arguments before us both on behalf of the appellant and on behalf of the respondents have mainly been restricted, and in our opinion rightly so, to the question as to whether the amount of insurance policy taken out by the deceased and payable on his death is liable to be deducted either wholly or partially from the amount of compensation which is payable to the legal representatives of the deceased in a claim under the Fatal Accidents Act.

14. It may be mentioned that the present appeal arises out of a suit filed in a Civil Court to enforce a claim for compensation specifically made under Ss. 1-A and 2 of the Fatal Accidents Act, 1855. Therefore, though at one stage the learned counsel for the claimants also wanted to canvass before us the scope of the provision relating to compensation payable under S. 110B of the Motor Vehicles Act, 1939, and as to the scope of the words "the amount of compensation which appears to it to be just", we have declined to hear the learned counsel for the plaintiffs on that aspect as such a controversy was not relevant for the purpose of deciding the appeal before us.

15. Since the correctness of the view taken by the Division Bench in Jaikumar's case (AIR 1978 Bom 239) was doubted by the Division Bench which made the reference, it would be available at the outset to analyse that decision and ascertain what was the view of the Division Bench in so far as the deductibility of the amount of insurance in respect of policies taken out by the deceased payable on his death and in fact received by his legal representatives was concerned. It is, therefore necessary to deal with that decision in some detail. The Division Bench was dealing with an appeal against a judgment of the Motor Accidents Claims Tribunal for Greater Bombay, by which the Tribunal had awarded a sum of Rs. 40,000/- with interest at 6% p.a. from the date of the claim by way of compensation to the widow and two sons of the deceased Jerome D'Souza. The deceased was at the material time a taxi driver and was knocked down by a car belonging to the respondent resulting in his instantaneous death. The owners of the car did not contest the claim and the claim was contested only by the insurance company after securing permission under Section 110-C

of the Motor Vehicles Act. The Division Bench quoted the principles laid down by the Supreme Court in *Gobald Motor Services Ltd. v. R. M. K. Veluswami*, AIR 1962 SC 1 (at p. 6), as follows:—

“Only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever source comes to them by reason of the death, that is, the balance of loss and gain to a dependant by the death must be ascertained.....”

With regard to the manner in which these principles have to be worked out the Division Bench observed as follows (at p. 241 of AIR 1978 Bom):—

“To work this out, one has to find out amongst other things (1) the net annual income of the deceased earned by dint of his labour, manual or of head and heart, (2) as to how much out of it was spent by him for himself and how much for his dependants, which is otherwise referred as their “dependancy”, (3) as to how long each dependant would have been required to depend on the same, widow being assumed to be so required during her whole of lifetime in the absence of any evidence to the contrary, and (4) how long the deceased could have supported, each one of them, depending on the estimate of expectancy of his future span of life. The age of the deceased on the date of the accident, his health and estimate of the years during which he would continue to earn, also are equally important and relevant factors.”

After referring to the decision of the Supreme Court in *Sheikhupura Transport Co. Ltd. v. N. I. T. Insurance Co.*, AIR 1971 SC 1624, the Division Bench pointed out that even for determination of compensation under Section 110-B of the Motor Vehicles Act, essential principles of the decided cases under the Fatal Accidents Act still hold the field and pecuniary benefits coming to the claimants by reason of the death of the deceased are still liable to be balanced against the claimants' pecuniary losses. The Division Bench then went on to consider the question as to what were the claimants' pecuniary losses and whether there were any pecuniary benefits coming to the claimants by reason of the death of the deceased. Holding that the dependants of the deceased were receiving net amount of Rs. 200/- per month and taking the average longitude at 65 and the fact that the deceased was 42 years of age at the time of the accident, the life expectancy was fixed at 23 years and the compensation on this data by recourse to the accepted formula was

computed at Rs. $200 \times 12 \times 23$ — Rupees 55,200/-. The widow in that case had received Rs. 15,000/- towards the life insurance policy and the contention on behalf of the defendant was that this amount of Rupees 15,000/- was liable to be deducted from the amount of Rs. 55,200/-, being a pecuniary advantage received by the claimants by reason of death in terms of the ratio of *Gobald Motor's case* (AIR 1962 SC 1). The Division Bench noticed the fact that judicial opinion was sharply divided on the question whether the life policy amount could be said to have come to the claimants by reason of the death of the deceased to justify its deduction from the amount of compensation payable to the claimants towards their pecuniary loss. Decisions cited before the Division Bench in support of the view that insurance policy amount cannot be said to have come to the claimants by reason of death of the deceased and, therefore, is not deductible from the compensation were: (1) *L. I. C. of India v. Kasturben Naranbhai*, AIR 1973 Guj 216: 1973 Acc CJ 226; (2) *Sood and Co. v. Surjit Kaur*, 1973 Acc CJ 414 (Punj & Har); (3) *Bhagwanti Devi v. Ish Kumar*, 1975 Acc CJ 56 (Delhi). The judgments taking the opposite view relied upon by the defendants were: (1) *Union of India v. S. Ghosh*, AIR 1973 Pat 129; (2) *Sushila Devi v. Ibrahim*, AIR 1974 Madh Pra 181; (3) *Sabita Pati v. Rameshwar Singh*, 1973 Acc CJ 319 (Orissa); and (4) *Automobiles Transport v. Dewalal*, AIR 1977 Raj 121. The Division Bench took the view that receipt of insurance amounts amounted to pecuniary advantage, but the genuine question was whether this could be said to be a pecuniary advantage that comes to the claimants by reason of the death of the deceased. Observing that reading of the decided cases went to show how this very question can arise under variety of circumstances giving rise to different considerations pregnant with equally different legal implication and that it was by no means easy to lay down any inflexible rule as to which pecuniary benefit can be said to have been received “by reason of the death”, the Division Bench said (at p. 243 of AIR 1978 Bom):—

“It is pertinent to note that in the absence of any provision to the contrary such policy amounts form part of the estate of the deceased and come to his heirs or dependants by way of inheritance, unless it is sought to be disposed of by the deceased otherwise. Nominee mentioned therein is not necessarily the beneficiary but invariably happens to be merely an authorised collector thereof for the benefit of all heirs. We are unable to see

any difference between this amount, and any other income yielding estate, that comes to the dependants either by way of inheritance or pursuant to any will or settlement. The causal connection between receipt of such amounts, and death is too apparent and both really stand on the same footing legally."

The Division Bench distinguished the nature of the payment received by way of donations by the charitable trusts or provisions for such dependants by some public-spirited institutions or gifts or contributions by relatives or sympathisers as they stood on different footing and could never be treated as advantages or benefits having been received by reason of the death of the bread winner, though the death may furnish an occasion for such receipts. It was then observed as follows (at p. 243 of AIR 1978 Bom):—

"We are ourselves unable to see how and why the policy amount or other amounts from income yielding assets, such as bank balances, or interests thereon, or on fixed deposits, or dividends from shares and securities, left or settled by the deceased on the dependants, cannot be said to have come to the claimants by 'reason of the death' of the deceased and why it should not be balanced against the pecuniary losses caused by the death of the bread winner in terms of Gobald Motor's case (AIR 1962 SC 1) (supra)."

The Division Bench thus took the view that insurance amounts received by the legal representatives of the deceased stand on the same footing as other estate left behind by the deceased and justification for this view was found in the observations of the Supreme Court in Gobald Motor's case in which the Supreme Court had laid down that the source of the pecuniary advantage received by the legal representatives was irrelevant. The Division Bench disagreed with the view taken by the High Courts of Gujarat, Punjab and Haryana and Delhi which have treated the receipt of insurance amounts as collateral benefit coming to the dependants not so much by reason of death of the deceased as by reason of the contract that the deceased had entered into with the Life Insurance Company and according to the Division Bench, this view was open to grave doubt. The Division Bench noticed the fact that this view was based on the decisions in Bradburn's case (1874 LR 10 Exch 1) and in the case of Parry v. Cleaver, (1969) 1 All ER 555 (HL), which were cases of compensation for personal injury. According to the Division Bench, insurance amount received from the insurance company in the case of personal injury stood on a different footing from the life policy

amounts payable to the dependants of insured on the death of the insured and principles governing awards of damages in these two events cannot be identical. The Division Bench then considered in para 13 a decision of the Delhi High Court and the Orissa High Court where, according to the Division Bench, justification was found for deducting some portion of such policy amounts and the Division Bench found that the claimants could have the benefit of policy amounts even if the deceased had died otherwise than in the accident or would have shared the benefit thereof had the policy matured during his lifetime and death in fatal accidents only accelerates its receipt by the dependants, according to this view, and interest chargeable for the estimated accelerated years alone represents the deductible portion of such benefit. The Division Bench expressly referred to the decision of the Delhi High Court in Amarjit Kaur v. Vanguard Insurance Co. Ltd., 1969 Acc CJ 286, in which Deshpande, J. of the Delhi High Court drew support for his view from the decision in Grand Trunk Railway Co. of Canada v. Jennings, (1888) 13 AC 800. It is necessary to reproduce a little extensively the observations of the Division Bench in para 14 which, it appears to us, indicate that the principle of acceleration seems to have been accepted by the Division Bench. In para 14 the Division Bench observed as follows (at p. 245 of AIR 1978 Bom):—

"It is true that liquid assets possessed and owned by the deceased in certain cases are open to the enjoyment of all such dependants during lifetime of the deceased and they can claim certainty of inheriting or receiving it otherwise in the ordinary course. Accidental death in such cases can be said to have only accelerated the process of their ownership. Pecuniary benefit to the dependants is bound to be far lesser than in cases where such certainty of enjoyment, actual receipt, in any manner whatsoever, is absent or slender.

Cases of the former type are bound to be far and few. The amount of the life policy standing in the name of the deceased is exposed to more uncertainties in majority of the cases, there being no guarantee even of continuation thereof."

(Underlining ours.)

The observations quoted above and those underlined by us would thus indicate that in case of receipt of insurance amount, the Division Bench recognised the fact that the benefit received by the claimants on the death of the deceased is merely acceleration and

that in such cases, the pecuniary benefit is bound to be far less than in cases where there was no such expectation or certainty of enjoyment at all. In the same paragraph the Division Bench referred to the decision of the Privy Council in Jennings' case cited (1888-13 AC 800) (*supra*), in which the deceased had subscribed to the policy expressly for the benefit of the wife and the wife was bound to receive the benefits thereof irrespective of death of the husband and of the accident. But the Division Bench took the view that this could not be true of all policies which would indicate that at least in certain kinds of policies the Division Bench was inclined to take the view that when insurance amount is received on death, the only benefit arising as a result of death of the deceased was in the nature of accelerated succession. Having thus dealt with the decisions which take the view that death merely accelerates the receipt of the insurance amount by the dependants, the Division Bench seems to have found that so far as the case before it was concerned, this was not material and on the facts of that case, the entire policy amount would have to be deducted. This would be clear from para 15 of the judgment which reads as follows :—

"Had the deceased not met with accident, policy amount would have gone to the husband on maturity, and there was no guarantee that the amount would have been spent for the benefits of the dependants, alone in this case. Deceased is not shown to have been possessed of other property. Instability and insecurity to which a driver's life is exposed, introduces high degree of uncertainty of the dependants having been ever benefited." The net result of the decision of the Division Bench was that the entire amount of insurance received by the widow of the deceased came to be deducted as a pecuniary benefit arising from death from the compensation to which the widow of the deceased was found to be entitled.

16. The decision in Jaikumar's case (AIR 1978 Bom 239) cannot, however, be read as laying down the law that in each case, the entire amount of insurance must be deducted as a matter of course because the Division Bench had clearly approved of the principle of acceleration in para 14 of the judgment. Indeed the observations in para 14 indicate to the contrary because the Division Bench having referred to the facts of the Privy Council decision in Jennings' case (1888-13 AC 800) has clearly stated that the ratio of Jennings' case cannot be applicable to all the policies and "No inflexible rule, therefore,

can be laid down in this behalf as is suggested by the Delhi High Court". It may be pointed out that in Amarjit Kaur's case (1969 Acc CJ 286), to which reference was made by the Division Bench in Jaikumar's case in para 14, the Delhi High Court in para 15 had taken the view that "The best way to estimate the benefit of acceleration is to calculate the 'Interest on the money during the period of acceleration' as observed by Lord Watson at page 805 of the Grand Trunk Railway Company's case (Jenning's case). ((1888) 13 AC 800)". With respect, therefore, it is necessary to point out that if the Division Bench, which made this reference, has understood the decision in Jaikumar's case as laying down a principle that in all cases the insurance amount received by the claimants in respect of policies taken out by the deceased should be deducted from the compensation to which the claimants are found entitled, that would not be the correct reading of the decision in Jaikumar's case. As a matter of fact though the passage from "The Quantum of Damages" by Kemp and Kemp dealing with acceleration has been quoted in the reference order, it appears that before the Division Bench, which made the reference, the argument that the value of the accelerated benefit alone should be deducted does not seem to have been advanced.

17. As a matter of fact if the reference would have been restricted merely to the question as to whether in a case where the claimants are in receipt of amount of insurance in respect of the life policies taken out by the deceased, the entire amount was liable to be deducted or only the value of the acceleration of the benefit should be deducted, we would not have been required to deal with the matter further. However, the entire appeal has been referred to us and it, therefore, becomes necessary to deal with the contentions advanced both on behalf of the appellants and the respondents which have essentially turned again on the question, namely, whether any insurance amount received by plaintiff No 1 was liable to be deducted.

18. Since the reference appeared to have been made at the instance of the claimants, the arguments were opened by Mr. Tijoriwala appearing for them and once again the same argument was advanced before us, as was advanced before the Division Bench in Jaikumars case (AIR 1978 Bom 239). Mr. Tijoriwala has argued that since the insurance amount has been received by plaintiff No. 1 because of a contract between the deceased and the insurance company, the payment

cannot be said to arise out of the death of the deceased and, therefore, no amount is liable to be deducted from the amount of compensation and the further argument advanced is that permitting the insurance amount to be deducted out of the compensation amount would mean that the tortfeasor would get the benefit of the premium which is paid by the deceased. As a matter of fact both the arguments are founded on the views which have been taken in the decisions relied upon on behalf of the claimants in Jaikumar's case.

19. According to Mr. Shah appearing on behalf of the appellants, if the mode of determination of compensation is to make out a balance-sheet between the pecuniary loss and the pecuniary benefit, then the receipt of insurance amount is clearly a benefit and the entire amount of insurance was, therefore, liable to be deducted. The learned counsel contended that the view taken by the Division Bench in Jaikumars case (AIR 1978 Bom 239) is a view which is in accord with the decision in Gobald Motor's case (AIR 1962 SC 1) and, therefore, there was no need to reconsider that decision. This argument was obviously founded on the footing that Jaikumar's case decides as a principle of law that in each case the value of the insurance amount was liable to be deducted from the amount of compensation to which the claimants are found entitled.

20. In the case before us, we are concerned only with the moneys received from insurance policies on the life of the deceased because the case has proceeded on that footing in view of the admission of plaintiff No. 3 that "My father had taken several insurance policies on his life". We shall later refer to the decisions on which reliance has been placed by Mr. Tijoriwala, but it does not require much argument to see that when it is contended that the insurance amount is received by the heirs of the deceased as a result of the contract with the insurance company, the argument is obviously based on certain decisions of Courts in England where it has always been the common law that in the case of computation of damages for personal injury, the amount of insurance received by the injured person should not be deducted. It is that principle which is now sought to be extended even in the case where the damages are claimed not by the deceased himself but by the heirs of the deceased in exercise of a right which is newly conferred under the Fatal Accidents Act. In so far as the position in English law is concerned, till a statutory provision was made in 1908 for

the first time, insurance moneys received by the claimants on policies taken out by the deceased were always deducted from the amount of compensation.

20-A. The basis of the proposition that in the case of personal injuries, moneys received on account of accident insurance should not be deducted from the amount of compensation claimed is the decision in *Bradburn v. Great Western Railway Co.*, (1874) LR 10 Exch 1, in which it was held that in an action for injuries caused by defendant's negligence, a sum received by the plaintiff on an accidental insurance policy cannot be taken into account in deduction of damages. Two passages from the judgment in *Bradburn's* case contain the ratio of that case. In that case *Bramwell B.* said :—

"In *Dalby v. India and London Life Assurance Company*, (1854) 15 CB 365, it was decided that one who pays premium for the purpose of insuring himself, pays on the footing that his right to be compensated when the event insured against happens is an equivalent for the premiums he has paid; it is a quid pro quo, larger if he gets it, on the chance that he will never get it at all. That decision is an authority bearing on the present case, for the principle laid down in it applies, and shows that the plaintiff is entitled to retain the benefit which he has paid for in addition to the damages which he recovers on account of the defendants' negligence."

In the same case, *Pigott B.* said :—

"The plaintiff is entitled to recover the damages caused to him by the negligence of the defendants, and there is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident happening to him. He does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency; an accident must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it."

It may be pointed out at this stage that a reading of some of the decisions of English Courts, which have been relied upon on behalf of the plaintiffs before us, shows that the English Courts have laid down a principle that in the case of personal injury, the insurance amount is a quid pro quo for the premium paid in the case of insurance for personal injury. It is on the basis of that principle that an argument has been advanced

ed in India that in the case of a claim for compensation under the Fatal Accidents Act, insurance amount should not be deducted from the amount of compensation.

21. The decision in Bradburn's case (1874 LR 10 Exch 1), in so far as the non-deductibility of accident insurance from the damages claimed for personal injury is concerned, has stood in the field even now and has been expressly approved by the House of Lords in Parry v. Cleaver, (1969) 1 All ER 555: 1969 Acc CJ 363. Pointing out the real reason as to why such amounts are excluded from deduction in the case of a personal injury, Lord Reid in para 7 of the judgment observed as follows:—

"As regards moneys coming to the plaintiff under a contract of insurance, I think that the real and substantial reason for disregarding them is that the plaintiff has bought them and that it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the benefit of the tort-feasor. Here again I think that the explanation that this is too remote is artificial and unreal. Why should the plaintiff be left worse off than if he had never insured? In that case he would have got the benefit of the premium money; if he had not spent it he would have had it in his possession at the time of the accident grossed up at compound interest. I need not quote from the well known case of Bradburn v. Great Western Rly. Co., (1874) LR 10 Exch 1: (1874-80) All ER Rep 195, but I may refer to an old Scottish case, Forgie v. Henderson, (1818) 1 Murr 413 (418), where the pursuer was assaulted by the defender. During part of his resulting illness he received an allowance from a friendly society, and Lord Chief Commissioner Adam said in charging the jury:

"I do not think you can deduct the allowance from the Society, as that is of the nature of an insurance, and is a return of money paid."

22. The question which, therefore, requires to be determined is whether a similar position must obtain in so far as claims by heirs of the deceased for compensation under the Fatal Accidents Act, 1855, is concerned.

23. The Fatal Accidents Act of 1855 is in substance a reproduction of the English Fatal Accidents Acts 9 and 10 Vict., Ch. 93, known as Lord Campbell's Acts and the scope of the provisions corresponding to Section 1-A of the Fatal Accidents Act in the English Fatal Accidents Act has been discussed by the House of Lords in Davies

v. Powell Duffryn Associated Collieries Ltd., 1942 AC 601, and by the Privy Council in the decision in Nance v. British Columbia Electric Railway Co. Ltd., 1951 AC 601, which has been accepted by the Supreme Court in Gobald Motors' case (AIR 1962 SC 1) to be laying down the correct principle for determining the questions relating to determination of compensation under the Fatal Accidents Act. As we have already pointed out, though insurance amount received by the insured in pursuance of a contract of insurance for personal injury was not deducted while determining claims for compensation for personal injury, when a question as to the compensation payable in respect of a fatal accident for death of the deceased victim of an accident arose, under the common law, insurance moneys received by the heirs were always deducted from the amount of compensation till a statutory provision to the contrary was made for the first time in 1908. The reason for this lies in the fact that the basis of the two claims, that is, claim for damages for personal injury and claim for compensation under the Fatal Accidents Act is wholly different. A claim for damages for personal injury is a claim for damages in tort under the common law. Under the common law there was no right in the heirs of the deceased victim of a fatal accident to claim any compensation till for the first time such right was created in them by the Fatal Accidents Act. The right of the heirs of the victim of a fatal accident to claim compensation is, therefore, a statutory right and the claim for such compensation has to be determined in accordance with the relevant statutory provisions. The relevant statutory provision dealing with the power of the Court to give damages is contained in the third part of Sec. 1-A of the Fatal Accidents Act, 1855, which reads as follows:—

"and in every such action, the Court may give such damages as it may think proportionate to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, or any of them, in such shares as the Court by its judgment or decree shall direct."

It will suffice for the present to state that the measure of damages is the loss resulting from the death of the deceased and certain principles have now been evolved and well

established as to how the loss resulting from the death of the deceased has to be estimated.

24. The difference in the nature of the two claims, that is, damages for personal injury and compensation under the Fatal Accidents Act is highlighted in the following observation of Singleton, L. J., from the judgment of the Court of Appeal in *Payne v. Railway Executive*, (1951) 2 All ER 910 at page 914, where after reproducing the classic observations of Bramwell, B., and Pigott, B., in *Bradburn's case* (1874 LR 10 Exch 1) (cited supra), it was observed as follows:—

"Under the Fatal Accidents Act, 1846 the damages awarded represent the pecuniary loss to the widow or dependants arising from the death of the deceased. In an action for damages for personal injuries different considerations arise, as Bramwell, B., pointed out. In such a case the damages assessed cover pain and suffering, loss of amenities of life, and loss of earnings, past and prospective."

25. We may refer to the decision of the Court of Appeal in *Baker v. Dalglish Steam Shipping Co.*, (1922) 1 KB 361, in which dealing with the nature of the right created under the Fatal Accidents Act known as Lord Campbell's Act, the learned Judge observed as follows at page 371:—

"The claim is a new right given by Lord Campbell's Act on new principles, not the transfer of any existing right of the dead man. The claimant is entitled to damages proportioned to the injury resulting to her from the death, and that injury must be pecuniary injury. She is not entitled to money compensation for mental suffering resulting from the death or for loss of the deceased's society. She is entitled to claim on the one hand any pecuniary benefit which it is reasonably probable she would have received if the deceased had remained alive; per Erle, C. J. in *Pym v. Great Northern Ry. Co.*, (1863) 4 B & S 396."

In the same case, Younger, L. J., dealing with the nature of the loss for which the compensation is to be computed pointed out that the right to recover damages is restricted to the actual pecuniary loss sustained by each individual and said at page 381:—

"If that same accident and death has produced from some other quarter a sum which would not otherwise have been received, the recoverable pecuniary loss is pro tanto reduced, and with it the wrongdoer's liability to that extent."

26. The legal position with regard to deduction of collateral benefits such as

amounts paid in pursuance of a policy of insurance while determining compensation has been succinctly stated in *McGregor on Damages*, 13th Edn., para 1237, where the learned author observes as follows:—

"The path taken by the collateral benefits issue in fatal accident claims has been curiously different from the path it has followed in the field of personal injury. Whereas there was for long general acceptance of the rule that the damages in a personal injury claim were not to be reduced because benefits had been conferred upon the plaintiff by third parties which mitigated his loss, the general rule was the exact opposite where the claim was in respect of a fatal injury, and it became accepted, without any real dispute, that only the net pecuniary benefit accruing to the dependants is recoverable as damages. This undoubted general rule finds its clearest and most authoritative expression in the speeches of their Lordships in *Davies v. Powell Duffryn Collieries*, 1942 AC 601. Lord Macmillan put it thus: 'Except where there is express statutory direction to the contrary, the damages to be awarded to a dependant of a deceased person under the Fatal Accidents Acts must take into account any pecuniary benefit accruing to that dependant in consequence of the death of the deceased. It is the net loss on balance which constitutes the measure of damages.'"

The learned author points out that serious inroads were made by statute upon this rule of deduction of collateral benefits and referring to these inroads he observes:

"The first statutory inroad came with the Fatal Accidents (Damages) Act, 1908, which provided by Sec. 1 that, in assessing the damages, insurance moneys should no longer be taken into account. Next followed, by Section 22 of the Widows', Orphans' and Old Age Contributory Pensions Act, 1929, a provision that such pensions were not to be taken into account, and this was later replaced by the larger provisions of the Law Reform (Personal Injuries) Act 1948, which added to the items not to be taken into account any right to benefit under the National Insurance Act 1946."

After the enactment of the Fatal Accidents Act, 1959, the net result was that in England, in view of the provisions of Section 2 of the 1959 Act, in assessing the damages, any insurance moneys, benefits under the National Insurance Acts, pension or gratuity paid or to be paid as a result of the death were not to be taken into account.

27. Thus having regard to the basic difference in the nature of the claim for damages

in the case of personal injury and claim for compensation in the case of a fatal accident made under the statute, namely, the Fatal Accidents Act, it would be difficult to accept the argument that because in cases of damages for personal injury, the accident insurance is treated as *quid pro quo*, and, therefore, was not deducted from the compensation for personal injury, the entire amount of life insurance must also be excluded from computation of compensation claimed under the Fatal Accidents Act.

28. Here we must refer to the well established principles on which compensation in such cases is to be determined. It is not necessary to go back to the English decisions, namely, the decision of the House of Lords in *Davies v. Powell Duffryn Associated Collieries Ltd.*, 1942 AC 601, and to the decision of the Judicial Committee in *Nance v. British Columbia Electric Railway Co. Ltd.*, 1951 AC 601, in detail because the Supreme Court in *Gobald Motors case* (AIR 1962 SC 1) has adopted these principles laid down in those decisions. The principle is that in calculating the pecuniary loss to the dependants, the actual extent of the pecuniary loss to the dependants has to be determined and this can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which, from whatever source, comes to them by reason of the death, that is, the balance of loss and gain to a dependant by the death must be ascertained. The Supreme Court reproduced the following passage from the decision of Viscount Simon in *Nance v. British Columbia Electric Railway Co. Ltd.*, which referred to the two heads of damages. The passage reads as follows (at p. 5 of AIR 1962 SC) :—

"The claim for damages in the present case falls under two separate heads. First, if the deceased had not been killed, but had eked out the full span of life to which in the absence of the accident he could reasonably have looked forward, what sums during that period would be probably have applied out of his income to the maintenance of his wife and family?"

Then summarising the decision of Viscount Simon as to the mode of estimating the damages under the first head, the Supreme Court observed as follows (at p. 5 of AIR 1962 SC) :—

"Viscount Simon then proceeded to lay down the mode of estimating the damages under the first head. According to him, at first the deceased man's expectation of life has to be estimated having regard to his age,

bodily health and the possibility of premature determination of his life by later accidents; secondly, the amount required for the future provision of his wife shall be estimated having regard to the amounts he used to spend on her during his lifetime, and other circumstances; thirdly, the estimated annual sum is multiplied by the number of years of the man's estimated span of life, and the said amount must be discounted so as to arrive at the equivalent in the form of a lump sum payable on his death; fourthly, further deductions must be made for the benefit accruing to the widow from the acceleration of her interest in his estate; and fifthly, further amounts have to be deducted for the possibility of the wife dying earlier if the husband had lived the full span of life; and it should also be taken into account that there is the possibility of the widow remarrying much to the improvement of her financial position. It would be seen from the said mode of estimation that many imponderables enter into the calculation. Therefore, the actual extent of the pecuniary loss to the respondents may depend upon data which cannot be ascertained accurately, but must necessarily be an estimate, or even partly a conjecture. Shortly stated, the general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever source comes to them by reason of the death, that is, the balance of loss and gain to a dependant by the death must be ascertained."

These are then the principles and ineffect a computation, according to these principles, must bring into being what in substance is, as *Windeyer J. of the High Court of Australia in National Insurance Company of New Zealand Ltd. v. Espagne*, 105 Common Wealth LR 569, calls, a balance sheet. We are in the present case concerned with the deduction under category 'fourthly' in the above quoted principles laid down by the Supreme Court, as we shall presently point out.

29. Now, if the true requirement of the mode of estimating damages is to find out the pecuniary advantage from whatever source it comes to the heirs by reason of the death, the question is, can the life insurance amount be said to be such a pecuniary advantage that the whole of it must be deducted from the amount of compensation or does the pecuniary benefit lie merely in the fact that there is an acceleration in getting the benefit of the amount of insurance which on the death of

the deceased becomes a part of the estate of the deceased. Now, if the deceased had lived his full length of life, the policies would have matured, they would have become a part of his estate and, as it appears from the facts of the present case, the deceased was a well to do man having a large amount of insurance, a large business and property, the possibility of the insurance amount being frittered away or spent away for maintenance would almost be negligible. It would, therefore, be reasonable to assume that if the deceased had lived a full span of life, the insurance amount would have become a part of his estate to which in normal course the present plaintiffs would have succeeded as heirs of the deceased after his natural death. The insurance amount as a part of his estate would have sooner or later come to them by inheritance. All that happens on the unnatural or accidental death of the deceased is that the pecuniary benefit in the form of insurance amount which would have come to the heirs by inheritance as a part of the estate of the deceased after the natural death of the deceased now comes to them much earlier in point of time, though as a result of the unfortunate circumstance of the death of the deceased. Properly looked at, therefore, the benefit to the claimants truly lies only in the fact of acceleration in the succession to the estate of deceased including the insurance amount and not in the fact that the entire estate has come to them, which in any case would have come by way of inheritance.

30. The manner in which life insurance amount should be taken into account in cases where the heirs of the deceased have received the insurance amount in respect of a policy of life insurance taken out by the deceased has been the subject of decisions by Courts and it now seems to have been well established at least for over a century that in the case of life insurance amount, the benefit to heirs lies only in the acceleration of insurance moneys and only the value of such acceleration has to be taken into account. The value of such benefit cannot be the entire amount of insurance received by the heirs. We may once again refer to McGregor on Damages, 13th edition, where the law has been summarised in paragraph 1248. Referring to the law in England prior to the intervention of the statute which made insurance moneys wholly excludible from deduction, the learned author has observed as follows:—

“However, the earlier law assists the conclusion that no account should be taken of the cesser of premiums in assessing the damages.

In *Hicks v. The Newport, Abergavenny and Hereford Ry.*, (1857) 4 B & S. 403n, and *Grand Trunk Ry. of Canada v. Jennings*, (1888) 13 AC 800 (PC) the nineteenth century decisions which established that at common law the acceleration of the insurance moneys must be taken into account in assessing the damages, it was suggested that the benefit of the acceleration of the insurance moneys might be arrived at by deducting future premiums. The future premiums were however not to be deducted *qua* premiums; they merely provided one method of calculating the benefit of the acceleration, and statute now requires that this benefit is not to be taken into account. Further, the saving of the future premiums is not a saving which necessarily follows from the death, since the deceased might not have continued to maintain the insurance policy.”

31. On the basis of the *Hicks*’ case ((1857) 4 B & S 403n) and the *Jennings*’ case (1888-13 AC 800) (PC), Munkman in his treatise on Damages for Personal Injuries and Death, Sixth edition, at page 130 has observed as follows:—

“A deduction must certainly be made for benefits which would not have arisen at all but for the death, such as accident policies (until the law was amended to prohibit a deduction): *Hicks v. Newport, Abergavenny and Hereford Ry. Co.*, (1857) 4 B & S 403n. But even in the case of an insurance policy, there was no obligation to deduct the exact sum, pound for pound: if it was a life policy, as distinct from an accident policy, the benefit to be taken into account was the acceleration of the payment of the policy, rather than its full value: *Grand Trunk Ry Co. of Canada v. Jennings*, (1888) 13 AC 800 (PC). After 1908, deductions for insurance were forbidden by statute.”

32. We may at this stage point out that the passage in Munkman’s treatise, which is quoted by the Division Bench which made the reference, was under the heading “Accident Insurance” and dealt with damages for personal injuries and was not, therefore, very relevant in so far as cases under the Fatal Accidents Act are concerned.

33. The same position is reiterated by Kemp and Kemp in “The Quantum of Damages” in the paragraph which we have reproduced earlier.

34. *Jennings*’ case (1888-13 AC 800) (PC) is, in our view, clearly an authority for the proposition that in the case of receipt of insurance amount by the heirs of the deceased after the death of the deceased, the benefit to be taken into account is merely the benefit

of acceleration. In Jennings' case, the decision in Hicks' case (1857-4 B & S 403n) was approved and Lord Watson observed as follows at page 804:—

"The pecuniary benefit which accrued to the respondent from his premature death, consisted in the accelerated receipt of a sum of money, the consideration for which had already been paid by him, out of his earnings. In such a case, the extent of the benefit may fairly be taken to be represented by the use or interest of the money during the period of acceleration; and it was upon that footing that Lord Campbell, in Hicks v. Newport, etc., Railway Company, (1857) 4 B & S 403n, suggested to the jury that, in estimating the widow's loss, the benefit which she derived from acceleration might be compensated by deducting from their estimate of the future earnings of the deceased the amount of the premiums which, if he had lived, he would have had to pay out of his earnings for the maintenance of the policy."

35. The following observations of Lord Porter in Davies' case ((1942) AC 601 at page 618) are instructive:—

"Under Lords Campbell's Act the question for decision is what damage is proportioned to the injury resulting from the death to the parties respectively for whom and for whose benefit the action is brought. The wording itself is sufficient to show that each individual must be considered separately, and Pym v. Great Northern Railway Co., (1863) 4 B & S 396, so decides. In calculating the damage proportioned to the injury it is accepted view that all factors, benefits as well as injuries, must be taken into account so as to ascertain on a balance of losses and gains what (if any) compensation is to be awarded. Pym's case illustrates this proposition. Accordingly, up till 1908 it was necessary to have regard to any insurance effected by the deceased on his life. If the subject-matter of that insurance was accidental death and the deceased man was accidentally killed, the full sum recoverable, being a gain resulting wholly from the death, was generally regarded as a gain which, to the extent to which any dependant benefited from it, would diminish the sum to be awarded to that dependant. But not every sum paid under an insurance policy was so regarded, Life insurance, inasmuch as its receipt was not solely brought about by the death but was merely accelerated by it was, it is true, to be taken into account but only to the extent of the benefit arising from its acceleration."

(Underlining ours.)

36. The Judicial Committee in Nance's case (1951 AC 601) has also taken a similar view. That was a case in which the widow of the deceased had come into possession of one-third of the estate and the deceased had a policy of Dollars 1,000/- on his life. Referring to the nature of deduction Viscount Simon observed as follows:—

"Then a deduction must further be made for benefit accruing to the widow from the acceleration of her interest in his estate on his death intestate in 1949 (she came into Dollars 6,500/- one-third of his estate, x years sooner than she would otherwise have done) and of her interest in sums payable on a policy of Dollars 1,000 on his life."

37. Though it is contended on behalf of the appellants that the entire amount of life insurance was liable to be deducted, it is difficult to accept that contention because the position is well established that the only benefit which has to be valued in terms of money, which accrues to the heirs in the case of a policy of insurance on the life of the deceased is the benefit of acceleration. Such benefit may fairly be taken to be represented by the interest on the life insurance moneys received for the period of acceleration which would be the difference between the age up to which the deceased would normally be expected to have lived and the age at which he died as a result of the fatal accident. The rate of interest will, of course, depend on the relevant facts in each case.

37A. We are, therefore, of the view that in the instant case, what was liable to be deducted from the amount of compensation determined by the trial Court at Rs. 1,90,000/- was only the value of acceleration in respect of the total insurance amount of Rupees 1,49,400/-. In view of the settled position of law, it would, in our view, be a futile exercise to deal with the several cases which are cited before us on behalf of the respondents in support of the proposition that the whole of the amount of insurance is liable to be excluded. As we have already pointed out earlier, those cases are mainly based on the analogy of non-deductibility of insurance amount in the case of personal injuries on the ground that in the case of accident insurance amount, the receipt is in the nature of a quid pro quo. The decision in Life Insurance Corporation v. Kasturben, AIR 1973 Guj 216, is expressly based on the ratio of the decision in Parry v. Cleaver, (1969) 1 All ER 555, which was a case dealing with personal injury. Damyanti Devi v. Sita Devi, 1972 Acc CJ 334, which is a decision of the

Punjab and Haryana High Court, follows the decision in Bradburn's case (1874 LR 10 Exch 1) which again was a case of personal injury. With reference to this decision, however, we may like to point out that the Punjab and Haryana High Court has gone to the extent of holding that the accelerated succession to the assets does not bring any additional benefit to the heirs which may be liable to be set off against the loss occasioned by the death. With respect, it is not possible for us to agree with this view because on the very fact that in the case of a death by a fatal accident, the heirs succeed to the estate much earlier than when they would have otherwise succeeded, the benefit is implicit and it is this benefit of accelerated succession which, authorities have decided, must be taken into account while making a balance sheet of the pecuniary loss and the pecuniary gain. In *Bhagwanti Devi v. Ish Kumar*, 1975 Acc CJ 56, again, the Delhi High Court has applied the ratio of cases dealing with personal injury because in paragraph 44 it has expressly been held that insurance benefits are in the nature of quid pro quo and have relation to the savings effected by the deceased, a line of reasoning from which we respectfully dissent. The Himachal Pradesh High Court in *H. P. Road Transport Corporation v. Pandit Jai Ram*, 1980 Acc CJ 1 : (AIR 1980 Him Pra 16), has again treated insurance amount as an advantage not as a result of death but as a result of contract. In *Amarjit Kaur v. Vanguard Insurance Co.*, AIR 1982 Delhi 1, again, the insurance amount is held not to be deductible on the ground that it is a quid pro quo.

38. We may in passing, however, point out that the principle that the benefit of acceleration must be taken into account has been accepted by the Delhi and Karnataka High Courts. A learned single Judge of the Delhi High Court in *Pushpa Rani Chopra v. Anokha Singh*, 1975 Acc CJ 396, has taken the view that what has to be deducted on account of insurance is the acceleration of the payment of the claim and not the whole claim and on the facts of that case, this deduction was worked out at Rs. 250/- while the entire amount of insurance of Rs. 2,500/- received on a life insurance policy of the deceased was deducted by the trial Court. In *Parvatamma v. Syed Ahmed*, 1977 Acc CJ 72 (Kant), a Division Bench of the Karnataka High Court has accepted the principle of acceleration following the decision in *Jennings' case* (1888-13 AC 800) (PC) and one-third of the life insurance amount was allowed to be deducted.

39. Mr. Tijoriwala appearing on behalf of the respondents at one stage wanted to contend firstly that the amount of Rs. 24,000/-, which has been deducted by the trial Court and which was really in the nature of an ex gratia amount paid by the company, should not have been deducted and that in the appeal filed by defendant No. 1, that part of the decision should be set aside. We are unable to entertain this contention. The effect of deleting the deduction of Rupees 24,000/- would be to enhance the amount of compensation decreed which would be wholly impermissible in the appeal filed by defendant No. 1.

40. It is necessary to make a mention in passing about the two reasons which are given by the Division Bench while making the reference in support of their view that the insurance amount should not be excluded from the amount of compensation. The Division Bench seems to have felt that if this was the correct view, there would be no occasion for any liability to be enforced against the insurance company under Section 95 of the Motor Vehicles Act. It does not appear from the reference order that the provisions of the Motor Vehicles Act were dealt with in any detail by the Division Bench, but we merely wish to point out that the liability of the insurer under Section 96 of the Motor Vehicles Act is merely to satisfy the judgment against a person insured in respect of third party risk and if the liability is to satisfy the judgment in respect of any liability which is determined, then the occasion to enforce the liability against the insurance company will arise only after the amount of compensation is correctly determined according to law. The insurance company will thus come into picture only at the stage subsequent to the determination of the liability. If the liability has to be determined by striking a balance between the pecuniary loss and the pecuniary benefit, then the mere fact that in a given case at the foot of such a balance sheet the amount is zero or less than the insured amount, will not in any way affect the merits of the question as to whether the insurance amount, in law, is liable to be deducted in whole or in part at all.

41. Similarly, the second ground which seems to have weighed with the Division Bench is that the benefit of the insurance must not go to a wrongdoer. Now, the nature of compensation which is made payable under the Fatal Accidents Act is not punitive. The damages are really of a compensatory nature and if in arriving at such

compensation the necessary factors which have now been crystallised by the decisions have to be taken into account, then the mere fact that in a given case, the liability of the wrongdoer is reduced, will not be very relevant.

42. We have made these observations since the referring order has given these two reasons as indicative of the mind of the Division Bench when it found that the decision in Jaikumar's case (AIR 1978 Bom 239) requires reconsideration.

43. In support of the application under O. 41, R. 27 of the Code of Civil Procedure, which has been filed before the Division Bench, the learned Counsel appearing on behalf of the respondents-plaintiffs has contended that even though the benefit of acceleration should be evaluated in terms of money, the policies, the details of which were given in the application, were such that payment in respect of a large number of those policies could not be taken into account at all for the purpose of deduction on the principle of acceleration. The main argument was in respect of a policy for a lac of rupees, which was under the Married Women's Property Act and it was sought to be contended that the benefit of this policy would not have gone to the estate of the deceased but that plaintiff No. 1 was alone entitled to the insurance amount on maturity. There was one policy which was taken out for marriage expenses of the minor and there was another policy which was taken out for the education of one of the children. Thus, according to the learned Counsel, at the most only those policies which are endowment policies should be taken into account. It is not necessary for us to consider these arguments, firstly because the details of these policies are not available on record and the defendants have relied on an admission made by plaintiff No. 1 that an amount of Rupees 1,50,000/- has been received as insurance amount in respect of life insurance policies of the deceased, and secondly because the parties have now arrived at a settlement as to the amount of compensation which the plaintiffs will be entitled to receive and defendant No. 1 will be liable to pay, thus again relieving us of the task of computing the value of the benefit of acceleration. The amount now agreed to be paid by defendant No. 1 is a sum of Rs. 1,00,000/- (Rs. one lac only) in accordance with the consent terms signed by the Counsel for the parties and handed over to us.

44. The result, therefore, is that the decree of the trial Court will stand modified as per consent terms. The decree of the trial Court will now be substituted by a decree in terms of the consent terms. We have been informed that the assets of the appellant-company are in the hands of a Receiver appointed in two suits for dissolution of partnership between the same parties. Since Rs. 40,000/- have already been deposited in the trial Court, the balance of the decretal amount will now be payable by the Receiver in accordance with the consent terms arrived at and filed in the Court between the parties. Since the consent terms have been filed and the decree of the trial Court is now substituted, it will be open to the trial Court to pay the moneys which are lying in deposit with it on production of a certified copy of the consent terms. The Receiver also to pay the amount as per the consent terms on production of the certified copy of the consent terms.

45. Before parting with this case, we would like to highlight the hardship that may be caused to the heirs of a victim of a fatal accident if the benefit in the form of insurance moneys is reduced by making a deduction by way of accelerated succession. It is, therefore, worthwhile considering whether insurance moneys should be wholly excluded from the compensation determined as payable to the heirs of the deceased as has been done in England in the new enactment of 1959. Section 2 of the English Act of 1959 provides that in assessing damages, any insurance moneys, benefits under the National Insurance Act or pensions and gratuities to be paid as a result of the death are not to be taken into account. Section 2 of the said Act of 1959 reads as follows:

"2. Exclusion of certain benefits in assessment of damages.

(1) In assessing damages in respect of a person's death in any action under the Fatal Accidents Act, 1846 ... there shall not be taken into account any insurance money, benefit, pension or gratuity which has been or will or may be paid as a result of the death.

(2) In this section—

'benefit' means benefit under the National Insurance Acts, 1946 (as amended by any subsequent enactment, whether passed before or after the commencement of this Act), or any corresponding enactment of the Parliament of Northern Ireland and any payment by a friendly society or trade union for the

relief or maintenance of a member's dependants :

'insurance money' includes a return of premiums; and 'pension' includes a return of contributions and any payment of a lump sum in respect of a person's employment." We are of the opinion that it would be in the fitness of things if the question as to whether the Fatal Accidents Act of 1855 deserves to be amended on similar lines is gone into. With a view to facilitate such a consideration, a copy of the judgment should be sent to the Law Department of the Government of India.

Order accordingly.

AIR 1982 BOMBAY 482

MODY, J.

Gopal Vishnu Ghatnekar, Appellant v. Madhukar Vishnu Ghatnekar, Respondent.

First Appeal No. 720 of 1972, D/- 24-6-1981.

(A) Maharashtra Co-operative Societies Act (24 of 1961), S. 30 — Transfer of share or interest of deceased member to a nominee or to an heir or legal representative recognised by Society — Does not create interest in such person to exclusion of other heirs — He only holds share and interest of deceased for disposal of the same in accordance with law.

The intention of S. 30 is to provide for who has to deal with the society on the death of a member and not to create a new rule of succession. Thus, the provision for transferring a share and interest to a nominee or to the heir or legal representative as will be decided by the society is only meant to provide for interregnum between the death and the full administration of the estate and not for the purpose of conferring any permanent right on such a person to a property forming part of the estate of the deceased. The idea of having this section is to provide for a proper discharge to the society without involving the society into unnecessary litigation which may take place as a result of dispute between the heirs or uncertainty as to who are the legal heirs or representatives. Even when a person is nominated or even when a person is recognised as an heir or a legal representative of the deceased member, the rights of the persons who are entitled to the estate of the interest of the deceased member by virtue of law governing succession are not lost and the nominee or the heir or the legal representative recognised by the society, as the case

may be, holds the share and interest of the deceased for disposal of the same in accordance with law. It is only as between the society and the nominee or heir or legal representative that the relationship of the society and its member is created and this relationship continues and subsists only till the estate is administered either by the person entitled to administer the same or by the Court or the rights of the heirs or persons entitled to the estate are decided in a Court of law. Thereafter the society will be bound to follow such decision. Judgment in Appeal No. 694 of 1968, D/- 15-6-1976 (Bom), Refd., AIR 1973 Delhi 148, Explained. (Para 6)

Therefore held, the plaintiff could not be said to have become the owner of the property of the deceased member qua the other heirs merely by virtue of the nomination.

(Para 6)

(B) Maharashtra Co-operative Societies Act (24 of 1961), S. 30 — Nomination by a member is permitted only in respect of the shares in and the property of the Society — Held, nomination in respect of structure built by member on land leased out to him by Society was invalid.

The relationship of the Society and member subsists only in respect of shares in and the property of the Society. Therefore, a nomination is permitted only in respect of the share in and the property of the Society. The Society is concerned only with the shares held by a member and the land given by it to a member and not with the structure that a member may put up. The member's interest in the structure cannot be a share or interest in the Society. (Para 10)

Therefore, held, the nomination in respect of the structure built by the deceased member on the land leased out to him by the Society was invalid and of no effect. The structure continued to belong to the estate of the deceased and in that view of the matter the defendant-son of the deceased member could never be a mere licensee and could not be evicted. The defendant was equally entitled to the structure as the plaintiff along with other heirs. (Para 10)

Cases Referred: Chronological Paras (1976) Appeal No. 694 of 1968, D/- 15-6-1976 (Bom), Poona Hindu Middle Class Co-operative Society Ltd. v. Jaywant Vishnu Sapre 7
AIR 1973 Delhi 148 7

V. V. Karmarkar and J. R. Lalit, for Appellant; Bhimrao N. Naik, for Respondent.

JUDGMENT:— The plaintiff and the defendant are brothers. Their father Vishnu Narayan Ghatnekar died on 9-5-1969 leaving

behind him the plaintiff, the defendant and other children as his heirs. At the time of his death Vishnu held shares in a co-operative society and was an allottee of a piece of land under a lease from the society on which he had put up a building. Vishnu also had filed a nomination with the society nominating the plaintiff as his nominee to whom the shares, the land and the building should be transferred after his death. By virtue of this nomination the plaintiff claims to be the owner of the entire property consisting of shares, land and building. He also claims possession from the defendant by virtue of the said ownership and on the ground that the defendant was in occupation of the property by virtue of a licence granted by the father and that the same had been terminated.

2. It is admitted that the property is that of the father Vishnu. At the time of his death all the heirs of Vishnu became interested in the estate and in ascertainment of what property goes to whom on his death. The suit, therefore, could not have been filed without all the heirs being on record inasmuch as the suit really involves a question of title to the property of the deceased. The suit, therefore, ought to have been dismissed on that ground alone. However, other points hereinafter decided have been argued exhaustively on both sides and it is but fair that I should decide them also.

3. The plaintiff's contention is that by virtue of S. 30 of the Maharashtra Co-operative Societies Act, 1960 r/w. Rule 25 framed under the said Act and Bye-law 16 (1) of the society, a nominee acquires title to the shares and the property to the exclusion of all the heirs of the deceased and that with the result the plaintiff has become owner of the property and the defendant has no title or interest in the property and is liable to be evicted. It is contended that in any event the nomination paper having been witnessed by two witnesses and all the other formal requirements of a will having been complied with it should be treated as a will and in that circumstance also the plaintiff becomes the exclusive owner of the property and as such entitled to evict the defendant.

4. Section 30 of the Maharashtra Co-operative Societies Act, 1960 reads as follows :—

"30. (1) On the death of a member of a society, the society shall transfer the share or interest of the deceased member to a person or persons nominated in accordance

with the rules, or, if, no person has been so nominated to such person as may appear to the committee to be the heir or legal representative of the deceased member :

Provided that, such nominee, heir or legal representative, as the case may be, is duly admitted as a member of the society;

Provided further that, nothing in this sub-section or in Sec. 22 shall prevent a minor or a person of unsound mind from acquiring by inheritance or otherwise, any share or interest of a deceased member in a society.

(2) Notwithstanding anything contained in sub-section (1) any such nominee, heir or legal representative, as the case may be, may require the society to pay to him the value of the share or interest of the deceased member, ascertained in accordance with the rules.

(3) A society may pay all other moneys due to the deceased member from the society to such nominee, heir or legal representative, as the case may be.

(4) All transfers and payments duly made by a society in accordance with the provisions of this section shall be valid and effectual against any demand made upon the society by any other person."

5. Rule 25 of the Maharashtra Co-operative Societies Act, 1961 reads as follows :—

"25. Nomination of persons :— (1) For the purpose of transfer of his share or interest under sub-section (1) of S. 30, a member of a society may, by a document signed by him or by making a statement in any book kept for the purpose by the society nominate any person or persons. Where the nomination is made by a document, such document shall be deposited with the society during the member's lifetime and where the nomination is made by a statement, such statement shall be signed by the member and attested by one witness.

(2) The nomination made under sub-rule (1) may be revoked or varied by any other nomination made in accordance with that sub-rule.

(3) (i) Where a member of a society has not made any nomination, the society shall on the member's death, by a public notice exhibited at the office of the society, invite claims or objections for the proposed transfer of the share or interest of the deceased within the time specified in the notice.

(ii) After taking into consideration the claim or objections received in reply to the notice or otherwise, and after making such

inquiries as the committee considers proper in the circumstances prevailing, the committee shall decide as to the person who in its opinion is the heir or the legal representative of the deceased member and proceed to take action under S. 30."

Bye-law 16 of the Housing Society reads as follows:—

"16. Transmission of Interest:

(1) How nomination is to be made:— A member may, by a writing under his hand deposited with the Society during his lifetime or by a statement made in any book kept thereat, nominate any person to whom under Sec. 22 of the Act his share or interest in the Society or so much thereof as is specified in such nomination shall be transferred at his decease, or the moneys referred to in S. 22 (2) of the Act or so much thereof as is specified in such nomination shall be paid.

(2) How it is to be revoked or varied:— A nomination so made may be revoked or varied by any similar writing or statement under the hand of the nominator deposited or made as aforesaid.

(3) Fees on Nomination or Revocation:— A nomination made at the time of applying for membership shall be recorded free of charge. But for the recording of every nomination subsequently made or of a revocation or variation a fee of annas four shall be paid."

6. However, what is important is the section and not the rules and bye-laws inasmuch as the rules and bye-laws cannot provide anything contrary to the section. It is very clear on the plain reading of the section that the intention of the section is to provide for who has to deal with the society on the death of a member and not to create a new rule of succession. The purpose of the nomination is to make certain the person with whom the society has to deal, and not to create interest in the nominee to the exclusion of those who in law will be entitled to the estate. The purpose is to avoid confusion in case there are disputes between the heirs and legal representatives and to obviate the necessity of obtaining legal representation and to avoid uncertainties as to with whom the society should deal to get proper discharge. Though, in law, the society has no power to determine as to who are the heirs or legal representatives, with a view to obviate similar difficulty and confusion, the section confers on the society to determine who is the heir or legal representative of a deceased member and provides for transfer of the shares and interest of the deceased

member's property to such heir or legal representative. Nevertheless, the persons entitled to the estate of the deceased do not lose their right to the same. Mr. Naik contends that once a person is nominated and the society transfers the share or interest of the deceased to him, he becomes the owner. If that is to be accepted it will follow that if a society accepts a person as the heir or legal representative and transfers the share or interest to him, that person will become the owner. That, obviously, cannot be the intention of the legislature. Society has no power, except provisionally and for a limited purpose to determine the disputes about who is the heir or legal representative. It, therefore, follows that the provision for transferring a share and interest to a nominee or to the heir or legal representative as will be decided by the society is only meant to provide for interregnum between the death and the full administration of the estate and not for the purpose of conferring any permanent right on such a person to a property forming part of the estate of the deceased. The idea of having this section is to provide for a proper discharge to the society without involving the society into unnecessary litigation which may take place as a result of dispute between the heirs or uncertainty as to who are the legal heirs or representatives. This being the position, the contention of Mr. Naik cannot be accepted. Even when a person is nominated or even when a person is recognised as an heir or a legal representative of the deceased member, the rights of the persons who are entitled to the estate of the interest of the deceased member by virtue of law governing succession are not lost and the nominee or the heir or the legal representative recognised by the society, as the case may be holds the share and interest of the deceased for disposal of the same in accordance with law. It is only as between the society and the nominee or heir or legal representative that the relationship of the society and its member is created and this relationship continues and subsists only till the estate is administered either by the person entitled to administer the same or by the Court or the rights of the heirs or persons entitled to the estate are decided in a Court of law. Thereafter the society will be bound to follow such decision. The plaintiff, therefore, cannot be said to have become the owner of the property qua the other heirs merely by virtue of the nomination.

7. Mr. Naik relies on an unreported judgment dated 15-6-1976 of Hajarnavis

and Shah, JJ. in Appeal No. 694 of 1968. Poona Hindu Middle Class Co-operative Society Ltd. v. Jaywant Vishnu Sapre. Based on this judgment he contended that it is the right of the society to decide who is to be the member of the society and once the society has decided to take the nominee as the member or to take one of the heirs as the member, the heirs or other heirs of the deceased member, as the case may be, cannot have any cause of action in respect of the property allotted by the society to a member.

(a) In the judgment cited the appellant was a society of which one Vishnu Sapre was a member. (The name of the deceased in the present appeal also happens to be Vishnu). He had obtained on a lease a separate sub-plot of land from the society after becoming a member thereof. By a registered Will dated 19-9-1939, he bequeathed the said plot to his two sons Jaywant and Ramchandra. He appointed three executors and also created a trust of which the executors were trustees. The executors applied for a probate which was granted by the District Court, Poona, on 23-11-1940. The executors also made an application to the society on 23-1-1942 referring to the Will and the two sons being the legatees and the fact of the plot having been bequeathed to his two sons. The executors also requested and applied for Jaywant being substituted as a member of the society in place of the deceased. The society by its resolution dated 7-2-1942 elected Jaywant as its member. Because of certain breaches of the bye-laws of the society which required construction to be put up by a particular time, the plot was forfeited to the society and the lease was cancelled. A dispute arose which was referred to the statutory arbitration and the registered nominee gave an award in favour of the society. The other brother Ramchandra was not a party to these proceedings. Ramchandra filed a suit from which the said appeal arose in the Court of Civil Judge, Junior Division, Poona, challenging the award mainly on the ground that he was not made a party to the proceedings before the arbitrator even though he was entitled to the plot as a legatee under the Will. Decree was passed against the society which was challenged in that appeal. On behalf of the society it was contended that (1) disposition of the plot made by Vishnu was not binding on the society; (2) the executors of the Will themselves made an application to substitute the name of Jaywant in place of Vishnu and

the society had acted on the basis thereof; (3) that in accordance with the bye-laws of the society as well as provisions of Sec. 27 of the Bombay Co-operative Societies Act, the transfer in favour of Jaywant made by the society was valid and effective against the plaintiff who was not a member of the society. Other pleas were also raised. It was further contended on behalf of the appellant that (i) on passing of the resolution by the society it was only Jaywant who had a right to the property and that Ramchandra had no right in respect of the property, (ii) without being member he cannot claim any right against the society, (iii) his claim was barred by the law of limitation and (iv) Ramchandra can claim as a legatee under the Will only against Jaywant and not against the society.

(b) It is held by the learned Judges that it is the executors who had asked the society to recognise Jaywant as a member of the society in place of Vishnu and so it was not open to the plaintiff to challenge the action taken by the society on this application without challenging the authority of the executors to make the application. This was the main ground for deciding against Ramchandra. Thereafter Sec. 27 of the Bombay Co-operative Societies Act, 1925 is set out and after pointing out that Vishnu had not made any nomination, it is observed that the society was free to transfer the share or the interest of the deceased to any of the heirs or legal representative after electing him as the member of the society. It is again emphasized that the authority of the executors to represent to the society to take Jaywant as a member had not been challenged. It is then observed that the society was therefore right in recognizing only Jaywant as a member of the society. Section 19 of the said Act is then set out and it is observed that the transfer of any property of the society is not governed by the ordinary law but by the provisions of the Bombay Co-operative Societies Act, 1925 and the rules and bye-laws framed by the society. It is stated that that being the position the plaintiff Ramchandra did not get any title to the suit property. It is observed that even if Ramchandra had half share in the property of the society he cannot enforce the claim against the society without being elected as a member of the society. It is emphasized that the executors had not moved the society for recognizing him as a member of the society and, therefore, whatever claim that Ramchandra had he can enforce it only against the executors.

Reliance is then placed on a judgment of the Delhi High Court in the Chief Commr. v. Mrs. Kitty Puri, AIR 1973 Delhi 148, wherein it is, *inter alia*, observed, ".....In fact, even the society cannot transfer the share or interest of a deceased member to a nominee of such a member except after the nominee is duly admitted to be a member of the society." He does not automatically succeed to the share or interest of the deceased member. The reason is that the membership is a contract between the member and the society. It is not an interest which can be inherited by the nominee of the successor from the deceased member without reference to the society.

(c) The judgment then proceeds to say that in view of the fact that only a member can claim interest in the property, the plaintiff had no cause of action against the society.

8. The ratio of the judgment therefore is that it is only a person who is a member of the society that can claim a right against and in respect of the property of the society. However, the right of a society to admit a person of its choice as a member cannot be exercised arbitrarily and so as to deprive a person of his right to the shares or property of a deceased member. The law does not give a right to the society to continue as member a person who had no right to be a member or to refuse membership to a person who is entitled to become a member. To put it differently, a society cannot arbitrarily refuse to make a person a member. It is for this very reason that the provision is made in the Co-operative Societies Act for an appeal to the Registrar in case society refuses to accept any person as a member. Therefore, in my view, this judgment does not take any view which is contrary to the view that I am taking. To repeat, a society has a right to admit a nominee of a deceased member or an heir or legal representative of a deceased member as chosen by the society as the member. A person who disputes the right of such person to be a member or continue to be a member of the society will have to obtain relief in the normal Court against such person and have his rights ascertained and declared and thereafter apply to the society on the basis of the Court judgment to make him a member of the society. In case society refuses, that person will have to take appropriate proceedings against the society's refusal. In the case cited before me the plaintiff had taken resort to Court against society without making any application for membership.

Moreover the plaintiff's claim was under a Will, and when there is a Will in which executors are appointed the property vests in the executors and therefore it is the executors alone who can represent the estate. If the executors request the society to make somebody a member, the remedy of the person objecting will be only against the executors. It is in the light of this legal position that the learned Judges came to the conclusion they did. It cannot be, that the Act dealing with the regulation of the Co-operative Societies is intended to lay down a new rule of succession which will again be dependent on the sweet will of the society or to deprive a person to a part of the estate or to give to the society a right to pick and choose from among heirs who should inherit the property of the deceased, except provisionally. Take the case of legal representatives. The Act gives right to the society to accept an heir or a legal representative as a member. It is the society which has to select which of the legal representatives it will take as a member. Executors are legal representatives. It cannot be the intention of the legislature that an executor, who may not be even a legatee, should get the share or interest of the deceased member to the exclusion of the legatee on whom the share or interest may have been bequeathed or to exclude residuary legatee, in the absence of specific bequest thereof.

9. Mr. Naik contends, in the alternative, that the nomination which is described as 'Varas Patra' is signed by the deceased and witnessed by two persons. It, therefore, complies with all the requirements of a valid Will and should be construed to be a Will. He contends that even though it may be described as a nomination paper i.e. 'Varas Patra', looking to the tenor thereof, it is really a will. This contention of Mr. Naik is without any substance. It is well settled that a document can be said to be a Will only when it is executed with an intention to regulate succession after death. There must be *animus testandi*. It is true that in construing a document, the nomenclature given to the document is not to be given too much importance and what is of importance is the intention as disclosed by contents and surrounding circumstances. However, in the present case the nomenclature completely corresponds to the contents and the intention and by no stretch of imagination this nomination form can be said to be a will. The only similarity between a will and this nomination form is that a Will has to be witnessed by two persons and

the nomination paper is witnessed by two persons. The law permits the nomination of such number of persons as a member may desire and requires witnessing only by one person. The nomination form in the present case is a cyclostyled form which is issued by the society. This form has been drafted by the society obviously prior to the Act of 1960. The form refers to various provisions of law and bye-laws which clearly are meant for nomination and it is stated that this document was being executed in accordance with these provisions. It is, therefore, clear that the intention of the deceased in signing this nomination form was not to make a Will or to provide for succession after his death but only to nominate in accordance with the law prevailing. The form, by mistake or otherwise, in the footnote says that the nomination can be in favour of one person only, though this is clearly contrary to law. The form has column for two witnesses. It is obvious that it is because of this column that the signatures of two witnesses have been taken though only one witness is required in law. The intention was not to take signatures of the two witnesses to make this document a Will. It is also possible that because of this footnote that the deceased nominated only one person and not more. In this view of the matter it is not possible to hold that the document is a Will of the deceased and in any event looking to the possibility that the deceased was misled by the footnote it cannot be said to be a true Will.

10. Mr. Lalit for the appellant contends that in any event there could not have been any nomination in respect of the structure put up by the deceased. The society's interest is confined only to the shares and the land i.e. the deceased had a share or interest, qua the society, only in the shares and the land and, therefore, Sec. 30 providing for nomination can apply only to the shares and the land and the title, if any, conferred on the plaintiff will be in respect of the shares and the land and not the structure. The structure will continue to belong to the estate and devolve in accordance with law. He points out that it was a mistake on the part of the society to include in the form, the structure also. The contention of Mr. Lalit has to be accepted. It is well settled that in India ownership of land and the building can be separate unlike in England. The relationship of the society and member subsists only in respect of shares in and the property of the society. Therefore, a nomination is permitted only in respect of the

share in and the property of the society. The society is concerned only with the shares held by a member and the land given by it to a member and not with the structure that a member may put up. The member's interest in the structure cannot be a share or interest in the Society. The nomination in respect of this structure is, therefore, invalid and of no effect. Even if I had held that the plaintiff became entitled in his own right, to the shares and the land by virtue of nomination he can in no circumstances become entitled to the structure which must continue with the estate of the deceased and in that view of the matter the defendant can never be a mere licensee and cannot be evicted. The defendant will be equally entitled to the structure as the plaintiff along with other heirs.

11. In the circumstances, the appeal is allowed. The decree of the learned trial Judge is set aside. The suit is dismissed. The plaintiff-respondent will pay the costs of the suit as well as of this appeal.

Appeal allowed.

AIR 1982 BOMBAY 487

DESHPANDE, J.

Shrikrishna Annaji Sonatake, Appellant v. Ramnarayan Pannalal Lathi and others, Respondents.

Second Appeal No. 532 of 1976, D/-6/7-10-1981.

Civil P. C. (5 of 1908), O. 1, R. 9 and O. 41, R. 4 — Suit impleading trust as defendant No. 1 and trustees as defendants Nos. 2 to 11 — Decree against trust only — Appeal by defendants 3, 5 and 6 without impleading other defendants co-trustees — Competency.

Held, all the trustees must be before the Court when the question of liability of trust properties is involved. Hence the appeal filed by defendants 3, 5 and 6 was not competent. AIR 1938 Mad 982 and AIR 1973 Guj 113 (FB), Foll.

Secondly as the decree was only passed against the Trust, the appeal filed by defendants Nos. 3, 5 and 6 was untenable, because they could not be said to be the persons aggrieved or adversely affected by the decree. (Paras 9, 15)

Cases Referred:	Chronological	Paras
AIR 1973 Guj 113 (FB)		15
AIR 1963 SC 1901		10
AIR 1944 Oudh 289		10
AIR 1938 Mad 982		15
AIR 1937 Bom 101		10

HZ/HZ/D615/82/JHS

J. R. Lalit, for Appellant; V. Z. Kankaria, for Respondents Nos. 1 to 3.

JUDGMENT:— This second appeal is filed by original plaintiff against the appellate decree passed against respondent No. 4 Trust, respondent Nos. 1 to 3 are the trustees of the Trust-respondent No. 4, though they are not described as such.

2. The plaintiff had filed a suit against the Trust initially in the Court of the Joint Civil Judge, Junior Division, Jalgaon, being Regular Civil Suit No. 618 of 1972 impleading the Trust as the first defendant and defendants Nos. 2 to 11 as original trustees. The suit was filed to recover an amount of Rs. 2,322/- with future interest and costs. The case of the plaintiff was that the first defendant is a Public Trust and he was the employee of this Trust working as a teacher in one of the High Schools conducted by the Trust. The plaintiff was appointed as the Head Master for academic year 1969-70 on monthly pay of Rs. 200/- as the basic pay and permitted dearness allowance. The total salary of the plaintiff was Rs. 327/- per month. It was the case of the plaintiff that he was appointed on June 11, 1969 for a period of one year i.e. from June 11, 1969 to June 10, 1970.

3. It appears that the school was closed within that time after appointment and the defendants did not pay the plaintiff the agreed amount of salary, and therefore, the plaintiff was required to file a suit for recovery of his pay. The plaintiff had, therefore, filed an earlier suit, being Regular Civil Suit No. 529 of 1969 to recover his salary and it appears that suit related to the first six months of academic year 1969-70. That suit came to be decreed and the decree in that suit is on record which shows that the plaintiffs' claim to the extent of six months' period was decreed on the basis that the defendant-Trust committed breach of contract.

4. In this suit, which is filed by the plaintiff the plaintiff says that he was ready and willing to work as Head Master for the whole year but Vidyalaya was closed and the defendant-Trust is liable to pay for the remaining six months of the academic year 1969-70.

5. Defendant-Trust raised a plea that the suit is barred by the provisions of O. 2, R. 2 of the Civil P. C., in view of the judgment and decree passed in the earlier suit being Reg. Civil Suit No. 529 of 1969. It also denied that the Trust had committed any breach of contract and finally contend-

ed that the plaintiff is not entitled to any relief because he has no cause of action to file the present suit.

6. The learned trial Judge framed as many as seven issues. On consideration of the evidence on record, he held on issue No. 5, which related to the closure of the school, that as on this issue no evidence was given by the defendants, therefore, the contention of the plaintiff was accepted by the trial Judge that the school was not closed and therefore holding the contract continues he held that the plaintiff is entitled to the relief claimed by him. On issue No. 6, which related to the bar under O. 2, R. 2 of the Civil P. C., the learned trial Judge held that the bar is not attracted, because the cause of action for the present suit and the cause of action for the earlier suit are different, holding that the former suit was for recovery of damages of the earlier six months and the present suit is confined to the period from Nov. 12, 1969 to June 11, 1970 and the bar of O. 2, R. 2 of the Civil P. C. does not arise. The learned trial Judge was of the view that since the plaintiff's claim relates to the monthly salary in which event monthly salary becomes due per month and as this cause of action is recurring cause of action, he held that the bar of O. 2, R. 2 of the Code cannot be attracted to the present suit. The other issues are not necessary to be taken into consideration. On these principal issues, the trial Judge having held in favour of the plaintiff passed a decree in the sum of Rs. 2,322/- plus interest. It is material to note that the decree reads as follows:—

"The defendant-Trust to pay the plaintiff a sum of Rs. 2,322/- plus interest at the rate of 4% p. a. from the date of suit till realisation. Defendant-Trust to pay the costs of this suit to the plaintiff and shall bear its own."

7. Against this decree, only defendant Nos. 3, 5 and 6 filed an appeal before the learned District Judge, Jalgaon. This appeal was heard by the learned District Judge and he has reversed the decree passed by the trial Court and dismissed the suit of the plaintiff on the ground of bar of O. 2, R. 2 of the Civil P. C., although he held on other issues in favour of the plaintiff concurring with the trial Court. In the result the learned District Judge allowed the appeal and set aside the decree of the trial Court, and dismissed the suit of the plaintiff by his judgment and decree, dated Feb. 9, 1976. The plaintiff being dissatisfied with

this appellate decree has filed this second appeal in the High Court.

8. It may be noted here that the first defendant is a Trust and there were as many as defendants Nos. 2 to 11 as trustees originally on record. Mr. V. Z. Kankaria, the learned Advocate for the respondents had told that defendants Nos. 3, 5 and 6 were represented by lawyers and original defendant No. 11 died and all other respondents were ex parte. Original defendant No. 2 Pandharinath Thapade is not the appellant before me.

9. Mr. J. R. Lalit for the appellant has raised preliminary point that the appeal filed by defendant Nos. 3, 5 and 6 before the Appellate Court is incompetent and defective, because the other defendants who were co-trustees are not joined in the said appeal either as appellants or respondents. Secondly, he says that as the decree is only passed against the Trust, the appeal filed by defendants Nos. 3, 5 and 6 is untenable, because they cannot be said to be the persons aggrieved or adversely affected by the decree. I have already quoted the extract of the operative portion of the decree and from that it appears that that decree does not show that original defendants Nos. 2 to 11 are made liable under the said decree.

10. Mr. Kankaria, the learned Advocate for the respondents has urged before me that the framing of the appeal before the Appellate Court is not defective, because defendants Nos. 3, 5 and 6 are co-trustees along with other trustees and the Trust is duly represented by them and their interest being joint, they are entitled to challenge the decree, which adversely would affect the Trust. He invited my attention to the provisions of S. 2 (18) of the Bombay Public Trusts Act, 1950 (hereinafter referred to as the "Trust Act"), which reads thus:—

"2 (18). 'trustee' means a person in whom either alone or in association with other persons, the trust property is vested and includes a manager."

Mr. Kankaria also invited my attention to the definition of 'Public Trust' and contended that any one of the trustees being interested can file the appeal, and therefore the framing of the appeal is not defective. He tried to substantiate his case by citing certain circumstances. Especially he invited my attention to the authority reported in *Rameshwar Prasad v. Shambehari Lal*, AIR 1963 SC 1901. Relying on the provisions of Civil P. C. contained in O. 41, R. 4 as interpreted by the Supreme Court in *Rameshwar Prasad v. Shambehari Lal* (supra), he

contended that one of the plaintiffs or defendants under R. 4 represents the non-appelling defendants and thus can file the appeal when the decree proceeds on any ground common to all. He also invited my attention to other two cases in support of his contention that one co-trustee can file appeal. He also relied on the case reported in *B. Sailendra Nath v. Shib Dass*, AIR 1944 Oudh 289, which case according to me is not applicable to the facts of the present case, because the said case deals with the appointment of new trustees under Section 92 of the Civil P. C. There is no quarrel with the proposition that the new trustees can be appointed in place of old trustees in a case which is governed by Section 92 of the Civil P. C. for removal of the trustees. The present suit is not a suit as contemplated by Sec. 92 of the Civil P. C. Mr. Kankaria again referred to an authority reported in *Gurunath Khandappa-gouda v. Venkatesh Lingo*, AIR 1937 Bom 101, which case has no bearing on the present facts of the case, because that case related to a decree for costs which was made against A, B and C in the trial Court and after execution of the decree against A, on appeal by B and C to which A was not party, the decree was reversed and A applied for restoration of that decree. It was held in that case that A was entitled to restoration though he was not party to the appeal. This case again is not of any assistance to Mr. Kankaria in any way.

11. There is another aspect, which is important in this case, that the first defendant-Trust was the public trust and defendant No. 2 was managing the affairs of the trust as stated in the judgment of the trial Court. It would have been expected that at least defendant No. 2 should have been on record to file the appeal. Mr. Kankaria is unable to show me from the memo of appeal of the Appellate Court or the plaint that the trustees were described as such or the present respondents Nos. 1 to 3 were mentioned as managing trustees. In the absence of the other co-defendants against whom the decree was not passed by the trial Court, in my opinion, the decree of the trial Court has become final and if it is allowed to be reopened at the instance of defendants Nos. 3, 5 and 6 as the remaining co-defendants are not parties to this appeal as stated above, I think that it will give rise to conflicting decrees. If the decree is joint and one, then it is difficult to see how in this particular case, at least defendants Nos. 3, 5 and 6 could represent the other trustees of the

Trust when defendant No. 2 was actually described as managing trustee as stated above in the judgment.

12. The learned Advocate Mr. Kankaria further contended that in view of the provisions of O. 41, R. 4 of the Civil P. C. as the trust property vests in the trustees as stated in the definition of "trustee" contained in S. 2 (18) of the Public Trusts Act and in view of the cases, which are cited by him to support his contention that the appeal before the Appellate Court was competent one, he also relied on the provisions of O. 41, R. 33 to support his contention that the decree can be passed against non-appealing defendants and the Appellate Court is entitled to exercise power under O. 41, R. 33 of the Civil P. C.

13. I need not discuss the provisions of O. 41, R. 33 of the Civil P. C. It is sufficient to say that reliance on the provisions of Order 41, Rule 33 is quite misconceived. Order 41, Rule 33 deals with the powers of the appellate Court to pass a decree against non-appealing respondent or under certain special circumstances. The power is wide and therefore it is also to be exercised sparingly. The power cannot be invoked for the simple reason, because the appeal filed by defendants Nos. 3, 5 and 6 before the learned District Judge is inherently defective and no formal application for amendment of the defect has ever been given even to-day. I have not prevented Mr. Kankaria to address his arguments although he has not formerly made any application for amendment, but that does not solve the controversy in regard to the preliminary point. In my opinion, reliance on O. 41, R. 4 of the Civil P. C. is also not correct. Order 41, Rule 4 deals with the case where there are more plaintiffs or more defendants than one in a suit and the appellate decree proceeds on any ground common to any one of them. In view of the contention of Mr. Kankaria that the interest of the Trust and the trustees is one and same, it is difficult to see how the provisions of O. 41, R. 4 can be availed of.

14. It is true that in case of trust, one of the trustees interested in the property can certainly take proceedings, but in this case I am concerned with the decree which is already passed by the trial Court and the trial Court having not held the respondents liable under the decree, I do not see how this principle will be applicable to the facts of the present case. The memo of appeal in the District Court as well as the plaint is

silent about the actual description and designation of the other respondents who are trustees although the plaintiff has himself stated in his plaint that he is suing the Trust and made the other trustees as party defendants to the suit. But that position is not being availed of by the defendants, because the suit was tried and the decree was passed by the trial Court. As the decree as interpreted is only against the Trust, it is not possible to accept the contention of Mr. Kankaria that the other trustees are adversely affected or can be said to be the aggrieved persons.

15. Mr. Lalit, the learned Advocate for the appellant has invited my attention to a case reported in *Vendakannu Nadar v. Nanguneri Taluk Singikulam Annadana Chattram*, AIR 1938 Mad 982 and reliance was placed on Head Note (e), which reads as follows:

"The general principle of law is that the office of a trustee, irrespective of the number of trustees, is a joint one and co-trustees form, as it were, one trustee and must therefore execute the duties of their office jointly. Hence no suit in regard to trust properties would be maintainable by one or some of the trustees only, if the remaining trustees are not before the Court either as plaintiffs or even as defendants."

Following ratio of this decision, I see no difficulty in accepting the contention raised by Mr. Lalit. It is further found in the said authority that the other co-trustees were not made parties and even formal amendment application for bringing them on record was not made. In this case also, Mr. Kankaria has also not made any attempt to make any application to bring the other trustees on record. Therefore, in my opinion, the appeal filed before the District Court is defective. Mr. Lalit also derived support from the Gujarat High Court (FB), case reported in *Ahmaram Ranchhodbhai v. Gulamhusein Gulam Mohiyaddin*, AIR 1973 Guj 113 which reiterates the same principle that all the trustees must be before the Court when the question of liability of trust properties is involved. In view of this legal position, I hold that the appeal filed by defendants Nos. 3, 5 and 6 before the learned District Judge, Jalgaon being Civil Appeal No. 124 of 1974 was not competent appeal and, therefore, the findings recorded by the learned District Judge in the appeal are liable to be vacated. I do not think it necessary to deal with the other point regarding bar of O. 2, R. 2 of the Civil P. C., as the appeal stands disposed of on the preliminary point raised by Mr. Lalit.

16. In the result, the appeal is allowed. The appellate decree, dated Feb. 9, 1976 in Appeal No. 124 of 1974 is set aside and the decree of the trial Court in Civil Suit No. 618 of 1972, D/- April 11, 1974 is restored and confirmed.

Mr. Lalit for the appellant pressed for costs throughout. I do not agree with the learned Advocate as the appellant has succeeded on a technical point and therefore the appellant will be entitled to the costs of this appeal.

Appeal allowed.

AIR 1982 BOMBAY 491

M. N. CHANDURKAR AND
B. C. GADGIL, JJ.

M/s. Nilesh Construction Company and another, Appellants v. Mrs. Gangubai and others, Respondents.

Appeal No. 137 of 1982 in Notice of Motion No. 1236 of 1981 in Suit No. 1811 of 1980, D/- 26-4-1982.

(A) Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 85-A — Issue of tenancy — Cannot be raised on vague plea. (Civil P. C. (5 of 1908), O. 6, R. 2).

Before a reference to the Mamlatdar for deciding the issue of tenancy under the Tenancy Act is made, the alleged tenant must disclose in his pleadings details about the tenancy and the exact nature of the right which is claimed by him. An issue of tenancy cannot be raised on a vague plea. AIR 1975 Bom 52, Followed. (Para 11)

(B) Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 85-A — Bar of jurisdiction of Civil Court — Power of Civil Court to determine applicability of Act and recall reference — Notice of Motion No. 1236 of 1981, dated 11-3-1982 (Bom), Reversed. (Civil P. C. (5 of 1908), S. 9).

If the question raised is whether the provisions of the Tenancy Act are attracted to a given case, on facts which are not in dispute, it is clearly permissible for the Civil Court to go into the question of the applicability of the provisions of the Tenancy Act. If it is found on the facts that the reference to the Revenue Court should not have at all been made as the lands were excluded from the operation of the Tenancy Act, it would be permissible to recall the reference. 1979 Bom CR 75, Followed. Notice of Motion No. 1236 of 1981, D/- 11-3-1982 (Bom), Reversed. (Para 11)

(C) Bombay Tenancy and Agricultural Lands Act (67 of 1948), Ss. 88 (1) (b) and 45-C Proviso — Land covered by S. 88 (1) (b) Notification — Effect — Relevancy of Section 45-C Proviso in context of such land.

The effect of the Notification issued under Section 88 (1) (b) is that the lands covered by the Notification have been totally excluded from the operation of the provisions of the Tenancy Act, because the imperative words of Section 88 are, "nothing in the foregoing provisions of the Act shall apply" to the area reserved for non-agricultural or industrial development. The "foregoing provisions" are Sections 1 to 87-A and, therefore, the moment a Notification is issued under Section 88 (1) (b), none of the provisions of Tenancy Act will apply in the case of any area which has been specified as being reserved for non-agricultural or industrial development. The effect of the Notification is to exempt lands from the operation of the provisions of the Tenancy Act retrospectively. AIR 1966 SC 538, Followed. (Para 13)

It is, therefore, difficult to accept the contention advanced on behalf of the plaintiffs that the Notification dated 29th March, 1957 issued under Section 88 (1) (b) cannot deprive the plaintiffs of the rights which had vested in them as tenants. Even assuming that the plaintiffs' predecessor had any rights under the Tenancy Act, having regard to the mandatory provisions of Section 88 (1) (b), no rights under any of the provisions of Sections 1 to 87-A of the Tenancy Act could be claimed by the plaintiffs. (Para 14)

Reference to the provisions of Sec. 43-C and the proviso thereto appears to be wholly out of place for the purposes of the present case. In order to understand this proviso it has to be borne in mind that when the new provision in Cl. (c) was enacted in Section 88 (1) by the Bombay Tenancy and Agricultural Lands (Amendment) Act 1952 (33 of 1952), the effect was that all the lands situated within the limits of Greater Bombay, within the limits of the Municipal Corporation under the Bombay Municipal Corporation Act, within the limits of the Municipal Boroughs constituted under the Bombay Municipal Boroughs Act 1955 and in the limits of any cantonment were exempted from the operation of the provisions of the Tenancy Act. There was, thus, a total deprivation of the benefits of the Tenancy Act to the tenants of lands situated within the municipal limits of the Corporations or municipality and cantonment specified in Cl. (c). This was undone partly by the enact-

ment of the provisions of Section 43-C and the proviso. The object of enacting the proviso was to restore to the tenants of lands in the areas specified in Cls. (a) to (f) of Section 43-C the other rights which had already accrued to them prior to the Amending Act of 1952 and the Amending Act 1955 and which had been adversely affected by those enactments. The proviso to Section 43-C, however, has no relevance in the context of lands in respect of which a Notification under Section 88 (1) (b) has been issued. The effect of S. 88 (1) of depriving tenants of lands which are reserved for non-agricultural and industrial development continued because such lands were not the subject matter of provisions of Sec. 43-C or the proviso. Section 43-C was, therefore, wholly irrelevant for the purpose of ascertaining the effect of the Notification under Section 88 (1) (b). AIR 1973 Bom 172 and AIR 1966 SC 459, Distinguished.

(Para 15)

Cases Referred:	Chronological	Paras
1979 Bom CR 75		11
AIR 1975 Bom 52 : 1974 Mah LJ 548		11
AIR 1973 Bom 172 : 1973 Mah LJ 124		16
AIR 1966 SC 459		17
AIR 1966 SC 538		13

R. J. Joshi with H. C. Tunara and C. V. Mandavia, for Appellants; S. H. Kapadia with Kumar V. Deorukhkar i/b M/s. Gagrat and Co., for Respondents Nos. 1 to 5.

CHANDURKAR, J.:— This appeal by defendants Nos. 3 and 4 is directed against the order made by Kania, J. on 11th Mar., 1982 dismissing the Notice of Motion taken out by the appellants for vacating an order of interim injunction made by Modi, J. on 13th April, 1981. The contesting respondents Nos. 1 to 5 have filed a suit on the Original Side of this Court asking for a permanent injunction preventing the appellants from trespassing upon or entering the lands in question; from dispossessing the plaintiffs or any of them of the said lands or any part thereof; from constructing any structure or structures on the said lands or any part thereof and from preventing, obstructing or interfering in any manner with the exclusive possession, use and enjoyment of the said lands or any portion thereof by the plaintiffs. It is not necessary to go into the various allegations made in the plaint on which the plaintiffs claim a right to continue in possession of the lands in dispute and it is sufficient to mention that the claim of the plaintiffs appears to be that their predecessor-in-title, viz., Babiya, who

was the husband of plaintiff No. 1 and the father of the other plaintiffs was in exclusive and uninterrupted possession, use and enjoyment of the lands in dispute. It may be stated that the lands in dispute, which is having an area of 8006 sq. metres approximately, is a part of a larger piece of land having an area of 17,000 sq. metres situate at Village Kurar which has been included in the Municipal limits of Malad Municipality.

2. According to the defendants, the land in question belongs to one Sukhtankar with whom the appellants had entered into a partnership for the purpose of developing the land. This partnership came to be dissolved in 1977 and as a part of the division of the assets of the partnership, the lands have been taken over by the appellants who had applied to the Competent Authority under the Urban Land Ceiling Act for exemption under Section 20 of the Act. This application has been granted on 21st Feb., 1978 and the appellants claimed that permission to convert the land to non-agricultural purpose has also been granted on 2nd Nov., 1978.

3. In the suit, a Notice of Motion was taken out by the plaintiffs for an interim order of injunction. Injunction was granted by Modi, J. restraining the appellants from in any way interfering with the possession of the disputed lands bearing CTS Nos. 74, 75, 84 (1 to 7) and 95 (1 to 4) of Village Kurar, Dapthary Road, Malad, and from dispossessing the plaintiffs or any of them from the said lands or part thereof and from putting up any construction on or under the said land or any part thereof. The present appellants, who are defendants Nos. 3 and 4 were given liberty to put up a compound wall around the said lands but so as not to obstruct in any way the possession or right to pass or repass of the plaintiffs or any of them or their guests, invitees and persons desiring to visit them. Defendants Nos. 3 and 4 were also permitted to construct or have constructed drainage, electric cables and other facilities passing throughout the land in dispute provided, however that the same will be taken only along the periphery of the land. After having made an order of injunction, the learned Judge, taking the view that the plaintiffs claimed tenancy rights under the Bombay Tenancy and Agricultural Lands Act, 1948, made a reference to the Mamlatdar. In para 4 of the order Modi, J. observed as follows:

"The case of the plaintiffs based on adverse possession, prima facie, appears to be

difficult to prove. However, the plaintiffs' claim in the alternative is for the tenancy rights claimed under the Bombay Tenancy and Agricultural Lands Act, 1948. This issue in my view must be referred to the proper authorities under the said Act. Hence, under the provisions of Section 85-A of the said Act I stay this suit till this issue is decided and refer the said issue to Mamlatdar Borivali under the provisions of the Act for decision. The Mamlatdar should dispose of the matter as expeditiously as possible.

5. In case the decision is against the plaintiffs, liberty to the defendants to apply for vacating or variation of the interim order.

6. Liberty to the parties to apply also in case there is delay in disposing of the matter by Mamlatdar."

4. The reference was dealt with by the Tahsildar, Borivali, by his order dated 20th Aug., 1981. The Tahsildar took the view that the provisions of the Tenancy Act are not applicable to the suit lands because of the proclamation made by the then Government of Bombay on 24th May, 1948, which, according to the Tahsildar had the effect of the suit land becoming a part of the Municipal District of Malad, as well as in view of the provisions made in Section 88 (1) (b) under which the suit lands were reserved for non-agricultural and industrial development. He, therefore, took the view that the claim of the plaintiffs for tenancy right under the Tenancy Act was not established and was, therefore, rejected. This order was upheld by the Collector who dismissed the appeal against the order of the Tahsildar. By a brief order, the Additional Collector, Bombay Suburban District, upheld the decision of the Tahsildar and confirmed the declaration that, "the appellants are not the tenants of the suit lands viz., Survey Nos. 32/2 and 33 of Village Kurar." There is no dispute that these are the lands in question.

5. The plaintiffs have filed a revision application before the Maharashtra Revenue Tribunal which has not yet been heard. But, in the meantime, the appellants took out the Notice of Motion to have the order of injunction vacated. This Notice of Motion was taken out after the decision of the Additional Collector dismissing the appeal of the plaintiffs. The Notice of Motion was, however, dismissed by Kania, J. giving opportunity to the appellants to take out fresh Notice of Motion after the final disposal of the revision application by plaintiffs Nos. 1 and 6 before the Maharashtra Revenue

Tribunal, and the learned Judge noted the agreement of the parties that they would apply for the expeditious hearing of the application. It is this order which is now challenged in this appeal.

6. Mr. Joshi, learned counsel, appearing on behalf of the appellants had contended that in view of the fact that the lands in question have been included in the local area of the Municipal District of Malad by Notification under Section 8 (1) of the Bombay District Municipal Act 1901, as well as in view of the fact that the State Government has already issued a Notification on 29th Mar., 1957 in exercise of its power under Section 88 (1) (b) of the Bombay Tenancy Act declaring the entire land in village Kurar as being reserved for non-agricultural and industrial development, the provisions of the Tenancy Act were wholly inapplicable to the lands in question and not only were the plaintiffs not entitled to claim any right under the Tenancy Act but the reference made to the Tahsildar was also not necessary.

7. The argument in the appeal before us has proceeded on the limited question as to whether, on admitted facts in the present case, the plaintiffs were entitled to claim any right under the provisions of the Bombay Tenancy Act? The facts, which are not in dispute, are as follows:

(i) By a preliminary notification dated 24th May, 1948 issued under Section 8 (1) of the Bombay District Municipal Act 1901, the Government of Bombay had notified its proposal to constitute a local area, a permanent municipal district, under Ss. 4 and 7 of the said Act under the name of Municipal District to Malad and many other survey numbers of village Kurar including survey numbers 22 to 39 which included survey Nos. 32/2 and 33 in question.

(ii) The Government by subsequent Notification dated 22nd Nov., 1950 published in the Bombay Government Gazette dated 7th Dec., 1950, Part I A, after making a reference to the Notification dated 24th May, 1948, referred to above, declared under Sections 4 and 7 of the Bombay District Municipal Act, 1901, that the local area, the local limits whereof are set forth in the schedule annexed to the Notification to be a permanent municipal district with effect from 1st April, 1951 under the name of the Municipal District of Malad. The schedule set out the limits of the permanent Municipal District of Malad and they were the same as were specified in the Notification of 24th May, 1948.

(iii) The Government of Bombay had in exercise of the powers conferred by Cl. (b) of sub-section (1) of Section 88 of the Bombay Tenancy Act, issued a notification on 29-3-1957 and had specified the area mentioned in the schedule annexed to the Notification as being reserved for non-agricultural and industrial development and Village Kurar was mentioned at serial No. 12.

8. Normally, when the matter was pending in revision before the Maharashtra Revenue Tribunal, we would not have gone into the question as to whether the plaintiffs were entitled to the benefit of the Tenancy Act. But the matter appears to us to be so plain and clear and beyond any controversy that we do not think it worthwhile to allow the litigation between the parties to be dragged on only on the issue of a claim of tenancy. It also appears to us that the relevant facts were probably not brought to the notice of either Modi, J. or Kania, J. and if the relevant provisions were brought to the notice of the learned Judge who dealt with the matter earlier, we are sure that the matter could have been dealt with by this Court without making a reference to the Revenue Authorities.

9. It is contended on behalf of the appellants that there was no occasion in this case to make any reference to the Tahsildar because, on admitted facts, the provisions of the Tenancy Act were not applicable at all. According to the learned counsel, having regard to the fact that Notification dated 29th Mar., 1957 was issued under Section 88 (1) (b) of the Tenancy Act, the provisions of the Tenancy Act became inapplicable to the lands in question. The learned counsel contended that if the provisions of the Tenancy Act became inapplicable to the lands in question, and the Civil Court is competent to decide the question as to whether the provisions of the Tenancy Act were attracted in the instant case or not, and further Modi, J. having taken the view that *prima facie* the claim of the defendants that they were in adverse possession could not be supported, Kania J. should have vacated the injunction issued by Modi, J. According to the contesting respondents they and their three predecessors-in-title were in possession of the lands in dispute since 1903 and in any case as they were in possession on the date on which the Tenancy Act had come into force, certain rights had accrued to them under the Tenancy Act and therefore, the only forum where the question as to whether the contesting respondents were tenants or not could be decided was the Re-

venue Authorities viz., the Tahsildar and this could be done only by a reference under Section 85-A of the Bombay Tenancy Act. Reliance was placed on the provisions of the proviso to Section 43 (c) of the Tenancy Act and it was contended by Mr. Kapadia that once certain rights had accrued to the contesting respondents under the provisions of the Tenancy Act, those rights were not affected either by the Notification dated 29th March, 1957 or by the inclusion of the lands in question of village Kurar within the limits of the Municipality of Malad. We shall refer later to some decisions on which Mr. Kapadia has relied in support of the above contention.

10. Before we refer to the relevant provisions of the Tenancy Act, and especially to the provisions of Ss. 43 (c) and 88 thereof, it is necessary to refer to certain averments in the plaint made by the plaintiffs. In para 8 of the plaint the plaintiffs have admitted that the area in which the plot of land in dispute is situated falls within the territorial limits of Malad District Municipality prior to 1st Feb., 1957. Then in paragraph 12 they have stated that from and after 1st Feb., 1957 the said plot of land was merged in the Municipal Corporation of Greater Bombay and certain structures standing on the plot of land have been assessed to municipal taxes in the name of Bably, the deceased predecessor-in-title of the plaintiffs. The plaintiffs themselves have stated in para 30 that on 31st Jan., 1949 the tenancy of Bablya Chaudhary was terminated by the mother of the first defendant, and that after 1949, in any event, the plaintiffs' predecessor continued to remain in exclusive possession, use and occupation of the land in question and, therefore, the plaintiffs were owners of the said land by adverse possession. The allegation further made is that on 1st April, 1957 plaintiffs were in exclusive possession, use and occupation of the lands and the said lands were also under cultivation even as late as 24th Feb., 1979 as could be seen from the order of the Tahsildar, Borivali. That these averments were intended to support the claim of adverse possession is clear from the averments in para 30. Then in para 31 the plaintiffs have stated that Bablya had made an application on 17th April, 1965 for a declaration under Section 70-B of the Bombay Tenancy Act that he was a tenant but the said application (Suit No. 5 of 1965) was subsequently withdrawn by Bablya on the ground that certain provisions of Bombay Tenancy Act did not apply and Bablya

could not claim to be the owner of the land under his cultivation in view thereof. A plea of exclusive possession from 1949 onwards is once again raised in the same para and an averment has been made at the end of para 33 as follows:

"The plaintiffs therefore submit that in any event as stated hereinabove the afore-said lands continue to be agricultural lands and in any event the plaintiffs are the tenants of defendants Nos. 1 and 2 herein, and are in lawful possession thereof."

These are the material averments and these averments highlight the fact that while in para 30 it is stated that the tenancy was terminated by notice dated 31-3-1949, in para 33 a plea of tenancy is again taken and lawful possession of the land in question is claimed.

11. This Court has consistently taken the view that before a reference to the Mamlatdar for deciding the issue of tenancy under the Tenancy Act is made, the alleged tenant must disclose in his pleadings details about the tenancy and the exact nature of the right which is claimed by him and that an issue of tenancy cannot be raised on a vague plea (see 1974 Mah LJ 548): (AIR 1975 Bom 52). In so far as the present case is concerned, in the relevant averments referred to above, the case pleaded is that the plaintiffs were in adverse possession after the tenancy of Bablya was terminated by the notice dated 31-3-1949. The tenancy rights seem to have been claimed by the plaintiffs on the ground that they and their predecessors-in-title had been in lawful possession after the tenancy was terminated by notice dated 31st Mar., 1949. The claim thus appears to be one of deemed tenancy. It is, however, not necessary for us to go into this question because if it is found that the lands in question were excluded from the operation of the provisions of the Tenancy Act, then even Section 85-A of the Tenancy Act would not be attracted to the facts of the present case. If it is found on the facts of the present case that the reference to the Revenue Court should not have at all been made as the lands were excluded from the operation of the Tenancy Act, it would be permissible to recall the reference as held by this Court in Civil Revn. Appln. No. 561 of 1978 decided on 17th Nov., 1978* by Pratap, J., Satwashila Daulatrao Ghorpade v. Rukminibai. If the question raised is whether the provisions of the Tenancy Act are attracted to a given case,

on facts which are not in dispute, it is clearly permissible for the Civil Court to go into the question of the applicability of the provisions of the Tenancy Act.

12. It is, therefore, now necessary to refer to certain provisions of the Tenancy Act. Under the original provisions of Section 88 (1) (c) it was provided that nothing in the foregoing provisions of the Tenancy Act shall apply inter alia, "to any area within the limits of Greater Bombay and within the limits of the municipal boroughs of Poona City and Suburban, Ahmedabad, Sholapur, Surat and Hubli and within a distance of two miles of the limits of such boroughs; or (d) to any area which the Provincial Government may, from time to time, by notification in the Official Gazette, specify as being reserved for urban non-agricultural or industrial development." By Act 13 of 1956, in the place of original Section 88, new provisions in S. 88 (a) to (d) were substituted. We are concerned only with Cl. (b) of Section 88 which reads as follows:

"Nothing in the foregoing provisions of this Act shall apply—

(a)

(b) to any area which the State Government may, from time to time, by notification in the Official Gazette, specify as being reserved for non-agricultural or industrial development."

By Act 33 of 1952 Cl. (c) of Section 88 was substituted for the original Cl. (c). The new clause along with Cl. (d) reads as follows:

(c) to any area within the limits of Greater Bombay, within the limits of the Municipal Corporations constituted under the Bombay Provincial Municipal Corporations Act, 1949, within the limits of the municipal boroughs constituted under the Bombay Municipal Boroughs Act, 1925, and within the limits of any cantonment; or

(d) to any area which the State Government may, from time to time, by notification in Official Gazette, specify as being reserved for urban non-agricultural or industrial development:

By the same Act of 1956 a new provision in S. 43-C was enacted. This S. 43-C was one of the several provisions in Chaps. III A and B which were added to the Tenancy Act by Act 33 of 1956. Since heavy reliance is placed on the provisions of S. 43-C along with proviso thereof, it is necessary to reproduce that provision. Section 43-C and the proviso read as follows:

* Reported in 1979 Bom CR 75.

"43-C. Nothing in Sections 32 to 32-R (both inclusive) and 43 shall apply to lands in the area within the limits of—

- (a) Greater Bombay,
- (b) a municipal corporation constituted under the Bombay Provincial Municipal Corporations Act, 1949.
- (c) a municipal borough constituted under the Bombay Municipal Boroughs Act, 1925,
- (d) a municipal district constituted under the Bombay District Municipal Act, 1901,
- (e) a cantonment, or
- (f) any area included in a Town Planning Scheme under the Bombay Town Planning Act, 1954:

Provided that, if any person has acquired any right as a tenant under this Act on or after the 28th December, 1948, the said right shall not be deemed to have been affected by the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1952, or (save as expressly provided in Section 43-D), by the Amending Act, 1955, notwithstanding the fact that either of the said Acts has been made applicable to the area in which such land is situate."

One more amendment of the Tenancy Act which requires to be referred to was the amendment in Cl. (b) of Section 70 of Tenancy Act, by the Act 49 of 1969, which had the effect of vesting jurisdiction in the Tahsildar not only to decide whether the person is a tenant or not but also to decide whether a person "was at any time in the past, a tenant". We have referred to this amendment because it was contended on behalf of the plaintiffs by Mr. Kapadia that since the jurisdiction of the Tahsildar extended to decide the question as to whether a person was a tenant or not, the question as to whether the predecessor-in-title of the plaintiffs was a tenant could also be decided by the Tahsildar and the reference was, therefore, validly made to him.

13. Now we have already referred to the Notification which was issued by the State Government under Section 88 (1) (b) on 29th March, 1957 under which 20 villages were reserved for non-agricultural and industrial development and Kurar was one of the twenty villages so notified. Kurar is the village in which the land in dispute is situated. The effect of this Notification of 29th March, 1957 issued under S. 88 (1) (b) of the Tenancy Act is that the lands in village Kurar including the lands in question have been totally excluded from the operation of the provisions of the Tenancy Act, because the imperative words of Section 88 are, "nothing in the foregoing provisions of

the Act shall apply" to the area reserved for non-agricultural or industrial development. The "foregoing provisions" are Sections 1 to 87-A and, therefore, the moment a Notification is issued under S. 88 (1) (b), none of the provisions of Tenancy Act will apply in the case of any area which has been specified as being reserved for non-agricultural or industrial development. That the effect of a Notification under S. 88 (1) (b) is to exempt lands from the operation of the provisions of the Tenancy Act retrospectively is now settled by the decision of the Supreme Court in *S. N. Kamble v. Sholapur Borough Municipality*, AIR 1966 SC 538.

14. It is, therefore, difficult to accept the contention advanced on behalf of the plaintiffs that the Notification dated 29th Mar., 1957 cannot deprive the plaintiffs of the rights which had vested in them as tenants. This argument presupposes that on the date of the coming into force of the Tenancy Act the plaintiffs' predecessor-in-title was a tenant and certain rights under the Tenancy Act had vested in him. It is not necessary to go into this question because, even assuming that Bablya had any rights under the Tenancy Act, having regard to the mandatory provisions of Section 88 (1) (b), no rights under any of the provisions of Ss. 1 to 87-A of the Tenancy Act could be claimed by the plaintiffs.

15. Reference to the provisions of Section 43-C and the proviso thereto appears to us to be wholly out of place for the purposes of the present case. A bare reading of the provisions of Section 43-C in its substantive part will show that lands specified in Cls. (a) to (f) thereof, have been exempted from the operation of certain provisions viz., Sections 32 to 32-R and Section 43. The lands specified in Cls. (a) to (f) are lands either in the limits of Municipal Corporation or Committees or Cantonment or in any area included in any town planning scheme under the Bombay Town Planning Act 1954. Now the proviso to S. 43-C merely provides that if any person has acquired any right as a tenant under the Tenancy Act on or after 27th Mar., 1948, i.e. the date on which the Tenancy Act came into force, that right shall not be deemed to have been affected by the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1952 or by the Amending Act of 1955, which is same as the Act 13 of 1956, notwithstanding the fact that either of the said Act has been made applicable to the area in which such land is situated. In

order to understand this proviso it has to be borne in mind that when the new provision in Cl. (c) was enacted in S. 88 (1) by the Bombay Tenancy and Agricultural Lands (Amendment) Act 1952 (33 of 1952), the effect was that all the lands situated within the limits of Greater Bombay, within the limits of the Municipal Corporation under the Bombay Municipal Corporation Act, within the limits of the Municipal Boroughs constituted under the Bombay Municipal Boroughs Act 1955 and in the limits of any cantonment were exempted from the operation of the provisions of the Tenancy Act. There was, thus, a total deprivation of the benefits of the Tenancy Act to the tenants of lands situated within the municipal limits of the Corporations or municipality and cantonment specified in Cl. (c). This was undone partly by the enactment of the provisions of S. 43-C and the proviso. The effect of enactment of Section 43-C and the proviso thereof was that in respect of tenants of lands situated within the Municipal limits specified in Cls. (a) to (d) and other areas specified in (e) and (f) the rights of statutory ownership available to tenants of other lands could not be availed of by these tenants. The object of enacting the proviso was to restore to the tenants of lands in the areas specified in Cls. (a) to (f) of Section 43-C the other rights which had already accrued to them prior to the Amending Act of 1952 and the Amending Act 1955 and which had been adversely affected by those enactments. The proviso to Section 43-C, however, has no relevance in the context of lands in respect of which a Notification under S. 88 (1) (b) has been issued. The effect of S. 88 (1) of depriving tenants of lands which are reserved for non-agricultural and industrial development continued because such lands were not the subject matter of provisions of Section 43-C or the proviso. Section 43-C was, therefore, wholly irrelevant for the purpose of ascertaining the effect of the Notification under Section 88 (1) (b). The authorities relied upon by Mr. Kapadia were mainly concerned with the effect of Section 43-C and the proviso.

16. In *Pralhad Ganaba Kapare v. Sadaba Rambhau Bhosale*, 1973 Mah LJ 124 : 74 Bom LR 687 : (AIR 1973 Bom 172) the question was whether a Notification issued by the Government under Section 88 (1) (b) of the Act excluding the lands from the operation of Sections 32 to 32-R, after the lands had already vested in the tenants under

Section 32, divested the tenant of the ownership rights, and it was held by this Court that the tenant had acquired title to the lands which could not be divested by the Notification and the Agricultural Lands Tribunal had power to determine the purchase price in respect of the land under S. 32-G of the Act. The facts of that decision will show that the Notification including the fields in that case within the limits of the Poona Municipal Corporation was subsequent to the vesting of the title under Section 32 of the Tenancy Act. The learned Judge followed an earlier decision of Division Bench of this Court which had taken the view that inclusion of the lands of which the tenants had become owners with effect from 1-4-1957 within the limits of Thana Municipal Borough did not affect the rights which had already vested in the tenants on 1st April, 1957; the tillers' day. In the case before the Division Bench the lands in question were included in the limits of Thana Municipal Borough with effect from 1st Aug., 1958 by Notification issued by Government on 23rd June, 1958 when the proceedings for determination of purchase price under S. 32-G were pending before the Agricultural Lands Tribunal as the tenant had become owner of the land on 1st April, 1957 and it was held that the jurisdiction of the Lands Tribunal to determine the purchase price was not affected by the Notification on 23-6-1958. It may be pointed out that so far as the Notification in question in the present case is concerned, it was issued on 29th March, 1957 which is prior to the statutory vesting date.

17. The other decision relied upon by Mr. Kapadia is in *Ishverlal Thakorelal Almaula v. Motibai Nagjibhai*, AIR 1966 SC 459 in which the Supreme Court was dealing with the scope of Section 43-C and the proviso thereto. The Supreme Court held that the effect of the proviso was that rights other than those specified under S. 43-C were restored by the proviso retrospectively. As we have already pointed out, so far as the present case is concerned, Section 43-C is not at all relevant.

18. We may also refer to the provisions of Section 88-AI of the Tenancy Act which was inserted in the Act by Act 63 of 1958. It reads as follows:

"88-AI. Where any land being land situate in any of the villages specified in Sch. IV was not included within the limits of the former municipalities of Malad, Kandivali, Borivali, and Mulund immediately before the

first day of February 1957, and a tenant of the land would have been deemed to have purchased the land under Section 32 but for the Government Notification in the Revenue Department, No. TNC. 5157/31/90-M, dated the 29th March, 1957, issued under Cl. (b) of Section 88 in respect of the said villages, such tenant shall, notwithstanding the said notification, be deemed to have purchased the land under Section 32 on the relevant date specified in that section and the provisions of Sections 32 to 32-R and Section 43 shall apply to such purchase accordingly."

19. The Notification dated 29th March, 1957 referred to in S. 88-AI above is the same Notification No. TNC. 5157/31/90-M, by which lands in Kurar were reserved for non-agricultural and industrial development. By this new provision it was provided that any land situated in any of the villages specified in Schedule 4 — Village Kurar is at Serial No. 12 in the Schedule — was not included within the limits of former municipal limits of Malad immediately before 1st Feb., 1957 and the tenant of the land would have been deemed to have purchased the land under Section 32 but for the Government Notification dated 29th March, 1957, such a tenant shall, notwithstanding the said Notification, be deemed to have purchased the land under S. 32 on the relevant date in that section and the provisions of Sections 32-R and 43 were to apply to such purchase accordingly. This provision operates only in respect of those lands which were not included within the limits of Kandivali, Borivali and Malad immediately before the 1st day of March, 1957. Tenants of such lands were now vested with a right of statutory purchase if they were deprived of such a right as a result of Notification dated 29th March, 1957.

20. The Lands in question, even as specified in the plaint are Survey Nos. 32 part and 33 part i.e. City Survey Nos. 74, 75, 84 (1 to 7), 95 and 95 (1 to 4). The proclamation dated 24th May, 1948 included Survey Nos. 22 to 39 of village Kurar as proposed to be included in the permanent Municipal District of Malad. We have also referred to the final Notification issued dated 22nd Nov., 1950 by which the area within the limits specified there was constituted to be a permanent municipal district with effect from 1st April, 1951 in the Municipal District of Malad. We have also pointed out that the limits are same as specified in the earlier Notification of 24th May, 1948. The express provisions in Section 88-AI fur-

ther reiterate the position that while in respect of certain lands which were not within the limits of Malad Municipality before 1st Feb., 1957, statutory ownership rights were to be vested in the tenant thereof, no such rights were contemplated in respect of the lands in question because they were already part of the Municipality of Malad.

21. It is thus clear that the claim made by the plaintiffs, though not in so many words in the plaint, that they are governed by the provisions of the Tenancy Act is wholly misconceived and for the purpose of determining the question as to whether they are entitled to any interim relief or not, the determination of the alleged right as tenants was wholly irrelevant because we have already shown that the provisions of the Tenancy Act are not at all attracted in the present case. The consequence which must now follow is that the reference made to the Tahsildar was wholly unnecessary and incompetent and it is liable to be recalled and must be treated as recalled with the result that the Revenue Tribunal is not required now to decide on merits the Revision Application pending before it. Secondly, the appellants are entitled to have their Notice of Motion for vacation of injunction heard on merits without taking into account the fact that the plaintiffs were claiming to be entitled to the benefits of the Tenancy Act.

22. In the view which we have taken, the order made by Justice Kania rejecting the Notice of Motion No. 1236 of 1981 is set aside and the Notice of Motion will now be decided on merits. The appeal is thus allowed. In the circumstances of the case, we make no order as to costs of the appeal. The Notice of Motion to be heard in the third week of June, 1982.

Appeal allowed.

AIR 1982 BOMBAY* 498

A. N. MODY, J.

P., Appellant v. P., Respondent; and R. Co-respondent.

First Appeal No. 599 of 1979, D/- 6-8-1981.

(A) Hindu Marriage Act (25 of 1955), S. 13 (1) (i) — Pleadings — Alibi evidence of co-respondent — Cannot be believed in absence of pleading in that behalf. (Civil P. C. (1908), O. 8, R. 2).

*Only portions approved for reporting by High Court are reported here.

GZ/GZ/D75/82/JHS

If a person is relying on an alibi, it is necessary that it should be pleaded. The alibi of the co-respondent relied on, if not pleaded, is likely to take the opposite party by surprise and it ought to have been pleaded and not having been pleaded, apart from the question of whether he can lead evidence, the defence becomes difficult of belief. (Para 21)

(B) Evidence Act (1 of 1872), Ss. 137 and 138 — Cross-examination — Scope.

The answers in examination-in-chief are normally in reply to the questions put by the advocate, but whatever is stated is really the case of that witness and particularly when the witness is a party to the proceedings of that party. All the questions which are asked with a view to challenge the evidence-in-chief are permissible. There is no provision of law which says that cross-examination should be confined to what is volunteered by the witness and cannot be directed to challenge or clarify the answers given in reply to the questions put by his own advocate in examination-in-chief. (Para 23)

(C) Hindu Marriage Act (25 of 1955), S. 13 (1) (i) and (ia) — Evidence and proof — Respondent-wife in hotel cabin with her blouse and brassiere unhooked and co-respondent holding her breasts in his hands — Not by itself sufficient to prove adultery or cruelty.

It is true that there can be ordinarily no direct evidence of adultery. It is difficult to produce evidence of the party being found in actual compromising position. The finding of adultery must necessarily rest on circumstantial evidence. The circumstantial evidence will consist not only of the two offending parties being found together in unusual circumstance or being together alone in a secluded place for a long period of time but also will consist of the social condition of the party and the manner in which the parties are accustomed to live. To put it differently, what can be said to be natural mingling of the opposite sexes in a jet set world will be alien to a person belonging to ordinary middle class and the unusual mingling of two persons of opposite sex in seclusion for any length of time amongst that class can justifiably lead to an inference of adultery. However, in the present case this position cannot help the appellant-petitioner. The evidence on the incidents prior to 30th Nov., 1971 is not reliable. This leaves only the incident of 30th Nov., 1971. Assuming the incident of 30th Nov., 1971 i.e. the presence of the respondent-wife in the restau-

rant cabin with her blouse and brassiere unhooked and the co-respondent holding her breasts in his hands is proved, that by itself cannot permit any inference of adultery. It is possible that it was preliminary step to adultery and may ultimately have resulted in adultery but it cannot be said that the incident proved that adultery had taken place. Hence, the petitioner has been unable to prove adultery. AIR 1963 Bom 98, Distinguished. (Paras 18, 24)

As regards cruelty, it is not sufficient to prove mere cruelty. What is required is that the conduct should be such as is wilful or unjustifiable and of such a character as to cause danger to life, limb or health, bodily or mental or to give rise to a reasonable apprehension of such a danger. L. P. Appeal No. 28 of 1980, D/- 10-3-1981 (Bom), Foll. (Para 24)

The incident is such as may cause great disturbance to the petitioner, but cannot be said to be such as can cause any damage to the health. The evidence given also does not establish that the incident had in fact affected the health of the petitioner to any extent. The only evidence is of annoyance or mental disturbance. This cannot amount to legal cruelty required to form a ground for divorce. (Paras 18, 24)

Cases Referred: Chronological Paras

(1981) L. P. Appeal No. 28 of 1980, D/- 10-3-1981 (Bom), Madanlal Sharma v. Santosh Sharma 24

AIR 1975 SC 1534 25

AIR 1963 Bom 98:65 Bom LR 24 24

K. H. Panchal with Hemendra Shah, for Appellant; C. R. Dalvi with P. N. Karlekar, for Respondent; M. P. Kenia with Miss Premila Shah, for Co-respondent.

JUDGMENT:— The appellant (original petitioner) is the husband of the 1st respondent (original respondent). She is alleged to have committed adultery with the 2nd respondent (original co-respondent). The petition was dismissed, hence, this appeal.

2. The petitioner and the 1st respondent were married on 14-2-1943 according to Hindu Vedic rites, both being Hindus. They have four issues: three sons and one daughter. The first son is 27 years old, the daughter is 25 years old and the other two sons are respectively 17 and 15 years old. The allegations in the petition, which are not only vague but confusing, are, inter alia, that since about few years prior to the petition, the respondent had been cold and indifferent towards the petitioner; that her conduct aroused suspicion of the petitioner

about the fidelity of the respondent. In or about 1969 the petitioner arranged unobstructive watch on the movements of the respondent through investigative agencies. It is alleged that the respondent was seen moving out of the house almost every day in the absence of the petitioner and meeting various persons of opposite sex and was seen visiting pictures in their company but would return home before the petitioner returned. In the beginning the petitioner pulled up the respondent and pointed out that the respondent should realise her responsibility in life and should lead a chaste life. It is alleged that sometimes the respondent was seen entering a room in a hotel in the company of the co-respondent and coming out after a good length of time. In the following para it is alleged that on finding that his persuasion did not have any effect on the respondent, the petitioner sent a registered letter to the respondent through his advocate in May, 1969, recording the facts. The letter had some effect on the respondent, who improved in her behaviour for sometime, but after a few months, the petitioner again found the respondent to be acting in the same manner and discovered that the respondent in the company of the co-respondent was visiting pictures and hotels and would remain with the co-respondent in rooms in hotels for quite sometime. The petitioner had the movements of the respondent kept under watch in the month of Nov., 1971 and found that on 2-11-1971, the respondent was seen going out with two ladies. The respondent was very well dressed at that time. In the company of those ladies she went to Hotel Buckley Court at Wodehouse Road in a taxi and one of the ladies (other than the respondent) went in the hotel to enquire anxiously for some person but had to come back disappointed. From there the three ladies visited a cinema and after the show again went to the said hotel and returned back. It is then alleged that on 3-11-1971, the respondent went in a building known as Sakar Bhavan at 6th Khetwadi and enquired about some person from a lady on the 2nd floor of the said building, and finding that, that person was not at home, the respondent went to Grant Road, entered a shop known as Simplex Readymade Store and after sometime went to Shalimar Talkies at Grant Road, where co-respondent met her and they went inside the theatre at about 2.45 p. m. The respondent was already having tickets of the show. They came out of the theatre at about 3.15 p. m., hired a taxi bearing No. BMR 1454

and went inside Aroma Hotel near Chitra Cinema, Dadar, and came out after some enquiries. From there they proceeded by the same taxi to Preetam Hotel (which is an eating house and not a residential hotel) at Khodadad Circle, Dadar and were there till about 4.30 p. m. From there, they went by a taxi to Grant Road, entered Imperial Hotel behind Apsara Cinema at about 5 p. m., hired a room and were there in the hotel till about 6.30 p. m. and after coming out hired a taxi. The co-respondent dropped the respondent near Alankar Cinema and then went away. Then there is a reference to what happened on 4-11-1971. Then comes reference to 6-11-1971, when one Dr. Kishorebhai, was espied hugging and kissing the respondent. Then is mentioned the most important incident of 30-11-1971. On 29-11-1971, the petitioner on a pretext of going out of Bombay, left the home and stayed in Modern Hindu Hotel near Excelsior Cinema. On 30-11-1971, a watch was kept by two of the operatives of the detective agency which was hired as also the Chief Executive D'Souza and the petitioner. The respondent left her home at about 1.30 p. m. and took a bus, got down at Hughes Road, walked along the footpath followed by one operative on the same footpath and the other one on the opposite footpath. She entered New York Stores and Restaurant and was there till about 2.30 p. m. when one of the operatives of the detective agency, entered the cabin and saw that respondent's blouse and brassiere were unhooked and the co-respondent was holding her breasts in his hands. The respondent and the co-respondent were startled. The said operative immediately called the petitioner to the cabin and when the petitioner saw the respondent and the co-respondent in the said cabin, the petitioner informed the co-respondent that he was the husband of the respondent, the co-respondent got frightened and started apologising and at the instance of the petitioner disclosed his name. On the basis of this the petition is filed on the ground of adultery and cruelty. The written statement of the respondent consists of complete denials.

3. The petitioner's case mainly rests on his suspicion about the activities of the respondent and which were recorded by him in a letter dated 26-3-1967 addressed by him to the maternal uncle of the respondent, with a copy to one Jitendra, a brother of the respondent, to which there was no reply; a letter dated 16th May, 1969, addressed to the respondent by the petitioner through his

advocate to which also there was no reply. The finding of an empty bottle bearing name Saraswati which was, as the petitioner alleges, on enquiry found to have contained some medicine for abortion; the incidents of 2nd and 6th Nov., 1971 and the final incident of 30-11-1971. As regards the general allegations of bad character of the respondent, they are absolutely vague and devoid of any particulars.

4. The evidence in the matter is most unsatisfactory. The evidence led on behalf of the petitioner consists of his own evidence and that of the employees of the detective agency employed and the contemporaneous reports sent to the petitioner by the said agency. As pointed out by Mr. Dalvi, there are many contradictions between the reports and the evidence and also between the evidence of the two operatives and that of the petitioner as to what happened on 30-11-1971. There is a set of the books of account of the Agency showing the expenses incurred on each particular case. However, these books are not very satisfactory. The evidence of the respondent and the co-respondent also is unsatisfactory. The respondent maintains throughout her evidence that her married life with the petitioner was happy till about 1975/76, that is, even after the date of the filing of the petition. She then says that their married life was happy till 1969/70, which she changes to the married life being happy till about 1974/75 and then explains that the married life was happy till 1969/70 and good till 1974/75. Then she says that up to 1969/70, they had no complaints against each other and thereafter till 1974/75, she had no complaints against the petitioner and that the petitioner had no complaints against her, except as mentioned in the petition. I will refer to the other aspect of the evidence later on. The evidence of the co-respondent as is discussed hereinafter, is not reliable.

5. As contended by Mr. Kenia, the allegations of the petitioner as contained in the petition are most unsatisfactory, vague and contrary to the actual events that have taken place, as admitted by the petitioner in his evidence. Paras 3 and 4 of the petition give a clear impression that the case of the petitioner is that in or about the year 1969, the petitioner came to know that the respondent was carrying on with the co-respondent and that they were found in a hotel room more than once and that this was followed by the advocate's letter of May, 1969. Then it is

alleged that even after the incident of 30-11-1971, the respondent is carrying on her adulterous and immoral connection with the co-respondent openly and more vigorously, than before and that there is not a word about this in the evidence of the petitioner. The attack of Mr. Kenia is justified. He also points out that it is not as if the petitioner does not understand the law or legal drafting. The petitioner is a sales tax practitioner, and is therefore, supposed to have a trained legal mind to some extent, and therefore, he should be presumed to have understood the effect of what is stated in the petition. Though, there is substance in the attack of Mr. Kenia, I do not propose to attach too much importance to the manner in which the petition is drafted as in my view, the petition contains exaggerated allegations and allegations are mentioned out of sequence. Though, I may therefore, treat the petition a little leniently, it must to some extent have an effect on appreciating the evidence of the petitioner.

6 to 11. (His Lordship considered the evidence and proceeded.)

12 to 17. Then comes the most important period of 2nd to 6th Nov., 1971 and of 30th Nov., 1971. Mr. Dalvi and Mr. Kenia have strongly attacked the evidence led by the petitioner in this respect. The most important witness regarding these reports is one Chitnis, an operative of the Detection Service India Pvt. Ltd., the detective agency employed by the petitioner. (His Lordship after considering the evidence of witness Chitnis with regard to happenings of 2nd to 6th Nov., 1971 and holding that the same could not be accepted, proceeded.)

18. Then comes the most important incident of 30-11-1971. The report says that an arrangement was made on 29-11-1971 by the petitioner and according to the arrangement, the senior executive of the agency and operative picked up the petitioner from Modern Hindu Hotel located near Excelsior Cinema, at about 10.15 a.m., in Car No. MRG 4866. From there they went to Khetwadi, where they posted themselves unobstructively near about Kanji Bhavan, at about 10.35 a.m. the respondent was seen coming out of the balcony thrice and looking out on the road in both the directions. She left her residence at about 1.30 p.m., stood at a bus stop near her residence. Two of the operatives stood in the queue. At about 1.40 p.m. the respondent boarded a BEST bus No. BMQ 991 proceeding towards Babulnath. The operatives also boarded the bus. The petitioner and the

senior executive followed them in the car No. MRG 4866. The respondent left the bus at Hughes Road as also the operatives. The respondent started walking along the foot-path and the operatives kept a watch at a short distance, followed by the car. The respondent walked into the New York Stores & Restaurant, situated at the corner of the road and went up the loft, where special family rooms are available. She entered one of the cabins, two of the operatives kept a watch on the ground floor and as the respondent did not come down till 2.30 p.m. One of the operatives went up and suddenly got into the cabin and noticed that the respondent had unhooked her blouse and brassiere was found to have been moved up, thereby exposing her breasts, which were held by a gentleman in both his hands. On seeing the operative, the respondent and her male companion suddenly got up. The male companion came out and asked the waiter as to why he had allowed some stranger to come into the cabin, whereupon the waiter replied that he had allowed the said stranger to meet his relative. In the meantime the operative came down quickly and apprised the petitioner as to what he had seen, whereupon, the petitioner accompanied by the senior executive and another operative rushed in and found the respondent and her male companion seated side by side in the cabin. When the petitioner confronted the companion of the respondent, he gave his name as R., residing at Khar and stated that he had come to the said restaurant to meet the respondent by previous arrangement on telephone. Thereafter, the petitioner told R that he was the husband of the respondent, whereupon the said R offered his apologies and begged his pardon and bent down and touched his feet. On being further questioned, he stated that he in the past resided at Tara Bhuvan, near about the residence of the petitioner and that he knew the respondent for last about four years and that during that period till today he had been carrying on with the respondent. At this stage, the operative who had first found the respondent and R in the cabin stated that R was the same person who had met the respondent at Shalimar Talkies on 3-11-1971 from where R and the respondent had visited two hotels. Thereafter, R gave his visiting card, which showed him as a broker for the Empire Dyeing & Manufacturing Co. Ltd. He was then asked his residential address by the petitioner who wrote out his address on the reverse of the visiting card as x x x x. The said card was taken by the

senior executive from R. R also handed over another card of one C. B. H. which was taken over by the senior executive and they left the restaurant at 3.15 p.m.

19. The evidence of the petitioner on this point is that on 29-11-1971 he approached the investigating agency and informed them that he wanted to catch the respondent red-handed, moving with some person, and accordingly he left the house and stayed in Modern Hindu Hotel. He pretended to the respondent that he was going to Poona. In the afternoon, he went to Maganlal Dress-wala and took a mustache and wig on hire. The detective agency was to contact him in Modern Hindu Hotel. He stayed overnight and on 30-11-1971, he left with the personnel of the detective agency. They were D'Souza, Chitnis and Singbal. His evidence in chief follows by and large the report till he enters the family room. He then says that when he tried to enter the said family room, the co-respondent tried to leave the family room but was stopped by him from coming out. He enquired about his name which was given as R and he told him that he resided at Khar. He also informed him that he had come there by previous appointment on telephone with the respondent. At that time the respondent was in the family room. Chitnis then told him that the co-respondent was the same person as was seen at Shalimar Cinema on 3-11-1971. He then asked for the address of the co-respondent who gave a printed card. He produced the printed card and said that it is the same card which was given by the co-respondent showing his address. He then made enquiries with the co-respondent as to his occupation who told him that he was a broker. Then the petitioner enquired as to for which party he was working when he gave another card showing that he was working for that party. That is the card bearing the name of C. B. Hingorani. He then identified himself as the husband of the respondent whereupon the co-respondent begged his pardon and bent down to touch his feet. The petitioner then enquired of the co-respondent as to how he came in contact with the respondent and the reply is as stated in the report. In his cross-examination, he is again made to repeat what is stated in his examination-in-chief. He elaborated that there was no scuffle between him and the co-respondent, that no sound was created, that there was no hue and cry, that neither the manager of the hotel or the servants of the restaurant noticed the incident. He says that he

went back to the hotel and not to his residence because he wanted to think over the matter. After returning home he did not discuss the incident with the respondent, nor did he reprimand her. He took meals on that day at home and no quarrel or scene took place at their residence thereafter in respect of the New York Restaurant incident, but he did not like to speak to the respondent.

20. D'Souza being dead, obviously his evidence could not be led. The other operative, Singbal has also given evidence. Between the evidence of Chitnis and Singbal, there are certain discrepancies as to who went in first after the respondent and co-respondent were seen by Chitnis in compromising position in the cabin. There are some other discrepancies. The discrepancies, in my view, are not material, particularly, when the evidence is being given after a lapse of about 7 to 8 years.

21. As against this, as already pointed out the evidence of respondent is not such as can inspire confidence. Basically, her evidence consists of denials of the main events, coupled with positive evidence on certain other aspect of the matter which can be called peripheral material. Her evidence on this peripheral material, as already pointed out, is unacceptable. As regards the evidence of the co-respondent, his evidence consists of denial of his carrying on with the respondent and complete denial of his meeting the respondent either on 3rd or 30th Nov., 1971. If he had stuck to his denials, it would possibly have been difficult for the petitioner to shake the evidence of the co-respondent in cross-examination. However, the co-respondent has gone further and trotted out an alibi saying that on 30th Nov., 1971, for almost the whole day he had not gone out of the house at all because he was busy with the first death anniversary of his mother. His evidence regarding his being busy for this purpose cannot be accepted for several reasons. One is that there is no pleading of this alibi in the written statement. There is not a single word in the written statement even remotely indicating that his defence is not only that he was not present on the spot on 30th Nov. but that he was at home and very busy with any such ceremony. In my view, if the person is relying on an alibi, it is necessary that it should be pleaded. Order 8, Rule 2 of the Civil P. C. provides, inter alia, that the defendant must raise in his pleading all such grounds of defence as, if not raised, would be likely to take the opposite

party by surprise. In my view, the alibi of the co-respondent relied on, if not pleaded, is likely to take the opposite party by surprise and it ought to have been pleaded and not having been pleaded, apart from the question of whether he can lead evidence, the defence becomes difficult of belief. Another reason against believing the evidence is that according to him his mother died on 28th Nov., 1970, while the ceremonies for the first death anniversary which were to last for 4 to 5 days started on 29th Nov., 1971 as the co-respondent says that 30th Nov., 1971 was the second day of the ceremony. The learned trial Judge in his judgment has pointed out that death ceremonies are always observed as per Hindu calendar and that he had ascertained the corresponding Hindu tithies on 29th Nov., 1971 and 30th Nov., 1971. He found that it was impossible that the first death anniversary of the person who died on 28th Nov., 1970 can fall anywhere within 4 days of 30th Nov., 1971. Mr. Kenia for the co-respondent has not been able to point out that these observations of the learned trial Judge are wrong. Moreover, the learned trial Judge has stated that he had given an opportunity to the co-respondent to examine any priest or astrologer to convince him that the first anniversary of his mother's death could have fallen on 30th Nov., 1971, which opportunity was not availed of by the co-respondent. Still another reason which raises suspicion about his evidence is that there must have been a number of persons present at the death ceremony and it would be conducted by a priest. Apart from the bare and uncorroborated words of the co-respondent, no other evidence has been led by the co-respondent to prove the ceremonies. He could have led the evidence of his father or brothers or their wives or of some independent outsider for this purpose, but he has chosen not to do so. The evidence of the co-respondent also consists basically of denials with the only important positive evidence being of the alibi. If the co-respondent is disbelieved on the alibi, his denials will have to be viewed in the light thereof.

22. Whichever way one looks at the matter, the position emerges is that most of the evidence on either side is unreliable. The only evidence which can possibly be accepted and which has been accepted by the learned trial Judge is regarding the incident of 30th Nov., 1971. I do not propose to give any definite finding as regards whether that incident can be held to have been proved since, as I will presently point out,

in my view, even if that incident is held to be proved, it will not furnish to the petitioner a ground of divorce.

23. Before I come to the question as to whether the incident of 30th Nov., 1971 by itself can enable the Court to draw presumption of adultery or can amount to cruelty of the type required to furnish a ground for divorce, I must dispose of the contention of Mr. Shah that the learned trial Judge has erroneously disallowed certain questions regarding the alibi. Three questions were disallowed by the learned trial Judge. They are:

"Q. Is it your case that because of the first anniversary rites connected with your mother's death, you could not be out of your home all the day and particularly about 3 p.m. at New York Restaurant with the respondent on 30-11-1971?"

Q. Why have you referred to the incident of the 1st anniversary rites of the death of your mother?

Q. Have you given instructions to your Advocate while drafting the written statement regarding the incident of your mother's death and the 1st anniversary rites on or about 30-11-71?"

The reasons for disallowing the first question is not mentioned. I cannot understand why the question was disallowed. The question is absolutely relevant and though not very germane is only asked with a view to elicit the reason why the co-respondent was relying on the performance of the ceremony of the first anniversary of his mother's death. The next question also is to the similar effect and is disallowed on some peculiar ground which reads as follows:

"Question disallowed. The reference was not volunteered by the witness. He gave it in answer to the questions put by his advocate in his examination-in-chief."

The very purpose of the cross-examination is to ask the questions regarding what the witness has stated in the examination-in-chief. The answers in examination-in-chief are normally in reply to the questions put by the advocate, but whatever is stated is really the case of that witness and particularly when the witness is a party to the proceedings of that party. All the questions which are asked with a view to challenge the evidence-in-chief are permissible. There is no provision of law which says that cross-examination should be confined to what is volunteered by the witness and cannot be directed to challenge or clarify the answers

given in reply to the questions put by his own advocate in examination-in-chief. A party can always be asked the purpose behind his reliance on a particular incident even though the incident may have come out in reply to question put to him by his advocate in his examination-in-chief. The question was obviously wrongly disallowed. The third question is asked as a preliminary question with a view to point out and ascertain the witness's explanation as to why this incident was not referred to in the written statement. The question was perfectly legitimate question and has been wrongly disallowed. Unfortunately the learned trial Judge has not chosen to deal with the submissions of the learned advocate for the petitioner in support of his right to ask the question, hence, I am unable to know how the mind of the learned trial Judge worked, but whatever may be the view of the matter, I cannot think of any reason for which any of these questions could have been disallowed. If the answers to those questions were found to be material by me I would have remanded the case or taken the evidence of co-respondent in Court but ultimately I did not find it necessary to adopt such course as the evidence of the co-respondent is found to be not worthy of any belief even otherwise.

24. This brings me to the questions referred to above. I am deciding those questions on the assumption that the incident of 30th Nov., 1971 is proved. Mr. Shah has relied on *Devyani v. Kantilal*, (1963) 65 Bom LR 24: (AIR 1963 Bom 98) to contend that there can be ordinarily no direct evidence of adultery. It is difficult to produce evidence of the party being found in actual compromising position. The finding of adultery must necessarily rest on circumstantial evidence. The circumstantial evidence will consist not only of the two offending parties being found together in unusual circumstance or being together alone in a secluded place for a long period of time but also will consist of the social condition of the party and the manner in which the parties are accustomed to live. To put it differently, what can be said to be natural mingling of the opposite sexes in a jet set world will be alien to a person belonging to ordinary middle class and the unusual mingling of two persons of opposite sex in seclusion for any length of time amongst that class can justifiably lead to an inference of adultery. The contention is an acceptable one. However, in the present case this position cannot help Mr. Shah. As I have

already stated the evidence on the incidents prior to 30th Nov., 1971 is not reliable. This leaves only the incident of 30th Nov., 1971, which by itself cannot permit any inference of adultery. It is possible that it was preliminary step to adultery and may ultimately have resulted in adultery but it cannot be said that the incident proved that adultery had taken place. Hence, the petitioner has been unable to prove adultery. As regards cruelty, it is not sufficient to prove mere cruelty. What is required is that the conduct should be such as is wilful or unjustifiable and of such a character as to cause danger to life, limb or health, bodily or mental or to give rise to a reasonable apprehension of such a danger. This is the position after the amendment of the Hindu Marriage Act in the year 1978, as held in Madanlal Sharma v. Santosh Sharma, L. P. Appeal No. 28 of 1980 by Rege & Kanade, JJ. dated 10th March, 1981. Therefore, one has to determine whether this incident is such as has caused danger to health, which in the present case may be mental health or give rise to reasonable apprehension of such danger. While determining this question the Court cannot ignore what the condition of the petitioner's mental health was between the date of filing of the petition and the date when he has given evidence. The incident is such as may cause great disturbance to the petitioner, but cannot be said to be such as can cause any damage to the health. The evidence given also does not establish that the incident had in fact affected the health of the petitioner to any extent. The petitioner is a sales tax practitioner. There is no evidence to show that he was unable to attend to his matters or that his mental balance was upset or his nature had changed to any extent. The only evidence is of annoyance or mental disturbance. This cannot amount to legal cruelty required to form a ground for divorce.

25. Mr. Shah desired to contend that the legal position as laid down in the aforesaid judgment is not correct and that in amending the Act in 1978, the intention of the legislation was to introduce cruelty simpliciter as a ground for divorce and that in the alternative the law was still the same as laid down by the Supreme Court in Dastane v. Dastane, AIR 1975 SC 1534. However, it is not open to me to entertain any such contention in view of the binding judgment to the contrary and Mr. Shah will have to take it up in the higher Court.

26. Mr. Dalvi also contended that even if there is a matrimonial offence there was

condonation. He relied on several facts and circumstances and on case law to support his contention. I am not called upon to decide this question in view of what I have already held.

27. In the circumstances the appeal is dismissed. In view of the fact that I have disbelieved both the respondent and the co-respondent, it will be just to make no order as to the costs of the appeal.

Appeal dismissed.

AIR 1982 BOMBAY 505

V. S. DESHPANDE, C. J.

AND D. M. REGE, J.

M/s. Kanshiram Surinderkumar a firm, Appellants v. M/s. Thakurdas Deomal Rohire and others, Respondents.

Appeal No. 119 of 1976. In Misc. Petn. No. 811 of 1969, D/- 13-2-1981 & 16-2-1981.

(A) Trade and Merchandise Marks Act (43 of 1958), Ss. 11 (a), 12 (3) and 33 — Identical marks falling under S. 11 (a) — Registrability — Relevant considerations — Purity of register in public interest is a prime consideration as against acquiescence or delay, unless injury caused to party is so substantial as to outweigh public interest — Protection under S. 12 (3) or S. 33 cannot be extended to identical marks falling under S. 11 (a).

In the case of identical marks falling within S. 11 (a) viz. marks which are likely to deceive or cause confusion the question of purity of Register in public interest is a primary consideration as against the question of acquiescence, or delay unless the same has caused substantial injury to a party so as to outweigh the question of public interest. The provisions of S. 12 (3) or S. 33 cannot be extended to the case of identical marks falling u/s. 11 (a). Sections 12 (3) and 33 constituted exceptions to S. 12 (1) of the Act providing for the existence of two marks on the Register, though identical, under certain circumstances. Section 12 (3) is an evident exception to S. 12 (1) prohibiting the registration of a mark identical to the mark already registered while S. 33 is a sort of defence to the person who has vested rights in the prior use of a mark iden-

tical with that of the Register mark. It is therefore clear that for the identical marks which do not fall under either S. 12 (3) or S. 33, the said protection cannot be extended and they cannot be registered because of the provisions of S. 11 (a). Under the circumstances the contention that because of the provisions of S. 12 (3) and S. 33, the consideration as to purity of Register in public interest in case of identical marks falling u/s. 11 (a) would not arise, cannot be accepted. AIR 1958 Bom 56, Rel. on. AIR 1963 Bom 246, Disting. Judgment in Misc. Petn. No. 811 of 1969, Affirmed.

(Paras 19, 20, 22)

Held, the acquiescence or delay in the instant case was of a few months, the appellants having shown the use of the said mark by them only since 1961 and the registration of the mark in their favour having become effective only since 8-11-1962. There was also nothing to show that the appellants had suffered any damage due to such acquiescence or delay on the part of the Respondents. On the contrary if not anything the appellants had stood to gain thereby. (Para 22)

(B) Trade and Merchandise Marks Act (43 of 1958), S. 12 (3) — Claim of honest concurrent user — Claimant must show that concurrent use of the mark was honest — Question of honest belief as to reputation of opponent's mark is irrelevant for consideration. (Para 28)

Cases Referred : Chronological Paras
AIR 1963 Bom 246 21
AIR 1958 Bom 56 : 59 Bom LR 548

5, 16, 21

V. V. Tulzapurkar, for Appellants;
G. J. Desai, for Respondents.

REGE, J.:— This appeal involves a question of rectification of the Trade Mark Register by deleting mark 'Amar' registered in the name of the Appellants under No. 212206B in Part 'B' of the Register in class 24 of the rules made under the Trade and Merchandise Marks Act, 1958.

2. The appellants had by their application dated 8th Nov. 1962 applied for registration of the mark consisting of word "Amar" in respect of textile piece goods. On 25-3-1964 the said mark 'Amar' was registered in the name of the appellants under No. 212206B in part 'B' of the Register of Trade Mark in class 24. The Respondents thereafter on 21-5-1965 applied for the registration of the very same mark in their name,

However, on being pointed out about the registration of the said mark in the name of the appellants, the respondents made an application dated 2nd Sept. 1965 under S. 56 (2) of the said Act for rectification of the register by deleting the said mark 'Amar' as registered in the name of the appellants on the ground that the same was entered on the register without any sufficient cause. According to them, the registration of the said mark in the name of the appellants was in contravention of S. 11 (a) of the said Act as firstly they were the proprietors of the said mark before the mark was registered in the name of the appellants and secondly the said mark of the appellants being identical to that of their mark was likely to deceive or cause confusion.

3. The appellants opposed the said application for rectification, inter alia, denying that the respondents were proprietors of the said mark when the mark was registered in their name and that the mark was contrary to the provisions of S. 11 (a) of the said Act. They also pleaded acquiescence on the part of the respondents in use of the said mark by them. They also contended that their case fell under S. 12 (3) of the said Act on the basis of honest concurrent user.

4. The Joint Registrar of the Trade Marks held that on the material on record the Register was liable to be rectified as the respondents were the proprietors of the mark at the time when the same was registered in the name of the Appellants and that the Appellants' mark being identical to that of the respondents was in contravention of Section 11 (a). He also negatived the appellants' plea as to acquiescence on the part of the respondents so also their plea of honest concurrent user. Accordingly he passed an order rectifying the register by removing from the register the said mark in the name of the appellants.

5. In appeal to this court under Section 109 (2) of the said Act, the very same contentions were raised before the learned Judge and all of them were negatived. It may be pointed that in connection with the contention as to acquiescence the court also considered the question of purity of register in public interest in connection with marks falling under S. 11 (a) of the said Act viz., marks likely to deceive or cause confusion and relevance of the question of ac-

quiescence thereunder. He followed the decision of this court in *Ciba Ltd. v. M. Ramlingam*, (59 Bom LR 548) : (AIR 1958 Bom 56) holding that in respect of marks falling under S. 11 (a) as in this case, maintaining purity of register in public interest was of primary importance and the question of delay or acquiescence was to be considered from the point of view of any substantial injury caused to the party so as to outweigh the consideration of public interest and that the hardship of the party cannot be taken into account when the party was not an innocent party. He therefore held that in this case the question of public interest was of importance and no such hardship or injury was shown to the appellant so as to outweigh the public interest. The learned Judge also negatived on merits the appellants' plea as to acquiescence and honest concurrent user falling under S. 12 (3) of the said Act.

6. Against said order of the learned Judge, the appellants have filed this appeal as permissible under the provisions of the said Act. The learned counsel for the appellants has also raised before us the very same contentions which were raised by him in the lower court.

7. It cannot be disputed that the mark 'Amar' as used by the respondents in respect of the textile goods sold by them, was identical with the mark sought to be used by the appellants and was likely to deceive or cause confusion as contemplated under S. 11 (a) of the said Act. However, the registration of the said mark in the name of the appellants could be considered to be in contravention of S. 11 (a) if the respondents were to show that they were proprietors of the said mark i.e., had adopted and used the same, prior to it being used by and registered in the name of the appellants. It may be mentioned at the outset that none of the parties are the manufacturers of the textile goods. They only sell under their various marks textile goods manufactured by different mills. The appellants also work as commission agents in textile goods.

8. Both the sides had before the Deputy Registrar, led evidence by way of affidavits to substantiate their respective claims as to their being proprietors of the said marks.

9. It was the case of the respondents that they have been using the said mark

'Amar' on the textile goods sold by them since 1955, while according to the appellants they have been using the said mark since 1958. Both the joint Registrar and the learned Judge in their judgments have considered in detail the affidavits filed on both sides and found that the respondents had shown their proprietorship of the said mark since 1955, i.e., much prior to the use by the appellants of the same. In our view, on the material on record their said conclusion cannot be faulted with. The rival affidavits in that connection be shortly referred to,

10. The respondents in the affidavit of one Chhogumal made in their behalf have pointed out various sales which were supported by their books of account and as pointed out by the learned Judge, the said sales were not seriously disputed by the learned counsel for the appellants. The said sales are substantial. The respondents were therefore able to substantiate their case of use of the mark since 1955. The respondents also produced affidavits from the mills who had placed the respondents' said marks on the goods supplied by them to the respondents. It was also not disputed that the appellants had at least since 1958 knowledge of the respondents' use of the said mark 'Amar' since they had purchased as commission agents for their upcountry customers from the respondents under two invoices dated 20-1-1958 and 3-2-1958, which were produced during the hearing, textile goods under the said mark 'Amar.'

11. As against this the appellants who claimed to have used the said mark since 1958 do not appear to have been able to substantiate their said case. The appellants have not been able to produce their books of account in any event for the years 1958-59, 1959-60 and 1960-61 and there was no other positive evidence to show whether they had sold any of their goods with the said mark since 1958 to substantiate their case. The evidence produced by the appellants if believed could show the use of the mark only from 1961. Three purchasers had filed affidavits on behalf of the appellants. Their affidavits also did not take the appellants' case any further. One Dherasha who had filed an affidavit spoke about having purchased the goods bearing the said mark from the appellants in the years 1958, 1959 and 1960 but the affidavit showed that he had

purchased only 2 bales during all the said three years. One Hariram in his affidavit claimed to have purchased the goods from the appellants with the said mark in the years 1957-58 and 1959-60. In that case also, the bales purchased were two in number. So also was the affidavit of one Motiram who was also claimed to have purchased 1 bale bearing the said mark from the present appellants in the year 1957-58. The learned Judge has rightly disbelieved the last two affidavits as when even according to the appellants, they had started using the said mark since 1958, the affidavits spoke about the purchase of the goods from the appellants in 1957. The said affidavits spoke about the purchase in all of 5 bales in three years and were not supported by any account books. Apart from that as pointed out by the learned Judge that if it was admitted that in January/February, 1958 the appellants had purchased goods worth Rs. 6766.58 under the same mark from the respondents it was probable that the goods said to have been purchased by the said three persons making the affidavits, from the appellants could have been the very same goods purchased by the appellants from the respondents. Reliance was also placed on certain orders received by the appellants from the customers asking for goods under the mark 'Amar'. The persons who were supposed to have given the said orders had not filed any affidavit. It was not therefore possible to place any reliance on the said order forms and could not help the appellants in their contention. As pointed out by the learned Judge the respondents have not produced the best evidence to support their case. If their case was true the best evidence that they could have produced was affidavits from the Mills who had placed the said mark on the goods supplied to them, as the respondents had done.

12. On the material on record the learned Judge and the joint Registrar were justified in holding that the respondents were the proprietors of the said mark 'Amar' prior to the use of the mark by the appellants.

13. If therefore the respondents were the proprietors of the said mark at the time of the registration of the said mark in the name of the appellants and if the said mark being identical was likely to deceive or cause confusion, then the registration of the said mark was in con-

travention of the provisions of S. 11 (a) of the said Act.

14. The main contention of the learned counsel for the appellants was on the question of acquiescence. He has contended that the conclusion of the learned Judge that in cases of registration of mark under S. 11 (a) of the said Act, the question of purity of Register in public interest was a prime consideration unless the injury caused to a party was so substantial so as to outweigh public interest, was not right.

15. It was contended by the learned counsel for the appellants in the lower court that excepting in the cases of marks covered under Sec. 9 of the said Act viz., marks inherently incapable of adaptation, in no other case the consideration of purity of register in public interest would arise. The said contention was negatived by the learned Judge. However, before us the learned counsel has considerably narrowed down the ambit of the said contention. His contention before us was that it was only in cases of marks that were identical or nearly resembling, though falling under Section 11 (a) of the said Act, the question of purity of Register in public interest would never arise and the plea of acquiescence would be available against an unmeritorious applicant, though according to him in all other cases viz., marks under Sec. 9, under Sec. 11 (a), excluding marks that were identical or nearly resembling, as well as marks falling under Sections 11 (b) to (e) and Section 12 (1) of the said Act, the said consideration of public interest would arise. According to him, the consideration of public interest in case of marks that are identical or nearly resembling would not arise as S. 12 (3) and Sec. 33 of the said Act permitted the existence of two of such marks appearing on the Register at the same time.

16. The question as to the consideration of the purity of register in public interest as against acquiescence came directly to be considered by the Division Bench of this court in the case of Ciba Ltd. v. M. Ramlingam (59 Bom LR 548) : (AIR 1958 Bom 56). There the court was specifically concerned with the provisions of S. 10 (corresponding to S. 12 (1) of the present Act) dealing specifically with the prohibition against registration only of identical or deceptively similar marks and Sec. 46 of the Trade Marks

Act, 1940 dealing with rectification of the Register (corresponding to Sec. 56 (2) of the present Act).

17. The facts in that case so far as relevant were that amongst other marks of the appellants, their mark 'Ciba' was registered on 24-8-1946, and mark 'Ciba' (monogram) was registered on 27th October 1944. On 22nd December 1943 the respondents applied for registration of their label containing the word 'Cibal'. The said label was advertised after amendment on 3rd Nov. 1949 'CIBOL' was registered in the name of the respondents. On 16th March 1960 the appellants applied for rectification of the register under Sec. 40 of the Act, on the ground that the respondents' mark so closely resembled their mark that its registration contravened the provisions of Section 10 (1) of the Act, 1940. The Registrar in that case ordered rectification which decision was reversed by the single Judge of this Court and in appeal this Court restored the order of the Registrar holding that, in view of the phonetic as well as visual resemblance between the two words, it was clear that the subsequent registration of the respondents' mark was not justified in law.

18. As pointed out above the court thereafter was specifically concerned with the rectification of register in respect of the marks which were identical with or deceptively similar to the marks (covered under Section 11 (a) of the present Act) already registered under Section 10 of the Act, 1940 (Sec. 12 (1) of the present Act). In that connection the court made the following observations at pp. 560-561 of the report (of Bom LR): (At p. 58 of AIR).

"Now, in considering both S. 46 and S. 10, it has got to be remembered that the primary duty of the Court is towards the public and the maintenance of the purity of the register. When a case is sought to be made out that a particular trade mark is likely to deceive or cause confusion, the contest is not so much between the parties to the litigation as it is a contest between the party defending his right to a particular trade mark and the public, and the duty of the Court must always be to protect the public irrespective of what hardship or inconvenience it may cause to a particular party whose trade mark is likely to deceive or cause confusion. The object of maintaining a trade mark register is

that the public should know whose goods they are buying and with whom particular goods are associated. It is, therefore, essential that the register should not contain trade marks which are identical or which so closely resemble each other that an unwary purchaser may be likely to be deceived by thinking that he is buying the goods of a particular person or a particular firm or a particular industry, whereas he is buying the goods of another person or firm or industry."

19. As is clear from the above observations the same do not admit even of a limited exception as contended by the learned counsel for the appellants. The learned counsel for the appellants has based his said contention on the provisions of S. 12 (3) and S. 33 of the said Act. The said provisions constitute exceptions to Sec. 12 (1) of the Act providing for the existence of two marks on the Register, though identical, under certain circumstances. Sec. 12 (3) deals with the registration by the Registrar in his discretion and subject to such limitation and condition of a mark identical with the mark already registered, in case of there being an honest concurrent user. Sec. 33 inter alia, deals with the prohibition against the proprietor of a registered trade mark, from interfering in the use of a mark identical with his registered trade mark, by a person who has vested rights in the use of the same being prior to the use of the registered trade mark. The section also prevents the Registrar from the registering the said mark only by reason of the identical mark being registered earlier.

20. Section 12 (3) is an evident exception to S. 12 (1) prohibiting the registration of a mark identical to the mark already registered while Sec. 33 is a sort of defence to the person who has vested rights in the prior use of a mark identical with that of the Register mark. It is therefore clear that for the identical marks which do not fall under either Sec. 12 (3) or Sec. 33 of the said Act, the said protection was not extended and they cannot be registered because of the provisions of Sec. 11 (a). Under the circumstances the contention of the learned counsel for the appellants that because of the provisions of Sec. 12 (3) and S. 33 of the said Act, the consideration as to purity of Register in public interest in case of identical marks would not arise, cannot be accepted.

21. The learned counsel for the appellants has in support of his contention referred to a judgment of the single Judge of this court in the case of Neku-mar K. Porwal v. M/s. Mohanlal Har-govindas (AIR 1963 Bom 246). It is difficult to see how the said decision can have application to the question involved in this case. In that case the persons who applied for rectification of the register had in fact at the time of the registration of the earlier mark withdrawn their opposition to the same. The Deputy Registrar who dealt with the matter had in terms held that the parties applying for rectification were by their conduct not persons aggrieved and therefore could not obtain relief on either of the grounds mentioned in the application. However, although not necessary for him to do so, the Deputy Registrar had suo motu gone into the question of similarity of marks in the name of purity of register and public interest and had also held that there was no similarity. Even then the Deputy Registrar instead of dismissing the application even at that stage, again suo motu in the name of purity of register and public interest went further into a question of rectification on the ground of misdescription and rectified the register on that ground. The court in that case was therefore only concerned with the question of the jurisdiction of the Asst. Registrar to act suo motu under Sec. 56 (4) of the said Act in rectifying the register. While dealing with the said power of the Registrar, the Court observed as follows (at p. 252):—

"From these authorities, it will be clear that where a trade mark inherently incapable of registration or where the entry on the Register is not illegal or improper in the sense that it contravenes any of the provisions of the Act, the Court or the Registrar under sub-section (2) of Section 56 of our Act would have no jurisdiction whatever to exercise the power of rectification except on the ground and in the manner urged by the applicant being a "person aggrieved" in his application for rectification."

(underlining supplied)

The said decision has therefore no application to the point at issue before us. However, if at all, the aforequoted observations would go against the appellants for them to show that the Deputy Registrar has jurisdiction under S. 56 (4)

of the Act to rectify the Register suo motu on the basis of purity of Register or public interest in cases where the entry on the Register was illegal which would be the case in the case of identical marks as contravening S. 11 (a) of the Act. The learned Judge in that case in no way held contrary to the law laid down in Ciba's case, (AIR 1958 Bom 56), but on the contrary cited the same and held that the said decision was not applicable to the facts of the case as the mark concerned was not illegal or improper. The said decision therefore cannot help the learned counsel for the appellants in his said contention.

22. In our view therefore the learned Judge was right in holding that in this case of identical marks falling within S. 11 (a) of the said Act the question of purity of Register in public interest was a primary consideration as against the question of acquiescence, or delay unless the same had caused substantial injury to the appellants so as to outweigh the question of public interest. As the learned Judge has rightly pointed out, there is no case of such hardship in this case. The acquiescence or delay in this case was of a few months, the appellants having shown the use of the said mark by them only since 1961 and the registration of the mark in their favour having become effective only since 8th November 1962. There is also nothing to show that the appellants had suffered any damage due to such acquiescence or delay on the part of the respondents. On the contrary as the learned Judge has rightly pointed out if not anything the appellants have stood to gain thereby.

23. Even apart from his said conclusion the learned Judge has proceeded to consider the appellant's contention as to acquiescence and has negatived it. The learned counsel for the appellants has challenged that conclusion as well. In that connection, he has firstly contended that the learned Judge was wrong in holding that the acquiescence that was to be considered in this case was as that of 8th November 1962 when the registration of the mark in appellants' name had become effective and not later. According to the learned counsel for the appellants the acquiescence that was to be considered was as on the date of the respondents' application for rectification i.e. 2-9-1965.

24. On the reading of Sec. 56 (2), the said contention cannot be accepted. In

this case, it cannot be disputed that the respondents have come to the court for rectification on the ground that, entry made in the register of the said mark 'Amar' in the name of the appellants was without any sufficient cause and it is the appellants who were seeking to show that the said entry was properly made by pointing out that the respondents has acquiesced in the making of the said entry. If that were so, the only date from which acquiescence could be considered is the date on which the registration of the appellants' mark had become effective i.e. 8-11-1962 and not thereafter.

25. If that were the case, then as the learned Judge has rightly pointed out that on 8-11-1962 when the Registration of the mark in favour of the appellants had become effective there was no acquiescence of any substance by the respondents in the appellants' use of the said mark the delay at that date being of a few months,

26. However, even if the acquiescence till the date of the application for rectification i.e. till 2-9-1965 were to be considered still in our view, on the material on record there is no substance in it. The respondents have contended that they became aware of the Registration of the said mark 'Amar' in respect of their piece goods, when in 1965 the mills from which they were getting their goods stamped with the said mark, received a notice from the appellants in that regard. It is also not disputed that the appellants had purchased from the respondents the goods with the said mark 'Amar' and it was probable that the respondents would have considered the sale by the appellants of the goods under the said mark being of those purchased by the appellants from them,

27. As against this, to support his case as to respondents' acquiescence on that basis, the learned counsel for the appellants has relied on three things viz., (1) proximity of the shops of both the parties, (2) the exhibition of their goods with the marks by the appellants in their shop and (3) advertisements as to the appellants' said mark appearing in Textile Magazines. In our view, none of the said circumstances would prove knowledge by respondents about the appellants selling their goods under the said mark 'Amar'. The circumstance about the shops of the appellants and

respondents being close or the appellants exhibiting their goods bearing the said mark in their shops would not fix the respondent with the requisite knowledge about the appellants' use of the said mark unless it was alleged that the respondents had visited the appellants' shop. No such allegation is however found in the affidavits. The third circumstance viz. advertisement in textile magazine in 1962 also stands on the same footing unless it was shown that the respondents were subscribers thereto. Therefore even if the question of acquiescence is considered as at 2-9-1965 being the date of the application for rectification, still in our view, the material on record fails to prove the appellants' case.

28. That brings us to the last contention of the learned counsel for the appellants viz., that the Joint Registrar should not have rectified the register on the ground that the case fell within the provisions of S. 12 (3) of the Act being that of honest concurrent user of the said mark by the appellants. In this case since admittedly in 1958 itself the appellants have purchased goods from the respondents under the said mark 'Amar' it would be difficult to hold that the appellants' subsequent use of the said mark in relation to their goods could be considered as honest. What was contended by the learned counsel for the appellants was that although the appellants had in 1958 itself knowledge of the respondents' use of the said mark, the appellants would have honestly believed that the respondents had not built up sufficient reputation for their said mark as to be the proprietors thereof and therefore the appellants' use of the said mark could be considered to be an honest concurrent user. On the wording of Sec. 12 (3) the said contention of the learned counsel for the appellants has got to be rejected. All that is required to be shown under S. 12 (3) of the Act was that the concurrent use of the mark by the appellants was honest and the question of honest belief as to the reputation of the respondents' mark was irrelevant for consideration. In that view of the matter, the appellants' case cannot also come under S. 12 (3) of the said Act.

29. The appeal therefore fails and is dismissed with costs. The order of the learned Judge is confirmed.

30. The learned counsel for the appellants make an oral application before

us for leave to appeal to the Supreme Court. The same is rejected.

Appeal dismissed.

AIR 1982 BOMBAY 512

CHANDURKAR AND BHONSALE, JJ.

The Union of India, Appellant v. Bhusawal Municipal Council, Respondent.

First Appeal No. 774 of 1971, D/- 16-12-1980.

(A) Railways Act (9 of 1890), S. 135 — Notification D/- 29-11-1907 — Goods imported within municipal limits by Railway Administration — Liability to pay octroi duty. (Railways (Local Authorities' Taxation) Act (1941), Ss. 3 and 4; Constitution of India, Art. 285; Government of India Act (1935), S. 154).

Section 135 of the Railways Act specifically deals with railway property which could be subjected to levy of taxes in aid of the funds of the Local Authority. Under that Section unless the Railway Administration is expressly declared as being liable to pay a tax, that tax cannot be levied on the Railway Administration. This declaration has to be by a notification issued by the Central Government. Now Notification D/- 29-11-1907, which is issued in exercise of power under S. 135, enables the local authority to impose all such taxes in respect of property of the Railway Administration which could be imposed by that local authority in aid of its funds. It cannot be seriously disputed that on the terms of this notification Octroi Duty could have been validly levied by the Municipal Council in respect of railway property because under S. 72 of the Bombay Municipal Boroughs Act 1955 one of the taxes which could be imposed by the Municipality is "Octroi on animals or goods or both brought within the Municipal limits for consumption, use or sale thereof". Articles brought within the municipal limits by the catering department of the Railway Administration were obviously brought either for consumption or for sale or use. The question, however, is: Does this power survive after coming into operation Section 154 of the Government of India Act 1935. If the proviso to S. 154 was not attracted, then there would be no power in the municipality to tax the property of the Railway Administration because

of the express bar in the main part of S. 154. The power under S. 135 of the Railways Act to issue a notification could not have been exercised in respect of Government property after 1st April 1937 (when Part III of the Government of India Act 1935 came into force) because S. 154 of the Government of India Act 1935 exempted all such property from local taxation unless there was a federal law providing to the contrary. In view of the fact that S. 154 exempted the railway property from provincial or local taxation, except so far as the legislation may otherwise provide and under the proviso, all the taxes payable by virtue of notifications issued under Section 135 of the Railways Act continue to be payable until Legislature otherwise provides, the Central Legislature enacted the Railways (Local Authorities' Taxation) Act 1941. S. 3 of this Act enables the local authority to levy a tax in aid of its funds in respect of property vested in the Central Government, being a property of a railway, only if the Central Government issues a notification declaring the Railway Administration to be so liable. Therefore, after coming into force of Part III of the Government of India Act 1935, before the Railway property can be taxed, a notification under S. 3 of the 1941 Act has to be issued by the Central Government. Section 4 of the 1941 Act only empowers the Central Government to revoke or modify a notification issued under Section 135 of the Railways Act. The consequence of revocation is that the liability to pay tax to any local authority under that notification ceases. The position, as it appears, is that the notification of 1907 was revoked in October 1953. Therefore, even assuming that the notification of 1907 empowered the local authority to levy Octroi Duty, that liability ceased in terms of S. 4 of the 1941 Act with effect from 3rd October 1953 and no recovery of Octroi Duty could have been made thereafter. (Para 10)

Looking at the matter from a different aspect, it will have to be ascertained whether the notification of 1907 is such that the proviso to S. 154 of the Government of India Act would be attracted to it. Now there can be no doubt, that the notification of 1907 enables even Octroi Duty to be levied in respect of goods. But for the purposes of the proviso to S. 154, the requirement of that proviso has to be satisfied. The require-

ment is that the property which is being subjected to tax must be in existence before 1st April, 1937 physically and the property must be the same at the time when the tax is sought to be levied. The physical identity of the property, before and after 1st April 1937, is therefore a sine qua non for levy of a tax after 1st April 1937 by virtue of the proviso of S. 154 of the Government of India Act, 1935. AIR 1948 Cal 116 (2). Followed. (Para 11)

Such cannot however be said to be the case where Octroi Duty is sought to be levied. Octroi Duty is levied once and for all on any particular article or goods. There is no occasion to levy Octroi Duty again and again in respect of the same property. In other words, the Octroi Duty is paid on a property which comes for the first time within the municipal limits and that is brought for consumption, sale or use and the same goods are not again liable to duty. Therefore, the physical identity of the property prior to 1st April 1937 cannot be the same where on and after 1st April 1937 new goods are brought within municipal limits and Octroi Duty is sought to be levied on those goods or articles. Therefore, the proviso to S. 154 would be wholly inapplicable and unless there is a Federal Law as contemplated by the substantive provision in Section 154 of the Government of India Act 1935, there will be no power in any Municipal Council to levy Octroi Duty in respect of Government property after 1st April 1937. That will also be the position in the post-Constitution period and unless there is a law made by the Parliament as contemplated by Art. 285 of the Constitution, the scheme of which Article is the same as the scheme of Section 154 of the Government of India Act 1935, permitting the property of the Union to be taxed, Octroi Duty could not be levied after 25th January 1950.

(Paras 8, 11)

Octroi Duty which was permitted to be levied by the notification of 1907 could not have been levied on goods brought by the Railways after 1st April 1937 because of the bar under the main part of S. 154 of the Government of India Act and because such a tax was not saved by the proviso to S. 154, the Octroi Duty could also not be levied after the commencement of the Consti-

tution because of the express bar in Art. 285 (1) and further because there was no Octroi Duty which could be claimed under Art. 285 (2). AIR 1978 SC 1803, Rel. on. (Para 14)

(B) Limitation Act (36 of 1963), S. 30 — Cause of action arising after coming into force of 1963 Act — S. 30 has no application. (Para 16)

Cases Referred: Chronological Paras

AIR 1978 SC 1803	12
AIR 1973 SC 1185	12
AIR 1957 Cal 548	15
AIR 1949 FC 121	9
AIR 1948 Cal 116 (2)	8, 9
(1902) ILR 25 Mad 457	8
(1835) 5 LJ Ch 87: 42 RR 274, Jones v. Skinner	9

M. R. Kotwal, for Appellant; K. J. Abhyankar, for Respondent.

CHANDURKAR, J.:— The short question which arises in this appeal filed by the Union of India is whether goods imported within the limits of municipality by the Railway Administration are liable to Octroi Duty which the respondent Bhusawal Municipal Council is seeking to recover under a Notification issued under Section 135 of the Railways Act, 1890, on 29th November, 1907.

2. Facts in this case are not in dispute. The Catering Department of the Railway Administration admittedly brought within the limits of the Bhusawal Municipal Council certain articles required by them for catering administration at the Bhusawal Railway Station during the period from 2nd November 1963 to 1st November 1966. The Railway Administration not having paid the necessary Octroi Duty which, according to the Municipal Council, the Railway Administration was liable to pay for those articles brought within the municipal limits, a suit came to be filed for the recovery of the amount of Octroi Duty to the tune of Rs. 7,766.14 along with interest amounting to Rs. 2,611.21. Thus, in the suit filed on 6th February 1969 a sum of Rs. 10,377.35 was claimed from the Union of India. The plaint itself does not refer to the Notification dated 29th November 1907 but it is common ground that liability to pay Octroi Duty is fastened on the Union of India, according to the Municipal Council, by the Notification dated 29th November 1907 (Exhibit 86). This Notification reads as follows:

"In pursuance of Clause (i) of Section 135 of the Indian Railways Act, 1890 (IX of 1890) and in supersession of the notifications of the Government of India in the Public Works Department, No. 270, dated the 12th June, 1890, and No. 136, dated the 5th April, 1893, the Governor General in Council is pleased to declare that every railway administration in British India shall hereafter be liable to pay, in respect of property within any local area, every tax which may lawfully be imposed by any local authority in aid of its funds, under any law for the time being in force."

Two defences were raised by the Union of India to this claim. According to the Union of India, it was not liable to pay any Duty in the absence of any Notification in the Official Gazette declaring the Railway Administration to be liable to pay such taxes and that the Union of India was further protected under the provisions of Section 3 (1) and Section 4 of the Railways (Local Authorities' Taxation) Act, 1941 (hereinafter referred to as the 1941 Act). According to the Union of India, the provisions of the 1941 Act will be saved by Article 372 of the Constitution of India. The issue of limitation was also raised. It appears that the plea that a Notification under Section 135 of the Railways Act relating to Octroi tax was not issued was not specifically taken probably because in the plaint no such Notification was disclosed. The questions involved in the suit were essentially questions of law, the facts having been admitted. The oral evidence in the case, therefore, does not become very material.

3. The trial Court took the view that Section 135 of the Railways Act regulated the levy of taxes by a Local Authority and unless a Notification was issued under Section 3 of the 1941 Act, the property of the Railway Administration cannot be subjected to tax by the Local Authority. The trial Court further took the view that Exhibit 86 indicates that the Railway Authority was liable to pay taxes connected with immovable properties such as house tax, water tax, conservancy tax, latrine tax, wheel tax and water rate, etc. and that there was no Notification in respect of Octroi on goods brought within the Municipal limits. With reference to the provisions of Article 285 of the Constitution of

India, the trial Court took the view that under the Bombay Municipal Borough Act, 1925, when the Bhusawal Municipality had approved and levied Octroi since 1932 and the Octroi Rules were in force even before the Constitution came into force, the authority to impose Octroi Duty did not cease simply because the Constitution came into force. The trial Court found that the State Government has not framed any rules exempting the catering unit of the Railways from Octroi Duty. The trial Court took the view that the Railway Administration had paid Octroi Duty in the past and the articles were rightly taxed under the Octroi rules as there was no exemption. With regard to the limitation, the trial Court held that the claim in respect of all the items was within the period of limitation. A decree for Rs. 10,377.35 was thus being passed against the Union of India. This appeal has now been filed by the Union of India challenging the decree of the trial Court.

4. Mr. M. R. Kotwal, the learned Government Pleader, has mainly relied on the provisions of Article 285 (1) of the Constitution of India under which, according to the learned counsel, there is a blanket exemption of the property of the Union from all taxes imposed by a State or by any authority within a State unless provisions to the contrary is made by a law of Parliament. The learned Government Pleader therefore contended that goods brought within the municipal limits by the catering establishment of the Railway Administration were the property of the Union and since there was no law made by the Parliament providing for those goods being allowed to be taxed by the Local Authority, the Octroi Duty could not be levied by the Municipal Council on the articles in question. Mr. Abhyankar appearing on behalf of the Municipal Council had relied mainly on the provisions of Article 285 (2) of the Constitution of India and the argument advanced before us was that goods brought within the municipal limits have already been made subject to tax by virtue of Notification Exhibit 86 and therefore such tax would be saved by the provision of sub-article (2) of Article 285. The learned counsel pointed out that Notification of 1907 enabled the Municipal Council to levy Octroi Duty and that Notification continued to be effective even after

the coming into force of the Government of India Act 1935 because the power to levy Octroi Duty was preserved in the Municipal Council by the proviso to Sec. 154 of the Government of India Act 1935. According to the learned counsel, as Octroi Duty was levied since 1907 and it continued to be levied even after the commencement of the Constitution, the Union of India could not avoid its liability. Now, admittedly, so far as the Notification of 1907 is concerned, it was revoked by another Notification dated 6th October, 1953 Exhibit 9. That Notification expressly stated that the Central Government revokes the Notification of the Government of India "in the Department of Commerce and Industry No. 9977-Rys. dated the 29th November, 1907, issued under Clause (1) of the said Section". The learned counsel contended that the Octroi Duty was legally levied till 6th October 1953 and that since the Railways have been treated as liable to pay Octroi Duty even thereafter, even though the levy may be illegal, the Union of India would be liable to pay Octroi Duty. It may be pointed out at this stage that the dispute with regard to the liability to pay Octroi Duty was for the first time raised by the Union of India in August 1969.

5. Article 285 of the Constitution reads as follows :

"(1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State.

(2) Nothing in Clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State."

Article 285 of the Constitution is thus in two parts. Sub-Article (1) provides for exemption of the property of the Union from all taxes imposed by a State or by any authority within a State which will include a Local Authority like a Municipal Council. This exemption can, however, be taken away by a law made by the Parliament. In other words, the property of the Union could be sub-

jected to tax by a State or by a local authority only if it is so permitted by a law made by the Parliament after the Constitution has come into force. It is therefore a blanket exemption in respect of Union property from State taxation or taxation by any authority within a State. It is on the same pattern as is to be found with regard to exemption of federal property from State taxation in the Australian and the Canadian Constitution. Sec. 114 of Commonwealth of Australia Constitution Act 1900 provides inter alia that "A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State." Section 125 of the British North America Act 1867 provides as follows :

"No lands or property belonging to Canada or any Province shall be liable to taxation."

It is, however, open to the Parliament to enact a law which will enable the State or any authority within a State to tax the property of the Union.

6. The latter part of Art. 285 was intended to save the taxes which were being levied on the property of the Union at the commencement of the Constitution by any authority within a State so long as the tax continued to be levied in that State. Thus, where a property of the Union was, immediately before the commencement of the Constitution, liable to tax or treated as liable to tax levied by a local authority, that tax could continue to be levied in view of the express provisions in Art. 285 (2). Such property could be exempted from taxation only by a law made by the Parliament. The provisions of Art. 285 will, therefore, make it clear that the property of the Union of India could not be subjected to tax by a Local Authority unless the condition in Sub-Art. (2) was satisfied. It is on this Sub-Art. (2) that Mr. Abhyankar placed heavy reliance. Now, there is no doubt that the word "property" used in Art. 285 is a word of widest amplitude and it cannot be given any restricted meaning. In order to find out whether the Municipal Council could claim protection in respect of power to levy Octroi Duty from Art. 285 (2), it becomes necessary to find out

whether the Octroi Duty can be said to be a tax in respect of the property which was liable to that tax immediately before the commencement of the Constitution. Therefore, though the period in respect of which Octroi Duty is now sought to be recovered is a post-Constitution period, we will have to revert back to the position before the commencement of the Constitution on 26th January, 1950.

7. The Notification itself is dated 29th November, 1907 and the period from the first levy of the Octroi Duty which is said to have been made in 1932 up to the commencement of the Constitution would therefore have to be split up into two parts. Article 285 is the successor of the similar provision which was made in the Government of India Act in Section 154 of the Government of India Act 1935 which came into force on 1st April, 1937. Therefore, the period immediately preceding the commencement of the Constitution required to be considered for the purposes of the validity of the Octroi Duty would be from 1st April, 1937 to 25th January, 1950 and the other period would be from 1st September, 1932 to 31st March, 1937. Primarily therefore before the Municipal Council can claim that its power to levy Octroi Duty is saved by the provisions of Art. 285 (2), it would have to be established that the power to levy tax on the property of the Union validly vested in the Municipal Council up to 1st April 1937.

8. In this context, the provisions of S. 154 of the Government of India Act 1935 become relevant. It reads as follows :

"Property vested in His Majesty for purposes of the government of the Federation shall, save in so far as any Federal law may otherwise provide, be exempt from all taxes imposed by, or by any authority within, a province or Federated State :

Provided until any Federal law otherwise provides, any property so vested which was immediately before the commencement for Part III of this Act liable, or treated as liable, to any such tax, shall, so long as that tax continues, continue to be liable, or to be treated as liable, thereto.

A reading of S. 154 of the Government of India Act 1935 will show that the scheme of that section is the same as

the scheme of Art. 285 of the Constitution of India. Under Sec. 154 property vested in His Majesty for purposes of the Government of the Federation is exempted from all taxes imposed by or by any authority within a province or a federated State. Prior to the commencement of the Constitution, it cannot be disputed that the railway property was property of the Crown. That property of the Crown is exempted from all taxes which may be imposed by a local authority or by a province or a federated State. This exemption could be taken away by a federal Law which had to be a law made by the Central Legislature prior to the commencement of the Constitution. Now there can be no difficulty in holding that under the main part of S. 154 of the Government of India Act 1935 all properties of the Crown would be exempt from taxes imposed by a local authority. The word property under S. 154 is also used in its widest and generic sense. In Governor General of India in Council v. Corporation of Calcutta, AIR 1948 Cal 116 (2) B. K. Mukherjee, J. (as he then was) while dealing with the scope of S. 154, has observed as follows :

"The language of S. 154 is obviously very wide; it embraces within its scope all taxes and impositions levied by or by any authority within a province or Federated State. The expression "property" has also been used in a perfectly general sense and would include land, building, chattles, shares, debts, and in fact every thing that has a money value in the market and comes within the purview of any taxing statute."

It was pointed out by Mukherjee, J. that under the English Law the Crown not being bound by any Statute unless expressly named, property owned and occupied by Crown shall be exempt from taxation unless rendered liable either by express words or by necessary implication, and with reference to the provisions of S. 154 the learned Judge further observed as follows :

"In India it seems prior to the passing of the Government of India Act 1935, the question of exemption of Crown property from taxation was not definitely settled."

Mukherjee, J. referred to the decision in Bell v. Commrs. for the City of Madras (1902) ILR 25 Mad 457. It was pointed out that the view expressed therein was

that according to the uniform course of Indian Legislation, statutes imposing duties or taxes bind Government unless the very nature of the duty or tax is such as to be inapplicable to Government. It was then observed by Mukherjea, J., as follows:

"It is a fact, however, that on the general question different views were taken in other cases : vide 14 Bom 213. Many properties vested in His Majesty were treated as liable to taxation, when the Constitution Act of 1935 came into force, and the proviso attached to Section 154 makes it clear that properties which were treated as so liable immediately before April 1937, when Part III of the Act was to come into operation, would not enjoy the exemption given by the main provision of the section. The Parliament deliberately used the words "liable" or "treated as liable" with a view to avoid a final solution of the question regarding the legal liability of Crown property to taxation in India prior to the coming into operation of Part III of the Act."

9. Ormond, J., who was the other Member of the Bench, after pointing out that, "in England in the absence of special statutory provisions imposing a tax on Crown property, Crown property would be exempt by virtue of the Crown prerogative" and "it is equally well established that both in England and in India, liability for taxation may be imposed against Crown property by apt statutory provisions" set out in the scheme of S. 154, in paragraphs 20 and 21, as follows :

"The scheme of the section is that in the first part (the main body of it) there is an exemption from taxation in general terms. Then in the second part of the section (the proviso in it) there is an exception from that exemption. The result is that any property covered by the exception will be liable to tax in spite of the exemption in the first part. Were it not for the exception in the second part, it is clear and undisputed that the whole of the....."

"The proviso is worded in a manner which lays down a positive liability to tax in the case of the particular class of Crown property described in it The first result of the proviso is that any property covered by the exception in the proviso will be liable to tax, in spite of any exemption in the

earlier part of the section within the section itself. The further result is also, that any property covered by the exception will be liable to tax, in spite of any general exemption outside the section, such as might have been based on the general Crown prerogative."

The learned Judge further dealing with the proviso pointed out that the only taxable property brought within the exception contained in the proviso is property which was in physical existence before 1st April 1937. The four conditions which would be necessary to be established to bring the property within the proviso were set out as follows :

"(1) Physical existence of the property before 1-4-1937,

(2) Liability of that property to the tax then,

(3) Physical existence of the same property now, that is to say, for the current period for which tax is sought to be levied, and

(4) Liability of the property (if it were not Crown property) to the tax now."

It may be pointed out that the learned Government Pleader has heavily relied on the fact that one of the conditions necessary for the Union property to be subjected to Octroi Duty was that the identity of the property must be established both prior to and after the commencement of the Constitution and both prior to and after 1st April, 1937. The contention was that Octroi Duty is levied on goods as they come within the municipal limits and it is not a recurring duty on the same goods and the goods being different every time the duty is sought to be levied, whatever might have been the position prior to 1st April, 1937, after 1st April 1937 and 26th January 1950, in view of the substantive provisions in S. 154 of the Government of India Act 1935 and Art. 285 of the Constitution of India, the goods belonging to the Union of India are not liable to Octroi Duty. The wide meaning to the word property given by the Calcutta High Court has been expressly approved by the Federal Court in *The Corporation of Calcutta v. Governors of St. Thomas' School, Calcutta*, AIR 1949 FC 121. Dealing with S. 154 and the meaning of the word property used therein, the Federal Court observed as follows :

"Section 154 raises two questions for determination when an exemption from

liability to tax is claimed : (i) whether tax is claimed in respect of property; and (ii) whether such property is vested in Government : The word "property" is used in the context without any limitation and therefore should bear its normal meaning. Interpreted in that way it will embrace every kind of property. As observed by Langdale, M. R. in *Jones v. Skinner*, (1835) 5 LJ Ch 87 at p. 90 : (42 RR 274) :

" 'Property' is the generic term for all that a person has dominion over. It is the most comprehensive of all terms which could be used, inasmuch as it is indicative and descriptive of every possible interest which the property can have."

Without attempting to define affirmatively what the generic term will cover, it is sufficient for us to hold that the buildings in question are property and as in India the ownership of a building is not necessarily related to the ownership of the land on which the building stands, the buildings in the present case were vested in the Government.....
.....In our opinion, the meaning of "property" adopted in *Governor-General of India in Council v. Corporation of Calcutta*, 52 Cal WN 173 : (AIR 1948 Cal 116) is correct."

We have referred to this meaning given to the word property in S. 154 because at one stage it was contended by the learned Government Pleader that in S. 154 when the proviso referred to property or taxes on property, the reference was only to immovable property and that the proviso to S. 154 did not save the power to levy Octroi Duty which was a tax levied on movable property, viz., goods. In view of the wide meaning which the word property bears, even movable property will be covered by it and if the Municipal Council succeeds in proving that Octroi Duty levied in respect of such property is saved by the proviso to S. 154, it would be possible for it to contend that the requirements of Art. 285 (2) have also been satisfied.

10. Thus in the face of an express bar to tax Crown property contained in Section 154 of the Government of India Act 1935, it was incumbent on the Municipal Council to satisfy the Court that the power to levy Octroi Duty could be validly exercised even after 1937 when Part III of the Government of India Act 1935 came into force. It was for this

purpose that a reference was made to the Notification of 1907 which was issued under the Railways Act. It is necessary now, therefore, to refer to the provisions of S. 135 of the Railways Act. The relevant provisions are contained in Clauses 1, 2 and 3 of the Railways Act which read as follows :

" 135. Notwithstanding anything to the contrary in any enactment, or in any agreement or award based on any enactment, the following rules shall regulate the levy of taxes in respect of railways and from railway administrations in aid of the funds of local authorities, namely :—

(1) A railway administration shall not be liable to pay any tax in aid of the funds of any local authority unless the Central Government has, by notification in the Official Gazette, declared the railway administration to be liable to pay the tax.

(2) While a notification of the Central Government under Cl. (1) of this section is in force, the railway administration shall be liable to pay to the local authority either the tax mentioned in the notification or, in lieu thereof, such sum, if any, as an officer appointed in this behalf by the Central Government may, having regard to all the circumstances of the case, from time to time determine to be fair and reasonable.

(3) The Central Government may at any time revoke or vary a notification under Cl. (1) of this section."

Section 135 specifically deals with railway property which could be subjected to levy of taxes in aid of the funds of the Local Authority. By Cl. (5) of that section, the term Local Authority is given the same meaning as in the General Clauses Act 1887. Under S. 135 unless the Railway Administration is expressly declared as being liable to pay a tax, that tax cannot be levied on the Railway Administration. This declaration has to be by a notification issued by the Central Government. The second clause only deals with quantification of the tax liability. It provides that the liability could be discharged by paying a lump sum to be determined by an officer to be appointed by the Central Government. Clause (3) gives power to Central Government to revoke the said notification. Now Exhibit 86, which is issued in exercise of power under S. 135, enable the local authority to impose all such

taxes in respect of property of the Railway Administration which could be imposed by that local authority in aid of its funds. We do not think it can be seriously disputed that on the terms of this notification Octroi Duty could have been validly levied by the Municipal Council in respect of railway property because under Sec. 72 of the Bombay Municipal Boroughs Act 1955 one of the taxes which could be imposed by the Municipality is "Octroi on animals or goods or both brought within the Municipal limits for consumption, use or sale thereof". Articles brought within the municipal limits by the catering department of the Railway Administration were obviously brought either for consumption or for sale or use. The question, however, is : Does this power survive after coming into operation of S. 154 of the Government of India Act 1935? If the proviso to S. 154 was not attracted, then there would be no power in the municipality to tax the property of the Railway Administration because of the express bar in the main part of S. 154 of the Government of India Act 1935. The power under S. 135 of the Railways Act to issue a notification could not have been exercised in respect of Government property after 1st April 1937 because S. 154 of the Government of India Act 1935 exempted all such property from local taxation unless there was a federal law providing to the contrary. In view of the fact that S. 154 of the Government of India Act 1935 exempted the railway property from provincial or local taxation, except so far as the legislation may otherwise provide and under the proviso, all the taxes payable by virtue of notifications issued under Section 135 of the Railways Act continue to be payable until Legislature otherwise provides, the Central Legislature enacted the Railways (Local Authorities Taxation) Act 1941, reliance on which has been placed on behalf of the municipality. The relevant provisions are in sections 3 and 4 of that Act. The entire Act itself has only five sections. Section 3 reads as follows :

"3. (1) In respect of property vested in the Central Government, being property of a railway, a railway administration shall be liable to pay any tax in aid of the funds of any local authority, if the Central Government, by notification in the Official Gazette, declares it to be so liable.

(2) While a notification under sub-section (1) is in force, the railway administration shall be liable to pay to the local authority either the tax mentioned in the notification or in lieu thereof such sum, if any as a person appointed in this behalf by the Central Government may, having regard to the services rendered to the railway and all the relevant circumstances of the case, from time to time determine to be fair and reasonable. The person so appointed shall be a person who is or has been a Judge of a High Court or a District Judge."

Section 4 reads as follows :

"4. The Central Government may, by notification in the Official Gazette, revoke or vary any notification issued under Cl. (1) of S. 135 of the Indian Railways Act 1890; and where a notification is so revoked, any liability arising out of the notification to pay any tax to any local authority shall cease, and where a notification is so varied the liability arising out of the notification shall be varied accordingly."

Section 3 of this Act thus enables the local authority to levy a tax in aid of its funds in respect of property vested in the Central Government, being a property of a railway, only if the Central Government issues a notification declaring the Railway Administration to be so liable. Therefore, after coming into force of Part III of the Government of India Act 1935, before the Railway property can be taxed, a notification under S. 3 of the 1941 Act has to be issued by the Central Government. Section 4 only empowers the Central Government to revoke or modify a notification issued under S. 135 of the Railways Act. The consequence of revocation is that the liability to pay tax to any local authority under that notification ceases. The position, as it appears, is that the notification of 1907 was revoked in October 1953. Therefore, even assuming that the notification of 1907 empowered the local authority to levy Octroi Duty, that liability ceased in terms of S. 4 of the 1941 Act with effect from 3rd October 1953 and no recovery of Octroi Duty could have been made thereafter.

11. Looking at the matter from a different aspect, it will have to be ascertained whether the notification of 1907 is such that the proviso to S. 154 of the Government of India Act would be attracted to it. Now there can be no doubt,

as already pointed out, that the notification of 1907 enables even Octroi Duty to be levied in respect of goods. But for the purposes of the proviso to S. 154, the requirement of that proviso has to be satisfied. The requirement, as pointed out by Ormond, J. in Calcutta Corporation's case, is that the property which is being subjected to tax must be in existence before 1st April 1937 physically and the property must be the same at the time when the tax is sought to be levied. This is the undisputable effect of the proviso and the manner in which it is worded, and thus the proviso to Section 154, Government of India Act 1935 saved some taxes. The taxes saved were in respect of property which vested in His Majesty and was, immediately before 1st April 1937, liable to tax and taxes only in respect of such property could be recovered after 1st April 1937. The physical identity of the property, before and after 1st April 1937, is therefore a *sine qua non* for levy of a tax after 1st April 1937 by virtue of the proviso of S. 154 of the Government of India Act 1935. Such cannot however be said to be the case where Octroi Duty is sought to be levied. Octroi Duty is levied once and for all on any particular article or goods. There is no occasion to levy Octroi Duty again and again in respect of the same property. In other words, the Octroi Duty is paid on a property which comes for the first time within the municipal limits and that is brought for consumption, sale or use and the same goods are not again liable to duty. Therefore, the physical identity of the property prior to 1st April 1937 cannot be the same where on and after 1st April 1937 new goods are brought within municipal limits and Octroi Duty is sought to be levied on those goods or articles. In the case of Octroi Duty, therefore, it is obvious that the proviso to S. 154 would be wholly inapplicable and unless there is a Federal Law as contemplated by the substantive provision in S. 154 of the Government of India Act 1935, there will be no power in any Municipal Council to levy Octroi Duty in respect of Government property after 1st April 1937. That will also be the position in the post-Constitution period and unless there is a law made by the Parliament permitting the property of the Union to be taxed, Octroi Duty could not be levied after 25th January 1950.

12. We may now refer to two decisions of the Supreme Court in which the scope of Article 285 has been considered. In Union of India owner of the Eastern Railway v. Commissioner of Sahibganj Municipality (AIR 1973 SC 1185) a notification was issued on 24th August 1911 under Section 135 of the Railways Act declaring that the Administration of East India Railway shall be liable to pay in aid of the funds of the local authorities set out in the schedule thereto annexed the taxes specified in the second column thereof. The taxes in question were house rate and latrine fees. Out of the buildings in question some were constructed after 31st Mar. 1937 and some after 25th Jan. 1950. The Union of India contended that it was not liable to pay municipal tax by virtue of provisions contained in S. 154 of the Government of India Act 1935 and Article 285 of the Constitution. The High Court had held that the 1941 Act was a Federal Law within the meaning of Section 154 of the Government of India Act and Section 4 of the 1941 Act rendered the buildings liable to taxation. Reversing the decision of the High Court it was pointed out by the Supreme Court that the High Court overlooked the effect of Section 3 of the 1941 Act which required a notification declaring a liability to pay and that the notification under 1941 Act created a liability for railway property coming into existence after 1941 Act but no such notification was issued. Pointing out that Section 4 of the 1941 Act did not provide for payment of taxes in respect of railway property and that there was no law contemplated by Article 285 providing for taxation of railway property the Supreme Court observed as follows (at p. 1187):—

"The High Court was in error in construing the notification issued in 1911 under the 1890 Act to continue by virtue of the provisions contained in Section 4 of the 1941 Act. These 32 blocks of buildings vested in the Union some of them after 1st April 1937 and some after the Constitution came into existence. These properties could be made liable to pay tax to the municipality only if Parliament by law provided to that effect."

The Supreme Court thus held that the notification under the 1890 Act did not apply to the 32 blocks of buildings which were not in existence before 1st April 1937 and that there was no law declar-

ing the 32 blocks of buildings to be liable to payment of tax as claimed by the municipality. The Supreme Court decision therefore points out that the notification issued under the Railways Act could not be availed of by the Municipal Council after 1st April 1937. The scope of the proviso was, however, not in question in that case. The other decision is in *Union of India v. City Municipal Council, Bellary*, AIR 1978 SC 1803. The Supreme Court referring to the scope of Article 285 observed as follows (Para 7):—

"The property of the Union is exempt from all taxes imposed by a State or by any authority within a State. But the Parliament may by law provide otherwise and then any tax on the property of the Union can be imposed and levied in accordance with the said law. But then an exception has been carved out in clause (2). The exception is not meant for levying any tax on such property by any State; but it is merely for the benefit of any authority including the local authority like the Municipal Council in question. Clause (1) cannot prevent such authority from levying any tax on any property of the Union if such property was exigible to such tax immediately before the commencement of the Constitution. The local authority, however, can reap advantage of this exception only under two conditions namely (1) that it is 'that tax' which is being continued to be levied and no other; (2) that the local authority in 'that State' is claiming to continue the levy of the tax. In other words, the nature, type and the property on which the tax was being levied prior to the commencement of the Constitution must be the same as also the local authority must be the local authority of the same State to which it belonged before the commencement of the Constitution."

13. Mr. Abhyankar appearing on behalf of the Municipality has contended that when Octroi Duty is levied the nature and character is the same both as to the property and the tax. The contention appeared to be that the property subjected to tax were goods imported within municipal limits and the nature of tax was Octroi tax and therefore according to the learned counsel even the condition laid down by the Supreme

Court in Bellary Municipality's case was satisfied. Now it is obvious that when the Supreme Court referred to the nature and type of the property on which tax was being levied, that was in the context of Article 285 (2) which expressly provided that the property in respect of which the tax was being sought to be levied must be the same property which was liable or treated as liable prior to the coming into force of the Constitution. As already pointed out, when Octroi Duty is levied on goods brought into the municipal limits for the first time, on each occasion the goods are different and not the same goods though in a given case the goods may be identical or of the same kind.

14. We may also point out that the Supreme Court in the Bellary Municipality's case has taken the view that the provisions of the 1941 Act are not saved by Article 285 of the Constitution because, it was not a law made by the Parliament as contemplated by Article 285 (2). Referring to the provisions of the 1941 Act in the context of Art. 285 and Article 372 of the Constitution the Supreme Court has observed as follows (Para 8):—

"The Act of 1941 creating the liability of the Railways to taxation by local authorities was passed by the then Central Legislature which was a Federal Legislature of India. The present Central Legislature, namely, the Parliament has not enacted any law after coming into force of the Constitution making any provision affecting the exemption of the property of the Union from all taxes imposed by a State or by any authority within a State. The 1941 Act is repugnant to clause (1) of Article 285. It is neither a law made by Parliament nor a law made by the Central Legislature after the advent of the Constitution. In either view of the matter it is not a law covered by the phrase 'save in so far as Parliament may by law otherwise provide' occurring in clause (1) of Article 285."

It therefore appears to be clear to us that Octroi Duty which was permitted to be levied by the notification of 1907 could not have been levied on goods brought by the Railways after 1st April 1937 because of the bar under the main part of Section 154 of the Government of India Act and be-

cause such a tax was not saved by the proviso to Section 154, the Octroi Duty could also not be levied after the commencement of the Constitution because of the express bar in Article 285 (1) and further because there was no Octroi Duty which could be claimed under Article 285 (2).

15. It was at one stage contended by Mr. Abhyankar on the basis of the decision of the Calcutta High Court in *Corporation of Calcutta v. Union of India*, AIR 1957 Cal 548 that even if the Octroi tax was illegally levied after 1953, when the notification of 1907 was revoked, the case would still be covered by Article 285 (2) and the Municipal Council was therefore entitled to claim Octroi Duty from the Railway Administration. Dealing with the meaning of the words "treated as liable" which are to be found both in the proviso to Section 154 of the Government of India Act and Article 285 (2) of the Constitution of India, the Division Bench of the Calcutta High Court has observed as follows (at p. 550):

"The phrase "treated as liable" has the same legal meaning in both the proviso to S. 154 of the Government of India Act, 1935, and clause (2) of Article 285 of the Constitution and it has the same purpose, namely, to avoid a final solution of the dispute as to the legal liability of the particular property to the disputed tax and to authorise or validate the levy of the tax in the post-Act and post-Constitution period respectively, at least when such tax was actually levied and realised and paid, in fact, for the particular property as Central Government property for the period immediately before the relevant date, that is, the commencement of Part III of the Government of India Act, 1935, in the one case and the commencement of the Constitution in the other, even if such levy was illegal."

These observations are not of any assistance to the Municipal Council. The concept of "treated as liable" have been used by the learned Judges in the context of the particular property and it is in respect of such property which has once been treated as liable that it is said that the tax could be recovered even though it was illegally levied. That case dealt with house property which was assessed to municipal taxes and the contention on behalf of the Municipal Council was that though the assessment

up to the end of the second quarter of 1950-51, i.e., up to a post-Constitution period was actually paid by the Union, the Union was disputing the assessment as illegal and ultra vires immediately when the property came under the ownership to the Central Government on 1st April 1943 and the property, according to the Union of India, ceased to be liable to municipal taxes. The Calcutta High Court held that the levy of the disputed tax in the disputed post-Constitution period was valid in law because the disputed premises belong to Central Government and owned by it and were actually assessed to municipal tax and such tax was paid and realised immediately before the commencement of the Constitution. The premises were therefore held to be "treated as liable" for the purposes of Article 285 (2). As already pointed out, we are, in the present case, concerned with Octroi Duty and each levy is a fresh levy on fresh articles and tax was not intended to be recovered for the same goods for which once it is paid. The trial Court was, therefore, in our view, wrong in holding that the Union was liable to pay Octroi Duty as claimed.

16. This finding is sufficient to dispose the appeal. However, the question of limitation has been argued before us and we proceed to decide it. Admittedly, the Limitation Act, 1963 came into force on 1st January, 1964. Out of the several items which were subjected to Octroi Duty, there were only two items which fell within the period before 1st January 1964. Those are items 1 and 2 in Exhibit 41 dated 2nd November, 1963 to 17th December, 1963. The remaining items are between 10th January, 1964 and 1st November, 1966. Admittedly the suit is filed after the Limitation Act, 1963 has come into force. The trial Court has found that the limitation for the suit under the old Act would have been six years but under the new Act it is only three years under Article 113 which is the Article corresponding to Article 120 of the 1908 Limitation Act. The commencement of limitation in both the Acts would be from the time when the right to sue would normally accrue when the tax would become payable. It normally becomes payable at the time when the goods are brought within the municipal limits. Now the trial Court has taken the view that since under the new Limitation Act the period of limitation pre-

scribed is less i.e. three years, than the one prescribed under the old Act, i.e. six years, the provisions of Section 30 of the Limitation Act 1963 could be invoked by the Municipal Council and therefore the Municipal Council was entitled to file a suit within a period of seven years from 2nd November 1963. The only material provision is in clause (a) of Article 30 which reads as follows:—

"30. Notwithstanding anything contained in this Act,—

(a) any suit for which the period of limitation is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908 may be instituted within a period of seven years next after the commencement of this Act or within the period prescribed for such suit by the Indian Limitation Act, 1908, whichever period expires earlier;"

The trial Court has taken the view that the suit could be filed within seven years from 1st January 1964 and making provision for the statutory notice period of two months, it could be instituted on 1st March 1971 and since it was instituted on 6th February 1969, even the item dated 2nd November 1963 would be within limitation. In our view, the trial Court has fallen in a serious error of law in invoking the provisions of Section 30. A suit in respect of a claim for Octroi Duty arising after 1st January 1964 would be wholly governed by the provisions of Article 113 of the Limitation Act 1963. It is difficult for us to appreciate how the provisions of Section 30 of the Limitation Act could be made applicable to a cause of action which arises after the Limitation Act has already come into operation. Section 30 Cl. (a) refers to a suit for which the period of limitation is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908. It contemplates that the cause of action has arisen prior to the Act of 1963 but that the limitation for such a suit which has not been filed before 1st January 1964 is shorter under the new Act. It is apparent therefore that the provisions of Section 30 of the Limitation Act could be invoked only in respect of the first two items dated 2nd November 1963 and 17th December 1963. In respect of the remaining items the suit would be governed by the provisions of Article 113 of the Limitation Act 1963. On that view, items between 10th January 1964 and 10th January 1966 could

not have been claimed in the present suit because the claim in respect thereof would be barred by limitation. If at all the Municipality was entitled to any claim, it could be only in respect of items between 2nd November 1963 and 17th December 1963 and for items 45 to 257.

17. In the view which we have taken on the constitutional position in the appeal, the suit filed by the Municipal Council must stand dismissed. The judgment and decree passed by the trial Court are set aside and the appeal filed by the Union of India is allowed. Suit filed by the plaintiff is dismissed with costs throughout.

Appeal allowed.

AIR 1982 BOMBAY 523

Smt. SUJATA V. MANOHAR, J.

Purshottam Vishindas Raheja, Plaintiff v. Life Insurance Corporation of India and others, Defendants.

Notice of Motion No. 1303 of 1981 (In Suit No. 1593 of 1981), D/- 2-4-1982.

(A) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 28 — Section covers all claims arising under Act even though parties may not be landlord and tenant — Whether claim is one under Act or not depends upon substance of claim in plaint — Held, suit was not covered by S. 28.

Under S. 28 the Court of Small Causes alone has jurisdiction to entertain and try any suit or proceedings between a landlord and a tenant relating to the recovery of rent or possession of any premises and to decide any application made under that Act and to deal with any claim or question arising out of the Act or any of its provisions. But in order that a claim should arise under the provisions of the Bombay Rent Act, it is not necessary that the claim should be between a landlord and a tenant. Section 28 is wide enough to cover all questions which arise out of the Bombay Rent Act even though the parties may not have the legal relationship of a landlord and a tenant. In order to decide whether the claim of the plaintiff arises under the Act or not, one has to examine the substance of the case in the plaint and not merely the manner in which the claim is framed. Ingenuity in drafting cannot

IZ/IZ/E97/82/AKJ

confer jurisdiction on a court, Case law Ref. (Para 7)

The plaintiffs have filed the suit against defendants 1 to 10 asking for specific performance of the agreement of sale as against defendant No. 1. They have sought in addition, a declaration that the agreements entered into between defendants 2 to 9 on the one hand and defendant No. 10 on the other hand are null and void and have asked for a cancellation of these agreements. They have asked for a declaration that defendants 2 to 9 are not in actual or symbolic occupation or possession of the suit property. They have also asked for a declaration that defendant No. 10 has no right, title or interest in respect of the suit property and is a trespasser and have asked for possession of the premises from the defendant No. 10. The present notice of motion is taken out by the plaintiff for the appointment of a receiver of the said immovable property, especially of the studio premises and for other reliefs set out in the motion. The defendants contended that the disputes between the parties are under the Bombay Rent Act and ought to be tried before the court of small causes.

Held, the contention was not tenable. The plaintiff had claimed reliefs against defendant No. 10 on the ground that he is trespasser and has no right, title or interest in the suit premises. It was true that in order to decide whether defendant No. 10 was trespasser on the premises or not, it would be necessary to examine the provisions of S. 15 of the Bombay Rent Act and the notification issued under it. But the court did not cease to have jurisdiction simply because, in order to decide the title of a person to any property, it might incidentally have to examine the provisions of the Bombay Rent Act. In substance the suit against defendant No. 10 was a suit on the basis of trespass and as such the suit could not be considered as covered by S. 28. As against defendants Nos. 2 to 9, it was the plaintiff's case that they had parted with all their rights in the suit premises. They had also parted with possession of the suit premises. They therefore had ceased to be tenants of the suit premises. The plaintiff had therefore merely sought a declaration against defendants 2 to 9 that they were no longer in possession of the suit premises. The plaintiffs had not claimed any relief of possession

against them. The plaintiff had also asked for a cancellation of certain agreements executed between defendants 2 to 9 and defendant No. 10 on the ground that these documents were illegal and/or null and void. Such a suit also could not be considered as a suit which was covered by S. 28 of the Bombay Rent Act. In fact the court of Small Causes would not have jurisdiction to grant the relief of cancellation of documents. In substance, therefore, the claim of the plaintiff in the suit did not fall under S. 28. (Para 7)

(B) Civil P. C. (5 of 1908), O. 7, R. 11 — Suit for specific performance of agreement of sale — Notice of motion for appointment of receiver and injunction — Part of cause of action found defective against some of the defendants — Held, O. 7, R. 11 was not applicable — Those provisions could not be invoked at motion stage and plaint could not be rejected. Case law Ref. (Specific Relief Act (47 of 1963), S. 5). (Paras 11, 13)

(C) Specific Relief Act (47 of 1963), S. 20 — Suit for specific performance of agreement of sale — Remedy is discretionary — Plaintiff does not get right of possession unless he gets a decree — He cannot, therefore, dispossess anybody at interlocutory stage. (Civil P. C. (1908), O. 40, R. 1).

Specific performance of an agreement of sale is a discretionary remedy which may or may not be granted. It is quite possible that in a given case the party who asks for specific performance may, even when successful, get only damages in lieu of specific performance. Therefore, unless the plaintiff gets a decree of specific performance in his favour, he does not get a right to possession. He cannot, therefore, at the interlocutory stage, dispossess somebody who is in possession prior to the filing of the suit, by notice of motion (for appointment of receiver and injunction in this case).

(Para 18)

Cases Referred : Chronological Paras

AIR 1980 SC 1992	17
AIR 1980 Bom 341	14
AIR 1979 SC 1628	17
AIR 1977 SC 2421	12
AIR 1976 Punj & Har 316 (FB)	11
AIR 1973 SC 1099	8
AIR 1971 SC 1495	7
AIR 1967 SC 1853	8
AIR 1953 SC 73	7
AIR 1950 Cal 333	9

AIR 1948 Nag 181 9
 AIR 1945 Cal 355 9
 (1880) ILR 5 Bom 177 9
 (1820) Jac 490 : 1 Jac & W 666 : 37 ER 9
 522, Mole v. Smith 9

A. K. Sen with Atul Munim and S. R. Pandit, for Plaintiff; N. H. Seervai, for Defendant No. 1 and S. D. Parekh, for Defendants Nos. 2 to 10 to show cause.

ORDER:— The plaintiff is the Karta and Manager of a Joint Hindu Family called Raheja Sons (H. U. F.) which carries on business in the name and style of Shri Tirupati Builders. The plaintiff entered into an agreement with the Life Insurance Corporation of India (defendant No. 1) for the purchase of the suit property at Dadasaheb Phalke Road, Parel, Bombay under an agreement of sale dated 21st Jan. 1981. Life Insurance Corporation which is defendant No. 1 is the owner of the suit property which consists of several structures, some of which are used as a cinema studio. One T. Tarachand was a tenant of Life Insurance Corporation in respect of the said entire property including the said studio. T. Tarachand died on or about 18th September 1972. Defendants 2 to 8 are his surviving heirs and legal representatives. They claim tenancy rights in respect of the said property as the heirs of the deceased tenant. Defendant No. 9, Roop Tara Studios, is a partnership firm in which originally T. Tarachand was a partner. The said partnership firm claims that the tenancy rights of the said immovable property were held for the benefit of the partnership. One N. L. Mehta Cinema Enterprises Pvt. Ltd. is defendant No. 10.

2. The Life Insurance Corporation advertised for the sale of the said property in "as is where is" condition some time in June 1980. The plaintiff had submitted a tender for Rs. 37,50,000/-. Defendant No. 9 M/s. Roop Tara Studios had submitted a tender for Rs. 20,07,000/- and N. L. Mehta Cinema Enterprises Private Limited (Defendant No. 10) had submitted a tender for Rs. 21,06,000/-. There were other tenders also. The plaintiff's tender being the highest, was accepted by the Life Insurance Corporation by a letter dated 4th July 1980. Thereafter a formal agreement between the plaintiff and Life Insurance Corporation was entered into on 21st Jan. 1981.

3. Prior to the agreement of sale there were proceedings between the Life Insurance Corporation and the heirs of T. Tarachand in respect of the suit property. Life Insurance Corporation had terminated the tenancy in respect of the suit property and had instituted proceedings under the Public Premises Eviction Act for eviction of defendants 2 to 8. Defendants 2 to 8 thereupon filed a writ petition in this court challenging the application of the Public Premises Eviction Act to the premises owned by the Life Insurance Corporation. The Writ Petition was allowed. An appeal is pending from the decision in the writ petition.

4. It is the case of defendants 2 to 10 that defendant No. 9 entered into an agreement with defendant No. 10 in June 1980 whereunder defendant No. 10 agreed to buy the business of defendant No. 9 in respect of their studio division together with its goodwill and tenancy rights in respect of the said immovable property. Thereafter by an agreement dated 23rd Sept. 1980 entered into between defendants 2 to 9 on the one hand and defendant No. 10 on the other hand, the defendants 2 to 9 agreed to assign to defendant No. 10 the studio business of defendant No. 9 together with its stock-in-trade, goodwill and tenancy rights in the said immovable property. Defendant No. 10 claims to have paid to defendants 2 to 9 a sum of Rs. 3 lakhs on 23rd Sept. 1980 and to have obtained possession inter alia of the said studio on that day from defendants 2 to 9. Defendant No. 10 thus claims to be in possession of the studio premises since 23rd Sept. 1980.

5. The plaintiffs have filed the present suit on or about 1st Sept. 1981 against defendants 1 to 10. In the plaint the plaintiff has asked for specific performance of the agreement of sale dated 21st Jan. 1981 as against defendant No. 1. They have sought in addition, a declaration that the agreements entered into between defendants 2 to 9 on the one hand and defendant No. 10 on the other hand are null and void and have asked for a cancellation of these agreements. They have asked for a declaration that defendants 2 to 9 are not in actual or symbolic occupation or possession of the suit property. They have also asked for a declaration that defendant No. 10 has no right, title or interest in respect of the suit property and is a trespasser and

have asked for possession of the premises from the defendant No. 10. The present notice of motion is taken out by the plaintiff for the appointment of a receiver of the said immovable property, especially of the studio premises and for other reliefs set out in the motion.

6. Defendants Nos. 2 to 10 have raised certain preliminary objections to the notice of motion. The first preliminary objection is to the effect that this Court has no jurisdiction to entertain the suit as against defendants 2 to 10 in view of the provisions of S. 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the Bombay Rent Act). Defendants Nos. 2 to 10 have submitted that under S. 9A of the Civil P. C. the issue as to jurisdiction must be tried at the stage of the Notice of Motion as a preliminary issue and suit against defendants 2 to 10 should be dismissed on the ground that this Court has no jurisdiction.

7. Under S. 28 of the Bombay Rent Act the Court of Small Causes alone has jurisdiction to entertain and try any suit or proceedings between a landlord and a tenant relating to the recovery of rent or possession of any premises and to decide any application made under that Act and to deal with any claim or question arising out of the Act or any of its provisions. Admittedly the present suit is not a suit between a landlord and a tenant for recovery of rent or possession of any premises. According to the defendants Nos. 2 to 10 however, the claim in the suit against them is a claim arising out of the Bombay Rent Act and its provisions and hence it is covered by S. 28 of the Bombay Rent Act. Now it is true that in order that a claim should arise under the provisions of the Bombay Rent Act, it is not necessary that the claim should be between a landlord and a tenant. Section 28 is wide enough to cover all questions which arise out of the Bombay Rent Act even though the parties may not have the legal relationship of a landlord and a tenant. The Supreme Court, in the case of *Sushila Kashinath Dhonde v. Harilal Govindji Bhogani* reported in AIR 1971 SC 1495 has held that it is not necessary that there should be a relationship of landlord and tenant between the parties for a matter to be covered by Sec. 28. No doubt, one type of action contemplated

under that section viz., a suit or proceeding for recovery of rent or possession of any premises may be between a landlord and a tenant; but in respect of other matters dealt with in that section it is not necessary that the relationship of a landlord and a tenant should exist between the parties before the Court. In the case before the Supreme Court the suit was to enforce a charge under the provisions of S. 18 of the Rent Act. It was held as covered by S. 28 of the Bombay Rent Act. There is a similar observation in an early case of *Messrs. Importers and Manufacturers Ltd. v. Pheroze Framroze Taraporewala* reported in AIR 1953 SC 73. In the present case we have to examine whether the claim of the plaintiff against defendants 2 to 10 is a claim which arises under the provisions of the Bombay Rent Act. It is now well established that in order to decide this question one has to examine the substance of the case in the plaint and not merely the manner in which the claim framed. Ingenuity in drafting cannot confer jurisdiction on a court. According to the defendants Nos. 2 to 10 the suit is in substance for eviction against defendants Nos. 2 to 8 who are the heirs of the tenant and against defendant No. 9 who claim to be the tenants and for obtaining possession from their proposed transferee defendant No. 10. According to these defendants there was admittedly a tenancy in respect of the suit property created by the first defendant in favour of T. Tarachand and defendants 2 to 8 are the heirs of that tenant. There is some dispute as to whether tenancy is now a statutory tenancy or a contractual tenancy. Defendants Nos. 2 to 9 have purported to enter into an agreement to transfer the business of defendant No. 9 together with its tenancy rights, stock-in-trade and good-will in favour of defendant No. 10 in purported exercise of their rights under the notification issued under Sec. 15 of the Bombay Rent Act. According to these defendants the disputes between them and the plaintiff in the suit are thus under the Bombay Rent Act and they ought to be tried before the Court of Small Causes. This contention is not tenable. The plaintiff has claimed reliefs against defendant No. 10 on the ground that they are trespassers and have no right, title or interest in the suit premises. It is true that in order to decide whether defendant No. 10 is

trespasser on the premises or not, it will be necessary to examine the provisions of S. 15 of the Bombay Rent Act and the notification issued under it. But the court does not cease to have jurisdiction simply because, in order to decide the title of a person to any property, it may incidentally have to examine the provisions of the Bombay Rent Act. In substance the suit against defendant No. 10 is a suit on the basis of trespass and as such the suit cannot be considered as covered by S. 28 of the Bombay Rent Act. As against defendants Nos. 2 to 9, it is the plaintiff's case that they have parted with all their rights in the suit premises. They have also parted with possession of the suit premises. They therefore have ceased to be tenants of the suit premises. The plaintiff has therefore merely sought a declaration against defendants 2 to 9 that they are no longer in possession of the suit premises. The plaintiff has also asked for a cancellation of certain agreements executed between defendants 2 to 9 and defendant No. 10 on the ground that these documents are illegal and/or null and void. Such a suit also cannot be considered as a suit which is covered by S. 28 of the Bombay Rent Act. In fact the court of Small Causes would not have jurisdiction to grant the relief of cancellation of documents. In substance, therefore, the claim of the plaintiff in the suit does not fall under S. 28 of the Bombay Rent Act.

8. My attention was drawn to the case of *Thakkar Keshavalal Mohanlal v. Parekh Amrutlal Harilal* reported in AIR 1973 SC 1099. In that case a suit had been filed before the Competent Court under S. 28 of the Bombay Rent Act for eviction both against the tenant as well as his sub-tenant. The sub-tenant contended that since the claim against him was a claim in trespass, S. 28 would not apply to the suit against him and the court had no jurisdiction to entertain a claim against him. In negating this contention the Supreme Court observed that the suit was essentially a suit between a landlord and tenant; and the joinder of the sub-tenant in such a suit would not make the suit any the less a suit between a landlord and a tenant. The court referred to its earlier decision in *Hiralal Vallabhram v. Kasturbhai Lalbhai* reported in AIR 1967 SC 1853 and observed that a suit on

the basis of trespass was clearly a suit which was not covered by the provisions of the Bombay Rent Act. In substance the claim of the plaintiff is in trespass against defendant No. 10. Such a claim does not fall under S. 28 of the Bombay Rent Act. It is true that in the present case the tenants are also made parties to the suit. But no relief of eviction or possession is asked for against the tenants. This is not merely a technical camouflage as the defendants 2 to 10 would like to submit, because in substance, it is the plaintiff's case that the tenants have parted with their possession of the premises and have also parted with their right title and interest as tenants. The plaintiff therefore seeks a declaration that the tenants have ceased to be tenants. Whether the plaintiff's case is correct or not is a matter which will be decided at the final hearing of the case after evidence is led. But whatever be the merits of the plaintiff's case, the fact remains that the basis of the suit against defendants Nos. 2 to 9 is that they have abandoned all their rights as tenants. Accordingly plaintiffs have not claimed any relief of possession against defendants Nos. 2 to 9 but are content with a declaration against them that they are no longer in possession or occupation of the suit premises. Under these circumstances it is not possible to hold that the claim in the suit against defendants 2 to 9 is a claim against tenants for possession. Thus the suit against defendants Nos. 2 to 10 is not covered by the provisions of S. 28 of the Bombay Rent Act. This court therefore has jurisdiction to entertain the present suit not merely against defendant No. 1 but also against defendants Nos. 2 to 10.

9. The next preliminary objection raised on behalf of defendants Nos. 2 to 10 is to the effect that the plaint discloses no cause of action against defendants Nos. 2 to 10. The plaint should therefore be rejected under the provisions of O. 7, R. 11 of the Civil P. C. Now, the present suit is a suit for specific performance of an agreement for sale entered into between the plaintiff and defendant No. 1. Ordinarily in a suit for specific performance, persons who are not parties to the contract of which specific performance is sought, cannot be joined as party defendants. In this connection a reference may be made to a decision of this Court in the case of *Luckumsey Ookerda v. Fazulla*

Cassumbhoy reported in (1880) ILR 5 Bom 177 where it was held that a stranger to a contract of which specific performance is sought, cannot be a party to the suit. In that case the plaintiff had joined another person who claimed a charge on the land which was agreed to be sold and had asked for a declaration that that person was not entitled to any charge upon the said land. The court held that the latter defendant had been improperly made a party. Similarly in the case of *Mt. Nagi v. Damodar Jagobaji* reported in AIR 1948 Nag 181, Hidayatullah, J. (as he then was) held that in a suit for specific performance of agreement for sale of land, strangers claiming independent title are not proper parties to the suit. He observed that the scope of a suit for specific performance of an agreement for sale of land, coupled with a prayer for possession cannot be enlarged and the suit turned also into a title suit. The plaintiff could take action against strangers only after he had perfected his title by obtaining specific performance. He cited the observation of Lord Eldon in the case of *Mole v. Smith* (1820) Jac 490 to the effect that when a bill is filed for specific performance it should not be mixed with a prayer for relief against other persons claiming an interest in the estate. Lord Eldon observed:

"It is to be regretted that this opinion will prevent the parties from having the question between them so effectively decided as it might otherwise have been; but I cannot, to avoid an inconvenience in a particular case, sanction a proceeding which I consider to be inconsistent with the rules of pleading, and which, if recognised, might lead to much difficulty and confusion in the proceedings of the Court."

The only exception to this rule is in the case of a voluntary purchaser from the vendor and a purchaser who takes with notice of the agreement. Such persons can be joined as party defendants in a suit for specific performance. The reason is that any person who has taken the property subject to the plaintiff's rights can always be joined as a party defendant. In this connection a reference may also be made to the decision in *Prem Sukh Gulgulia v. Habib Ullah*, AIR 1945 Cal 355. There is therefore considerable substance in the contention of defendants Nos. 2 to 10 that they are not proper parties to a suit for specific performance.

Mr. Ashok Sen, learned counsel for the plaintiff submitted that just as a purchaser with notice and a voluntary purchaser can be joined in a suit for specific performance, in the present case, defendant No. 10 who has taken the property with notice of the plaintiff's agreement with defendant No. 1 can also be joined. But this submission cannot be accepted because defendant No. 10 is not a person who has purchased the right, title and interest of the vendor in the suit property with notice of the agreement of which specific performance is sought assuming for the time being that defendant No. 10 has taken possession with notice of the plaintiff's claim. The agreement for the sale between plaintiff and defendant No. 1 is an agreement for sale of a lessor's interest in the suit property. Admittedly at the date when the agreement of sale was entered into, there was a tenancy in respect of the property which was agreed to be sold subject to such existing tenancy. Defendant No. 10 purports to have agreed to acquire the tenant's interest in the suit property, from defendants 2 to 9. The agreements between defendants 2 to 10 inter se are in respect of the tenants' interest in the property. Defendants 2 to 10 therefore are not concerned with the landlord's interest in the premises at all. In that sense they are, therefore, strangers to the agreement of sale which is in terms only in respect of the landlord's interest in the property. *Prima facie* therefore the plaintiff cannot join defendants 2 to 10 in the present suit.

10. The matter may also be looked at from a slightly different angle. The plaintiff is merely a person who has entered into an agreement to purchase an immovable property. He has a right to obtain specific performance of the agreement of sale and perfect his title. But, by virtue of an agreement of sale the plaintiff does not get any interest in the property which is agreed to be sold to him. The plaintiff, therefore, does not have in praesenti any interest in the property which he has agreed to purchase. He cannot, therefore, take any action against the tenants of the property, the sub-tenants of the property or even trespassers on the property. He may be entitled to seek protection of the property which is agreed to be sold to him. By virtue of the agreement of sale he is entitled to the benefits of the obligations which arise out of the contract and

which are annexed to the ownership of the immovable property which he has agreed to purchase. He may also be able to call upon the seller to protect the property in the same manner as an owner of ordinary prudence would, until the property is conveyed to him. In this connection a reference may be made to the case of *Sashi Bhushan v. Rai Chand*, AIR 1950 Cal 333. Since however, he does not himself have any interest in the property he cannot sue third parties who claim to have an interest in the property which is agreed to be sold. In that sense also it is possible that the plaintiff may not be able to sustain his cause of action against defendants Nos. 2 to 10.

11. These, however, are matters to be decided at the final hearing of the suit. It is not possible at the stage of the notice of motion to hold that under the provisions of O. 7, R. 11 of the Civil P. C. plaint should be rejected as not disclosing any cause of action. By and large the provisions of O. 7, R. 11 are contemplated to apply to the rejection of a plaint as a whole where it discloses no cause of action against the defendants. Where there is a joinder of causes of action and joinder of parties and a decree can be passed in respect of some of the causes of action against some of the defendants, provisions of O. 7, R. 11 cannot be invoked. My attention was drawn to the case of *Balwant Singh v. State Bank of India (FB)* reported in AIR 1976 Punj & Har 316 where a Full Bench of the Punjab High Court held that provisions of O. 7, R. 11 will be attracted only in a case where by reason of the plea that the plaint does not disclose a cause of action the plaintiff would be wholly non-suited. This rule would have no application to the cases where a plaint discloses a cause of action in respect of a part of the claim against some of the defendants. At the highest, in the present case a part of the cause of action would be found defective against some of the defendants. It is therefore not a fit case where the provisions of O. 7, R. 11 can be applied. In any case such provisions cannot be invoked in a notice of motion taken out by the plaintiff for appointment of a receiver and injunction.

12. Mr. S. D. Parekh, learned counsel for defendants Nos. 2 to 10 drew my attention to a decision of the Supreme Court in *T. Arivandandam v. T. V. Satyapal*, AIR 1977 SC 2421 in which the Supreme Court observed that if on a meaningful — not formal — reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the trial court should exercise its power under O. 7, R. 11, of the Civil P. C., taking care to see that the ground mentioned therein is fulfilled. The case does not lay down that in a case where only a part of the claim may be defective against some of the defendants, it is the duty of the court to reject the plaint under O. 7, R. 11. The ratio of that case has no application to the facts of the present case.

13. Mr. Parekh, learned counsel for defendants Nos. 2 to 10 also submitted that the suit against defendants Nos. 2 to 10 should be dismissed at the stage of the notice of motion. It is not possible to accept this contention or to hold that in a notice of motion taken out by the plaintiff for receiver and injunction it is the duty of the court to dismiss the suit because it has *prima facie* come to a conclusion that the suit is not maintainable against some of the defendants. This is a matter which will be adjudicated upon at the hearing of the suit or in a proper proceeding and not at the stage of the present notice of motion.

14. The question whether a Receiver should be appointed of the said property is therefore required to be considered on the merits of the case. It is submitted by the plaintiff that the original tenants, whether statutory or contractual, have abandoned their rights; there is a trespasser viz. defendant No. 10 who is in occupation and therefore it is necessary to protect their rights and that a Receiver should be appointed of the property in dispute. The defendants Nos. 2 to 10 contend that defendant No. 10 is not a trespasser. According to these defendants, under the notification issued under S. 15 of the Bombay Rent Act it is possible for a party to transfer his business as a going concern together with stock-in-trade, goodwill and tenancy rights, even though the tenancy rights may be only as statutory tenants. The contention of these defendants is contrary to the decision of a Division Bench of this Court reported in *Vasant Tatoba Hargude v. Dikkaya Muttaya Pujari* reported in AIR 1980 Bom 341. Defendants

2 to 10 also contend that the tenancy continues to be a contractual tenancy as there is an alleged waiver of the notice to quit. It is not necessary to examine these contentions at the interlocutory stage. But they are relevant at present only for the purpose of showing that rightly or wrongly, defendant No. 10 claims to be in possession under a semblance of title and he claims to be in possession as a person who has entered into an agreement with defendants 2 to 9 to purchase the business of defendant No. 9 as a going concern together with stock-in-trade, goodwill and tenancy rights of the suit premises.

15. There is a dispute as to whether defendant No. 10 entered into possession prior to the agreement of sale between the plaintiff and defendant No. 1 or thereafter. There has been considerable argument on both sides on the question of possession of defendant No. 10 in respect of the suit premises. It seems that original tenant T. Tarachand was a partner in the defendant No. 9's firm. The 9th defendant had hired certain equipment and machinery for the studio from a third party, one Samulla Sunny. After the death of the said Sunny a suit was filed for the administration of his estate, being Suit No. 6053 of 1980 in the Bombay City Civil Court at Bombay. In that suit a Receiver was appointed inter alia of the equipment and machinery which were lying in the suit premises. Pursuant to the order in that suit the Court Receiver had gone to take an inventory of the said machinery lying in the suit premises and had sealed the said premises. Thereafter the plaintiff filed a suit in the Bombay City Civil Court being Suit No. 7303 of 1980 against some of the defendants as well as the L.I.C. in which also a Receiver was appointed. There are various reports of the Receiver in that suit as well as at the ad interim stage in the present suit. Both the parties are relying upon various reports which have been made by the Receiver. From a perusal of these reports one thing at least is clear viz. that the Receiver had not put her lock on the premises. The premises were locked when the Receiver went there and she put her seal on the premises. Ultimately when the studio premises which had been locked throughout and on which there were seals of the Receiver appointed in these various litigations were opened by the Receiver, the premises were open-

ed with the keys which were in the possession of defendant No. 10. It is not necessary to go into the question as to how defendant No. 10 obtained the keys of the premises, but the fact remains that the keys of the locks on the premises were with defendant No. 10.

In view of this fact, prima facie, it is not possible to hold, as contended by the plaintiffs, that the premises were abandoned premises and that nobody was in possession of these premises, either when a Receiver was appointed in the City Civil Court Suit No. 6053 of 1980 or at any time thereafter. Self-occupied premises in the city of Bombay are extremely valuable. They may fetch for its occupier a large sum of money. It is difficult to accept the contention of the plaintiff that such valuable premises which may fetch for its possessor an amount running into lacs of rupees would be simply abandoned by anybody, and would require a Receiver to take possession of the same in order to preserve them. Defendants 2 to 9 cannot be said to have abandoned the premises. They have entered into an agreement to transfer inter alia their rights in these premises to defendant No. 10. Defendant No. 10 appears to have been in possession of the suit premises under such an agreement before the filing of the suit. At present, therefore, the premises are not in an abandoned state.

16. We have next to examine whether the plaintiff has a present right to possession of these premises. Assuming for the sake of argument that the possession of defendant No. 10 is wrongful the plaintiff today has no interest in the property in dispute. He is merely a person who has entered into an agreement to purchase the property. He has not paid the full purchase price to the vendor nor has he obtained a conveyance in his favour. As such, he cannot claim any right to immediate possession of the suit property.

17. Mr. Parekh, learned counsel for the defendants Nos. 2 to 10 has challenged the plaintiff's right to obtain specific performance of the agreement of sale. He has alleged that the terms of the agreement of sale are different from the terms on which tenders were invited. He has alleged certain breaches of the agreement on the part of the plaintiff and he has also submitted that L.I.C.; the first defendants are in the position of

trustees of the property because they hold this property for the benefit of their policy holders. He has further submitted that at the stage when the tenders were opened, and before the tender of the plaintiff was accepted, defendant No. 9 had raised his bid to Rs. 38,50,000 which was Rs. 1 lac more than the bid of the plaintiff. Relying upon the ratio of the decision of the Supreme Court in the case of *M/s. Kasturi Lal v. State of Jammu & Kashmir*, AIR 1980 SC 1992 as well as *Ramana Dayaram Shetty v. The International Airport Authority*, reported in AIR 1979 SC 1628, he has submitted that it was the duty of the Life Insurance Corporation to accept the highest bid and they acted wrongfully in accepting the bid of the plaintiff. According to him this could be a fit case where the court should not exercise its discretion in granting specific performance of the agreement of sale in favour of the plaintiff.

18. At the interlocutory stage it is not necessary to examine the merits of the case. But these submissions merely highlight the fact that the plaintiff does not have an immediate right to possession of the property in respect of which they have entered into an agreement of sale. In fact specific performance of an agreement of sale is a discretionary remedy which may or may not be granted. It is quite possible that in a given case the party who asks for specific performance may, even when successful, get only damages in lieu of specific performance. Therefore, unless the plaintiff gets a decree of specific performance in his favour, he does not get a right to possession. He cannot, therefore, at the interlocutory stage, dispossess somebody who is in possession prior to the filing of the suit. In view of this position, it is not possible to uphold the contention of the plaintiff that a receiver should be appointed of the property described in Exhibit "A" to the plaint. It may be noted that in the present proceedings the landlord namely, the Life Insurance Corporation has not advanced any arguments and has submitted to the orders of the court. The plaintiff is, however, entitled to some protection in respect of the property which he has agreed to purchase so that his rights may be protected in the event of his succeeding in the suit. Accordingly, I pass the following order:

Defendants 2 to 10, their servants and agents are restrained from in any manner disposing of alienating, encumbering, inducting any third party or creating or recognising any right in favour of any third party in respect of the property described in Exhibit "A" to the plaint or parting with possession thereof or any part thereof. Defendants 2 to 10, their servants and agents are also restrained from altering the condition of the property described in Exhibit "A" to the plaint or any part thereof.

Defendant No. 10 his servants and agents are further restrained from parting with the possession of the said premises or any part thereof in favour of defendants Nos. 2 to 9 or any of them.

Defendants 2 to 10, their servants and agents are restrained further from executing a deed of assignment pursuant to the agreement in question entered into between them.

The undertaking given by defendants 2 to 10 on 22nd Sept. 1981 is vacated.

Ad interim orders to continue till 15th June 1982. The receiver to make an inventory in respect of the property Exhibit "A" to the plaint including the goods lying in the studio premises and to prepare a list of all persons in occupation of the property Exhibit "A". Inventory to be made by the Court Receiver immediately by removing the seal of the studio premises and re-fixing the same after the inventory is completed.

Ad interim orders to stand vacated on 15th June 1982 and the Receiver to remove her seal forthwith thereafter.

Mr. Parekh learned counsel for the defendants 2 to 10 applies that the plaintiff should deposit in court a sum of Rs. 28,12,500 which, according to him, is the balance purchase price payable in respect of the agreement for sale.

Mr. Amin, learned counsel for the plaintiff states that the balance purchase price of Rs. 23,12,500 has been deposited by the plaintiffs with their attorneys *M/s. Bachubhai Munim & Co.* In view of this statement application rejected.

Costs to be costs in the cause.

Ordered accordingly.

AIR 1982 BOMBAY 532**SHARAD MANOHAR, J.****Kalyandas Manilal Shah, Petitioner v. S. M. Kankaria and another, Respondents.****Writ Petn. No. 89 of 1981, D/- 17-3-1982.**

Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Sections 12, 13 — Consent decree — Executability — Decree of eviction on basis of compromise entitling plaintiff to recover possession after expiry of 7 years from date of compromise but decree not snapping relationship of landlord and tenant between the parties — Held, in circumstances, compromise decree was inexecutable. (Civil P. C. (5 of 1908), S. 47, O. 23, R. 3).

In the instant case, under the compromise decree the plaintiff was to recover possession after the expiry of 7 years from the date of the compromise. During that period the defendant was supposed to pay standard rent. The standard rent was fixed by the Compromise Decree itself. If the defendant was not to be made a tenant but was to occupy the premises only by concession, the provisions pertaining to the fixation of standard rent would have been wholly irrelevant. But the Compromise Decree had taken care to fix the standard rent and what was made payable by the defendant per month for the future period of 7 years was the standard rent determined by the Compromise Decree itself. Further, by the Compromise Decree, the plaintiff was to resume the water supply and the defendant was to withdraw the complaint filed by him under Section 24 of the Rent Act. There was, however, no default clause whatsoever in the compromise. Thus, every right that was given to a statutory tenant was given by the compromise terms by the plaintiff to the defendant. But that was not all. Even in the subsequent suit for eviction filed before the expiry of the said 7 years, the plaintiff stated that the defendant was his statutory tenant with effect from the date of compromise. Thus, both the terms of the Compromise Decree as well as the subsequent conduct of the parties clearly indicated the complete absence of snapping of the landlord-tenant relationship. In fact the relationship of landlord and tenant, may be that of a statutory tenant, was very much retained by the Compromise Decree.

Held in the circumstances, the compromise decree became inexecutable. This was so because a normal Compromise Decree (as distinct from the instant Compromise Decree)

snapped the relationship of landlord and tenant, whether contractual or statutory, between the parties with effect from the date of the decree and from that date the tenant was not expected to get any protection under the Rent Act as such. But as it happened in this case if the Compromise Decree did not intend to snap the erstwhile relationship of landlord and tenant between the parties, but either same previous relationship was continued or a new contract of tenancy was brought about, the provision of Sections 12 and 13 of the Rent Act would spring back into operation and hence the decree for possession became inexecutable. Sections 12 and 13 of the Rent Act put an embargo upon the powers of the Court to hand over possession of the premises by the tenant to the landlord without satisfying itself that the conditions mentioned in the said Sections 12 and 13 of the Rent Act existed. AIR 1971 SC 1081, Disting; AIR 1954 Bom 370, Ref.

(Paras 8, 9)

Cases Referred :	Chronological	Paras
AIR 1973 SC 1311		3, 10
AIR 1971 SC 1081		8
AIR 1954 Bom 370 : 56 Bom LR 365		9

N. A. Kapasi, for Petitioner; V. Z. Kankaria, for Respondents.

ORDER :— This is a writ petition filed by the judgment-debtor whose contention that the Compromise Decree passed against him for possession was not executable against him on account of various reasons, has been negated by both the Courts below.

For the reasons which are somewhat peculiar to the case before me I am required to allow this petition by accepting at least one of the contentions urged on behalf of the petitioner-judgment-debtor.

2. The facts of the case which are not in dispute are as follows :—

(a) The suit premises consist of a shop situate in village Choti, Taluka Igatpuri, District Nashik. There is no dispute that Rent Act is applicable to the premises situate in this village. Admittedly the present petitioner (referred to hereafter as "the defendant") was a tenant in respect of the premises which belong to the plaintiff. In the year 1969, the plaintiff filed Regular Civil Suit No. 119 of 1969 for recovery of possession of the suit premises on the ground that he required the said premises for his bona fide occupation. It is not disputed that the suit was resisted by the defendant but that even before the framing of the issues meaning thereby that even before the Court had any occasion to apply its mind to the respective rights of the parties, a consent decree

came to be passed on 10-8-1970. Its intention and its legal consequence in the light of the subsequent conduct of the parties are the questions falling for determination in this petition.

(b) The consent decree starts with a statement that there was a settlement arrived at between the parties and that as per the settlement the plaintiff was to recover the possession of the suit premises on 10-8-1977, that is to say, after the expiry of 7 years from the date of the compromise. By the said compromise standard rent of the premises was fixed at Rs. 58.42. Reference is made to the fact that the defendant had filed a criminal case against the plaintiff under Section 24 of the Rent Act complaining about the unlawful cutting of the water supply. By the compromise it was agreed that the plaintiff should resume the water supply. Reference was made to the application for fixation of standard rent filed by the tenant (Application No. 16 of 1969) but the standard rent was fixed by the compromise itself at the rate of Rs. 58.42 as mentioned above.

(c) There was no default clause in the said compromise terms, nor did the compromise terms specifically provide that in case possession was not delivered by the tenant to the plaintiff on the expiry of the period of 7 years, the possession was to be recovered by the plaintiff by execution of the compromise decree.

(d) Upon the settlement between the parties the compromise decree came to be passed by the Court on 10-8-1970. The compromise decree, however, provided separately that if the possession was not handed over by the defendant to the plaintiff on 10-8-1977 the same should be given to him by the Court.

(e) It is common ground that till about the year 1971 the defendant did pay the monthly dues payable as per the compromise decree. In 1971 or around there started a dispute between the parties. The nature of the dispute was that the defendant was offering rent to the plaintiff but insisted upon a receipt. The plaintiff was agreeable to give a receipt only by mentioning the amount he received as mesne profits. The tenant refused to pay rent as such. The result was that on 28-2-1972 the plaintiff gave to the defendant a notice. In the said notice it was mentioned that what was payable by the defendant was by way of mesne profits. It may be mentioned here that in the notice the mesne profits were computed on the basis of

the standard rent. The notice stated that even assuming that the defendant was a statutory tenant still he was liable to pay mesne profits as per the compromise decree and he was called upon to pay the amount of mesne profits as per the compromise decree. There was another mention in the notice, namely, that the defendant had inducted some other person in the suit premises and that this was a breach of the provisions of the compromise decree. On these grounds the defendant was called upon to hand over the possession of the suit premises to the plaintiff. Finding that the defendant would not oblige, the plaintiff filed a second suit against the defendant in spite of the decree already obtained by him on 10-8-1970 for recovery of the possession of the suit premises from the defendant. The said suit was Regular Civil Suit No. 52 of 1972. The relevant averments may be elaborated as follows:—

In para 3 of the plaint it was specifically mentioned by the plaintiff that the defendant was his statutory tenant with effect from 10-8-1970.

In para 5 of the plaint it was no doubt mentioned that the defendant was entitled to occupy the suit premises till 10-8-1977 as a matter of concession, but this statement was made in the context of the further grievance that the defendant had inducted another person (defendant No. 2 in that suit) on the roof of the shop with a view to profiteering by taking monthly payments from him.

In para 6 of the plaint it was stated that the cause of action for the suit for possession accrued to him on the expiry of the period mentioned in the notice dated 28-2-1972, that is to say on 31-2-1972.

The suit was specifically filed under the Bombay Rent Act and an averment to that effect was made in para 7 of the plaint by stating that the suit was filed for possession as per the provisions of the Rent Act and also for recovery of mesne profits.

Para 8 of the plaint discloses that the suit was filed on the basis that the same was against a tenant, whose tenancy had expired, and not against a trespasser.

(f) In that suit issues were framed. Issue No. 1 which was evidently invited by the plaintiff himself runs as follows:—

"1. Does the plaintiff prove that the defendant No. 1 has become a statutory tenant up to 10-8-1977 under the compromise decree in R. C. S. No. 119/1969?"

Issue No. 3 runs as follows:—

"3. Does he further prove that the defendant No. 1 has sublet the suit property to defendant No. 2?"

In the said suit the defendant had taken the plea that the rent charged against the defendant was excessive. Hence issue No. 5 was framed as follows:—

"5. Does he further prove that the rent of the suit property as agreed in the decree in R. C. S. No. 119/69 is excessive?"

Issue No. 6 runs as follows:—

"6. If yes, what is the standard rent of the suit property?"

(g) It may be mentioned here that according to the defendant he was not a statutory tenant but a contractual tenant and that that was the reason why issue No. 1 was framed as set out above. The trial Court recorded its finding on issue No. 1 against the plaintiff meaning thereby that the plaintiff's contention that the defendant was only a statutory tenant of the premises was held to be legally invalid. The trial Court recorded a finding on issue No. 3 that the defendant had not sublet the suit premises. So far as issues 5 and 6 are concerned it was held that in view of the standard rent having been fixed by the compromise decree in the previous suit. Issue No. 6 did not arise. On Issue No. 5 the finding was that the rent was not excessive.

(h) The plaintiff filed an appeal to the District Court. The District Court also seems to have taken the view that the plaintiff had no right to recover possession of the suit premises from the defendant at least for the said period of 7 years, having regard to the provisions of the compromise decree. The District Court was, however, inclined to observe that the contentions of both the parties were kept open to be agitated in the proceedings for execution of the compromise decree which would arise only after the expiry of the said period of 7 years. With these observations the appeal filed by the plaintiff was dismissed by the District Court.

(i) This order of dismissal of the appeal was passed on 16th January, 1978. By this time the period provided by the compromise decree had already expired. Hence the plaintiff filed a Darkhast for the execution of the compromise decree for the recovery of the suit premises from the defendant. The defendant raised objections to the execution. Firstly, it was contended that the compromise decree in fact brought about a new contractual relationship of landlord and tenant

between the parties with effect from 10-8-1970 and having regard to the provisions of Sections 12 and 13 of the Bombay Rent Act, the decree had become non-executable. Secondly, it was contended that the compromise decree which was passed in Suit No. 119/1969 was without jurisdiction inasmuch as the Court had no jurisdiction to pass a decree against a tenant just by compromise of the parties without satisfying itself that the conditions for a decree mentioned in Ss. 12 and 13 of the Rent Act were existent.

These contentions taken by the defendant were rejected by the trial Court and the appeal filed by the defendant in the District Court met with the same fate. The present petition is directed against the view taken by both the Courts below.

3. At the time of the hearing of this petition it was argued by Shri Kapasi, the learned Advocate for the petitioner, that the decree was not just executable having regard to the law declared by the Supreme Court in the case of K. K. Chari v. R. M. Seshadri, AIR 1973 SC 1311, and in the other cases of the Supreme Court, inasmuch as the Civil Court did not have jurisdiction to pass a decree against a tenant governed by the Bombay Rent Act merely by compromise of the parties without satisfying itself that the conditions mentioned in Sections 12 and 13 of the Rent Act for a tenant's eviction existed on the date of the suit, or at any other relevant time. He secondly contended that a careful examination of the compromise decree would show that a new contract of tenancy was in fact brought about between the parties with effect from 10-8-1970 by virtue of the settlement arrived at on that date.

4. To my mind, it is unnecessary to examine both the above contentions urged by Shri Kapasi in view of the fact that the petition must succeed on a third point which was somewhat casually suggested by Shri Kapasi himself. The point is that on the plaintiff's own showing the defendant was at least a statutory tenant with effect from 10-8-1970 if not a contractual tenant. The legal significance of this position is that the defendant is entitled to take all the protection afforded to a statutory tenant under the Bombay Rent Act and, if that is so, the instant compromise decree for possession cannot be of any legal consequence whatsoever.

5. I will first refer to the various circumstances showing that as per the intentment and contemplation of the parties evidenced

by the compromise decree itself as also by the subsequent assertions and conduct of the parties, the defendant was at least a statutory tenant of the suit premises. After pointing out this position which emerges from the peculiar facts of the present case, I will refer to the various statutory provisions which culminate into the inevitable legal position that the decree for possession against the defendant cannot be executable at all.

6. I will first examine the compromise decree. The substance of the compromise decree is already set out. From the mandate of the decree it is clear that a very long period was given by the plaintiff to the defendant, a period of 7 years, for staying in the suit premises. During that period the defendant was supposed to pay standard rent. The standard rent was fixed by the compromise decree itself. If the defendant was not to be made a tenant but was to occupy the premises only by concession, the provisions pertaining to the fixation of standard rent would be wholly irrelevant. But the compromise decree has taken care to fix the standard rent and what is made payable by the defendant per month for the future period of 7 years is the standard rent determined by the compromise decree on 10-8-1970 itself. Further, by the compromise decree, the plaintiff was to resume the water supply and the defendant was to withdraw the complaint filed by him under Section 24 of the Rent Act. There was, however, no default clause whatsoever in the compromise.

It could be seen that every right that is given to a statutory tenant was given by the compromise terms by the plaintiff to the defendant. But that was not all. If the compromise decree stood all by itself, the question would have been somewhat arguable at least that the intention of the parties was somewhat equivocal on the question as to whether the rights available to a tenant under the provisions of the Rent Act was or was not intended to be made available to the defendant. But if there were any doubts about this position those doubts had completely been dispelled by the plaintiff's own contention in the suit filed by him subsequently. I have already referred to various averments made by the plaintiff in the Second Suit No. 52/1972. In the said suit plaintiff stated in so many unmincing words that the defendant was his statutory tenant with effect from 10-8-1970. The suit was filed against the defendant on the basis that he was a tenant. Cause of action was stated

to have arisen in favour of the plaintiff in that suit because the tenant's tenancy was terminated by virtue of notice dated 28-2-1972. Para 6 relating to the statement of cause of action mentions in so many words that the cause of action in that suit arose after the expiry of the period mentioned in the notice. It follows that according to the plaintiff that the defendant was at least a statutory tenant of the suit premises. The court-fee paid for the purpose of the suit further makes it clear that the plaintiff treated the defendant as a tenant within the contemplation of the Rent Act at the time of that suit. In addition to the above, an issue was specifically got framed on the question as to whether the defendant was a statutory tenant.

Allegations were made against the defendant, in effect, that the defendant had sublet the suit premises to defendant No. 2 in that suit. This definitely postulated that the defendant was a tenant, though only a statutory tenant as specifically alleged. The contention of the plaintiff was that during the said period of 7 years the defendant was entitled to all the rights of a statutory tenant and was also subject to all the liabilities and obligations of a statutory tenant.

If all these facts are taken in conjunction with each other, it is impossible to hold that it was not the intention of the plaintiff, when he entered into the compromise on 10-8-1970, not to confer upon the defendant all the rights that are available to a statutory tenant under the Bombay Rent Act. If this was so, the only question that requires to be considered by the Executing Court is as to whether the Statute left any scope for the Court to disregard the provisions of the Rent Act and to execute the compromise decree by ignoring the specific inhibitions contained in the Act.

7. This brings me to the question of analysis of the various relevant provisions of the Rent Act which, to my mind, put a complete embargo upon the power of the Executing Court to allow the execution to proceed so as to dispossess the tenant of the suit premises.

The first relevant provision is Section 5, sub-section (11) of the Bombay Rent Act which defines the word "tenant". The said sub-section (11) defines "tenant" as follows:—

"(11) "tenant" means any person by whom or on whose account rent is payable for any premises and includes—

(a) xx xx

(b) any person remaining, after the determination of the lease, in possession, with or without the assent of the landlord, of the premises leased to such person * * * It is well-known that the person whose contractual tenancy has been terminated but continues to be in possession as a tenant as per the above mentioned provision is known by the words "statutory tenant" in the legal parlance.

Under the Rent Act a landlord becomes entitled to the possession of the suit premises either from a statutory tenant or a contractual tenant only under two sections, viz., Ss. 12 and 13 of the Rent Act. Section 12 (1) provides—

"12 (1) A landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of this Act."

The said section thereafter goes to make provisions for notice, in respect of arrears of rent, to be given by the landlord to the tenant and a decree to be passed by the Court in the event of any default by the tenant in the matter of payment of rent. But what is to be noted is that Section 12 refers essentially both to contractual as well as statutory tenant, meaning thereby that the protection envisaged by the said section is available both to the contractual as well as to the statutory tenant.

Coming to Section 13 of the Act it is clear that unless conditions mentioned in Sec. 13 existed in favour of the landlord, the landlord is not entitled to recover possession from the tenant irrespective of the question as to whether a tenant was a contractual or a statutory tenant.

Reading these two Sections 12 and 13 together with the other provisions of the Act, it is clear that between the two provisions, the circumstances in which the landlord is entitled to dispossess a statutory tenant of possession of the premises in his occupation as a statutory tenant are exhausted. This means that even when a person becomes the statutory tenant, the Court cannot pass a decree of eviction even against him unless the conditions mentioned in the said Ss. 12 and 13 are found to be existent.

8. The question thus arises as to whether the decree passed against the defendant on 10-8-1970 at the time when the defendant was already a statutory tenant had any legal consequence or not. The contention before me is that once the decree is passed the provisions of the Rent Act are to be ignored and the rights of the parties are to be ascertained from the decree alone. In support of this contention reliance was placed upon the judgment of the Supreme Court in *Bai Chanchal v. Syed Jalaluddin*, AIR 1971 SC 1081. Para 6 of the judgment runs as follows :—

"6. The second point urged by learned counsel was that, by the consent decree itself, a new tenancy was created which was to continue for five years and, in the meantime, the Bombay Rents Hotel and Lodging House Rates Control Act, 1947 came into force and the appellants were protected from ejectment under the provisions of that Act. The consent decree does not state that a new tenancy is being created. The argument was that the terms of that consent decree should be interpreted as indicating an intention to create a new tenancy. We are unable to find any such terms. On the face of it, all that the consent decree envisaged, was that, though the judgment-debtors were liable to immediate eviction, the decree-holders agreed to let them continue in possession for period of five years. Since this concession was being granted as a special case, the decree-holder insisted that mesne profits should be paid at a much higher rate so much so that between all the defendants, governed by the two decrees of 8th July, 1946 and 28th January, 1949, the amount payable as mesne profit became Rs. 7,314-8-0 per annum which has no relation with the original rent of Rs. 199/- per annum for the entire land fixed by the lease of 1895. In fact, the decree-holders sought further protection by requiring the judgment-debtors to pay the mesne profits in monthly instalments, and the instalments were so fixed that the mesne profits due for five years were to be paid within a period of three years. There was the further clause that, in case of default of payment of the mesne profits, the defaulting judgment-debtors could be immediately called upon to deliver possession. These terms can, in no way, be interpreted as creating a new tenancy constituting the decree-holders as landlords and the judgment-debtors as their tenants. The terms of the consent decree neither constituted a tenancy nor a licence. All that the decree-holders did was to allow the judgment-debtors to con-

tinue in possession for five years on payment of mesne profits as a concession for entering into a compromise. The argument advanced must, therefore, be rejected."

The above decision really turned upon the words obtaining in the relevant compromise decree. The compromise decree read as a whole is entirely different in the instant case. Moreover, if there was any ambiguity about the parties' intention it is wholly resolved by the plaintiff's own subsequent conduct. The ratio of the above judgment might, perhaps, have been helpful for the plaintiff if on the plaintiff's own showing he had not continued to treat the defendant as his statutory tenant for the period from 10-8-1970. What we find in the usual compromise decree is that decree snaps the relationship of tenant and landlord between the parties with effect from the compromise decree and even if the judgment-debtor continues to be in possession after the compromise decree, he is not in possession of the same as a contractual tenant or as a statutory tenant. A compromise decree of the normal type intends to deny the judgment-debtor any protection of the statute. The instant compromise decree on the other hand purported to give every protection to the defendant. It is clear from the established facts that

(a) the amount to be paid by the defendant to the plaintiff from 10-8-1970 per month is the standard rent and for the purpose of the measurement of the dues in fact standard rent has been got fixed by compromise;

(b) there is no default clause whatsoever;

(c) the compromise decree does not even mention that the relationship of landlord and tenant has been put an end to;

(d) a provision that usually obtains in a lease for imposition of the obligation upon the tenant to hand over possession to the landlord after the expiry of the period of lease is incorporated in the instant compromise decree, hence from the compromise decree it is not at all difficult to infer or spell out an ordinary monthly lease for the specific period of seven years.

As a matter of fact that compromise as a whole could be legitimately constructed as a new contract of lease; but since the plaintiff has never stated that the defendant was granted a new lease by him, that aspect of the question becomes controversial. But so far as the statutory tenancy is concerned, in fact, the plaintiff himself has been crying

from house tops that the defendant continued to be a statutory tenant with effect from 10-8-1970 for a period of 7 years. If that was so, it is futile on the plaintiff's part to contend that the defendant would in no way be entitled to the protection ensured by the Rent Act.

A normal compromise decree (as distinct from the instant compromise decree) snaps the relationship of landlord and tenant, whether contractual or statutory, between the parties with effect from the date of the decree and from that date the tenant is not expected to get any protection under the Rent Act as such. In the instant case both, the terms of the compromise decree as well as the subsequent conduct of the parties, clearly indicate the complete absence of snapping of the relationship. In fact the relationship of landlord and tenant, may be that of a statutory tenant, is very much retained by the compromise decree. The very fact that during the relevant period suit was filed on the basis of tenancy shows that he was not only intended to be retained as a tenant but was in fact regarded and treated as a tenant within the meaning of the Rent Act. If that was so, it is futile on the part of the plaintiff to contend that the defendant was not entitled to the protection of the provisions of the Rent Act.

9. At the very outset in this judgment, I have stated that this conclusion has been arrived at by me in view of the peculiar facts of this case. The peculiarity that I have in mind is in the context of the judgment of a Division Bench of this Court in the case of *Ramjibhai Virpal v. Govardhandas*, (1954) 56 Bom LR 365 : (AIR 1954 Bom 370). In that case the Court was called upon to examine the effect of a compromise decree in a suit between the landlord and the tenant. After examining the effect of the compromise embodied in the decree, the Court had, in effect, found that the intendment of the parties was to snap the relationship of landlord and tenant. The Court did not state as to what exact nomenclature could be or should be used for the relationship between the parties as from that date, but they could see the negative intendment for certain, viz. not to keep alive the relationship of landlord and tenant. They no doubt stated the law by emphasizing that the question was one of the intention of the parties. But the same thing could be stated also in other words, viz. that if the compromise decree did not intend to snap the erstwhile relationship of landlord and tenant between the parties, but either same previous relationship was continued or

a new contract of tenancy was brought about, the provision of Sections 12 and 13 of the Rent Act will spring back into operation and hence the decree for possession shall become inexecutable.

As pointed out above, Sections 12 and 13 of the Rent Act put an embargo upon the powers of the Court to hand over possession of the premises by the tenant to the landlord without satisfying itself that the conditions mentioned in the said Sections 12 and 13 of the Rent Act existed. To my mind, therefore, the view taken by the Courts below cannot be sustained.

10. In view of this above finding it is really unnecessary for me to examine the question raised by Shri Kapasi as to whether the Court had power to pass a decree of eviction by compromise. Shri Kapasi has argued that in the instant case the compromise decree was passed even before any issue was framed and, according to him, this fact clearly brings the case within the ambit of the dictum pronounced by the Supreme Court in the case of K. K. Chari v. R. M. Seshadri, AIR 1973 SC 1311. I may state here that the contention urged by Shri Kapasi is not without substance. However, I did not call upon Shri Kankaria, the learned Advocate for the respondents, to answer this question because, to my mind, the petition is capable of being disposed on the first point mentioned above.

11. In the result, the petition succeeds. The rule earlier issued is made absolute. However, in the circumstances of the case, there will be no order as to costs.

Petition allowed.

AIR 1982 BOMBAY* 538

JAHAGIRDAR, J.

Balubhai G. Navlakhi and another, Petitioners v. Dharamdas Vitthaladas Shah and another, Respondents.

Criminal Appln. No. 705 of 1982, D/- 8-9-1982.

Law Reports — Cases reported in 1980 Bombay Cases Reporter 503 not shown to be based on certified copy of the judgment —

* Only portions approved for reporting by High Court are reported here.

Report not allowed to be cited before the Court. (Precedents) (Law Reports Act (18 of 1875), S. 3). (Para 8)

Cases Referred: Chronological Paras
1980 Bom CR 503 8

J. C. Rajani with R. M. Tiwari, for Petitioners; M. A. Rane, for Respondent No. 1; M. R. Suryawanshi, Public Prosecutor, for the State.

JUDGMENT:— 1. to 7. * * *

8. In support of his contention that even at this stage the complaint can be dismissed and the process issued by the learned trial Magistrate can be quashed, Mr. Rajani sought to rely upon a judgment of this Court in Bomanji v. Mehernosh, 1980 Bom CR 503. Before Mr. Rajani proceeded to read this judgment, I stopped him because it is my consistent practice not to allow this journal to be cited in my Court. As the preface of this volume shows, the publication of this journal, namely, Bombay Cases Reporter, was originally published under the caption "Unreported Cases Reporter (Bombay)". Under the practice of this Court, copies of judgments of this Court which are marked by the Judges to be referred to the law reporters are given to the Bombay Law Reporter and the Maharashtra Law Journal. The All India Reporter obtains certified copies of the judgments of this Court and thereafter publishes the judgments in its journal. There is nothing in this journal called Bombay Cases Reporter to indicate on what basis this journal has obtained the copies of the judgments of the Court. There is no guarantee that what has been reported in this journal is authentic. It is not indicated by the publishers of this journal or the editor that the copies of the judgments on the basis of which they are reported in this journal are certified copies of the judgments. I have often seen grave grammatical and other mistakes appearing in the pages of this journal. I have, therefore, regarded it as hazardous to rely upon this journal and, therefore, it is my consistent practice not to allow this journal to be cited in my Court. This is apart from the question involved under the Indian Law Reports Act, 1875.

9. to 12. * * * * *

Petition dismissed.

AIR 1982 BOMBAY 539**MADON AND PENDSE, JJ.**

National Textile Corporation (Maharashtra North) Ltd., Appellants v. Khushalchand Bissessardas Daga, Respondent.

Appeal No. 297 of 1976, D/- 21-7-1982.

(A) Sick Textile Undertakings (Nationalisation) Act (57 of 1974), Ss. 4 (6) and 5 (2) — Suit filed by company, a sick textile undertaking, against managing director for recovery of amount embezzled by him — National Textile Corporation is entitled to continue suit — Corporation's right to continue suits is not restricted only to suits mentioned in Section 4 (6). Judgment of Vimadalal, J. in Suit No. 35 of 1963 (Bom), Reversed.

The view of the trial Court, that it is only the types of suits mentioned in Section 4 (6) which could be maintained and continued by the National Textile Corporation is erroneous. S. 4 (6) was designed for a very different purpose. As will be seen on a perusal of sub-secs. (1) and (2) of S. 5, every liability of the owner of a sick textile undertaking, other than the liability specified in Section 5 (2), in respect of a period prior to April 1, 1974 is to be the liability of such owner and is to be enforceable against him and not against the Central Government or the National Textile Corporation. The only liabilities which could be enforced against the Central Government or the National Textile Corporation are the liabilities set out in Section 5 (2). S. 4 (6) was specially enacted to provide that if in respect of a liability mentioned in S. 5 (2) a suit, appeal or other proceeding instituted or preferred by or against the textile company was pending, the same was not to abate or to be discontinued or be in any way prejudicially affected by reason of the transfer of the sick textile undertaking but it could be continued, prosecuted and enforced by or against the National Textile Corporation. From this, however, it does not follow that if the sick textile undertaking had assets to recover in respect of which it had filed a suit, the suit could not be continued by the National Textile Corporation. Neither Parliament could have intended nor the ordinary canon of construction of statutes permit such an interpretation to be placed upon the provisions of the

Act. The trial Court was not right in law in holding that the National Textile Corporation can prosecute only the suits mentioned in S. 5 (2) and not other types of suits. The National Textile Corporation and its subsidiary corporation when any sick textile undertaking is transferred to it is entitled to continue all suits filed by such undertaking to recover any of its assets or properties or to enforce any of its rights. The amount embezzled by the respondent (defendant) from the funds of the Company (original plaintiff) by perpetrating a fraud upon the Company was the property of the Company and the Company was entitled to have the benefit and advantage of such property restored to it by the respondent who was its managing director and the director-in-charge of the company and thus stood in a fiduciary relation to the Company. The Appellants (National Textile Corporation) were, therefore, clearly entitled to have themselves substituted on the record of the suit under R. 10 of O. 22 of the Civil P. C., and to prosecute further the suit and if successful therein to have a decree passed in their favour. Judgment of Vimadalal J. in Suit No. 35 of 1963 (Bom), Reversed.

(Para 12)

(B) Limitation Act (9 of 1908), Articles 120 and 36 — Suit by company against its managing director for recovery of amount obtained by him by fraud — Suit falls under S. 88 of Trusts Act — Art. 120 applies and not Art. 36. AIR 1930 Bom 572 and AIR 1953 Mad 694, Foll. (Trusts Act (1882), S. 88).

(Paras 13, 14, 15)

(C) Limitation Act (9 of 1908), S. 18 — Knowledge of fraud — Suit by company against its managing director for recovery of amount obtained by him by fraud — Other Directors knowing of fraud but taking no steps with respect thereto and thus becoming parties to fraud — Their knowledge of fraud is not knowledge of Company. Judgment of Vimadalal, J. in Suit No. 35 of 1963 (Bom), Reversed.

(Para 16)

Cases Referred: Chronological Paras

AIR 1953 Mad 694	14
AIR 1930 Bom 572: ILR 54 Bom 226	14
AIR 1927 Lah 433: ILR 8 Lah 167	14
AIR 1925 All 519: ILR 47 All 669	14
AIR 1922 Cal 157: ILR 49 Cal 886	16
(1893) 20 Ind App 1: ILR 17 Bom 341	
(PC)	16

Aspi Chinoy with M. H. Shah, for Appellants; R. V. Mehta, for Respondent.

MADON, J.— This is an appeal against the judgment and decree of Mr. Justice Vimadalal dismissing a suit filed on the Original Side of this High Court on the ground that the appellants were not entitled to be substituted as the plaintiffs and to continue the suit.

2. The suit was originally filed by the Model Mills Nagpur Limited (hereinafter referred to as "the Company") against the respondent, who was the managing director of the Company until July 18, 1969, to recover from him a sum of Rupees 48,08,329.69 P. with interest at the rate of 6 per cent per annum on Rupees 35,55,600 from February 11, 1963 up to the date of the judgment and thereafter at the rate of 4 per cent per annum till payment. According to the case made out in the plaint, the said sum of Rs. 35,55,600 represented the aggregate of the amounts fraudulently taken away by the respondent in his capacity as the managing director of the Company. At the hearing of the suit the claim for interest on the said sum of Rupees 35,55,600 for the period prior to February 11, 1963 was given up and the suit was confined to the said sum of Rupees 35,55,600 with interest thereon from February 11, 1963 at the rates as aforesaid.

3. The facts which have given rise to this appeal have not been disputed before us, and it will be, therefore, sufficient, instead of setting them out in elaborate details, to sketch them in order to understand the points which were argued at the hearing of this appeal. The company was incorporated in Aug. 1920. Prior to the coming into force of the Companies Act, 1956, Messrs. Bansilal Abirchand Dadabhoy and Company a Partnership firm, were the managing agents of the Company. The respondent was a partner in the said firm. As appears from the evidence of the appellants' witness Dinshaw Dorabji Patel, in about Dec. 1950 Sir Maneckji D. Dadabhoy who was the chairman and managing director submitted his resignation and in his place the respondent was appointed as the director-in-charge. After the respondent was so appointed, the system of purchasing cotton till then followed of asking for samples from merchants and brokers, selecting the samples and then placing the orders was

discontinued and Messrs. Hari Cotton and Company were appointed the sole suppliers of cotton to the Company. The said firm of Messrs. Hari Cotton and Company was managed by the respondent's brother Naraindas Bissessardas Daga. Against cotton alleged to be supplied to the Company large advances were made to the said Messrs. Hari Cotton and Company and were owing by the said firm to the Company. In view of the restraints contained in the new Companies Act, 1956, on dealings by a company with concerns owned or controlled by relatives of directors the said Messrs. Hari Cotton and Company were replaced by Messrs. Harakchand Mohanlal, a sole proprietary concern, of which the proprietor was one Mohanlal Daga. Mohanlal Daga's brother Laxmichand Daga was the munim in the respondent's Bombay concern, namely, Messrs. Daga and Sons. The amounts fraudulently taken away by the respondent have been through the instrumentality of the said firm of Messrs. Harakchand Mohanlal. The uncontroverted evidence on the record shows that in May 1956 Laxmichand met Mohanlal Daga and told him that the respondent and his brother Naraindas were withdrawing moneys from the Company for their own purposes at Nagpur in the name of the said Messrs. Hari Cotton and Company and that in view of the provisions of the new Companies Act which had come into force on April 1, 1956 the said firm of Messrs. Hari Cotton and Company would have to be replaced by another entity. Thereafter a meeting took place between the said Mohanlal and the respondent, and it was agreed that a new proprietary concern should be started by the said Mohanlal in the name of Messrs. Harakchand Mohanlal and that Mohanlal would sign whatever documents were required of him and that the rest of the work would be managed by the respondent. Thereupon under the respondent's instruction Mohanlal was taken to the branch of the Bank of Bikaner in Bombay and an account in the name of Messrs. Harakchand Mohanlal was opened.

4. It may be mentioned at this stage that on Sept. 22, 1956 the Central Government gave its approval to the appointment of the respondent as managing director of the Company, and at the general body meeting of the Company held on Dec. 17, 1956 the respondent

was appointed as such managing director and an agreement relating to this appointment was executed between the Company and the respondent on Dec. 13, 1956.

5. After the concern of the said Messrs. Harakchand Mohanlal had started, orders were placed with it for supply of cotton to the Company. The modus operandi which was adopted was that against orders placed amounts were credited to the said Messrs. Harakchand Mohanlal in the books of account of the Company towards the price of cotton alleged to be in transit to the mills of the Company in Nagpur. Against such credits Messrs. Harakchand Mohanlal drew hundis upon the Company in favour of either Messrs. Hari Cotton and Company or the Bank of Bikaner or Messrs. Girdharlal Sunderlal. The firm of Messrs. Girdharlal Sunderlal consisted of two brothers, namely, Girdharlal and Sunderlal. The father of those two was one Asaram Rathi. Asaram was the munim in Messrs. Bansilal Ramchandra, a sole proprietary concern of the respondent. It is not disputed that the amounts of the hundis so drawn have all found their way into the pockets of the respondent, and the cotton alleged to be in transit to the Company never found its way to the mills. In certain cases instead of following the above modus operandi payments were made by cheques to Mohanlal, put into the bank account of the said Harakchand Mohanlal and then the amounts withdrawn and handed over to the respondent. Elaborate evidence of the fraud so practiced upon the Company was led in the trial Court, and so far as the amounts thus fraudulently taken away by the respondent and proved in Court are concerned, they aggregated to Rs. 38,17,600, or, in other words, the total amount claimed in the plaint except an item of Rs. 38,000. This has not been disputed before us by the respondent.

6. The fact that the books of account of the Company showed advances made to Messrs. Harakchand Mohanlal against cotton in transit which had not at any time arrived and thus a large debit stood against the said Messrs. Harakchand Mohanlal in the said books of account caused concern, and the manager of the mills, Jamshedji Pestonji Dordi, wrote letters to the respondent requesting him to see that the amount of outstandings

was recovered from the said Messrs. Harakchand Mohanlal. Two of these letters are on the record. It is also in evidence that the auditors of the Company had also raised queries about such large amounts being allowed to be left outstanding. In order to get over those objections another plan was hit upon. A company called Storage Batteries Manufacturing Private Limited (hereinafter referred to as "Storage Batteries") was got incorporated on May 27, 1958 with an authorized share capital of Rupees 20,00,000. The promoters of the said Company were one G. M. Mukerjee and L. M. Dhandotiya, and the said Mukerjee advanced Rs. 2,000 for initial expenses. The address of the said Company was 15, Narayan Dhabolkar Road, Bombay-6, which was the address of one Haridas Mundhra who was a friend of the respondent. Evidence on the record is clear that Storage Batteries was a sham Company got floated by the respondent to stave off the evil day when the fraud perpetrated by him upon the Company would be discovered. In further pursuance of his plan to defraud the Company and to prevent the Company from coming to know of his fraud a meeting of the Board of Directors of the Company was called on June 11, 1958. The said meeting was attended by the respondent, his son Laxmichand, one J. R. Motishaw and the said Asaram Rathi the munim of the respondent's sole proprietary concern. At the said meeting the resignations from the Board of two Directors, Lachhmandas H. Daga and Jaykrishnadas Harivallabhdas, were accepted. Amongst the business said to be executed at the said meeting as recorded in the minutes of the said meeting was the consideration of a letter dated Jan. 9, 1958 addressed by the Company's auditors to the Board of Directors with respect to the accounts for the year ended June 30, 1957. Item 1 of the report of the auditors referred to the advances made to the said Messrs. Harakchand Mohanlal. The explanation given by the Respondent at the said meeting was that advances were made to the said Messrs. Harakchand Mohanlal in accordance with the usual practice followed in the past in the matter of purchases of cotton and that out of the bales of cotton purchased from the said M/s. Harakchand Mohanlal all except a small lot of 330 bales of cotton had been received and the said Messrs. Harakchand Mohanlal

had assured that the remaining 300 bales would be delivered to the mills very soon. When asked about the constitution of the said firm of Messrs. Harakchand Mohanlal, the respondent stated that he had no interest whatever in the said firm and that the said Mohanlal was its sole proprietor. According to the said minutes, in view of the explanation given by the respondent the Board ratified the respondent's action in making the above purchases and granting the above advances. Apart from the said minutes there is no direct evidence of what transpired at the said meeting. Rajendra Thakorlal Desai, the secretary of the Company, who had given evidence at the trial of the suit, was unwell and was unable to remain present at the said meeting held on June 11, 1958. According to his evidence, he had not attended work on June 11, 1958 but had resumed duties on June 12, 1958 when the respondent gave him a draft of the minutes of the said meeting which the respondent had prepared and asked him to incorporate it in the minutes book. Another meeting of the Board of Directors was held on June 19, 1958 at which the said Desai was present and of which the minutes were dictated by him to his stenographer. At the said meeting the directors present were the Respondent, the said Motishaw, the said L. K. Daga, the Respondent's son, and the said Asaram Rathi, the respondent's munim. The minutes of the said meeting record that the Board considered the question of advances to the said Messrs. Harakchand Mohanlal made up to July 1, 1957 which were referred to in the auditors' report. Mostly the same explanation as was stated to be given by the respondent at the said meeting of the Board held on June 11, 1958 is stated to have been given at this meeting. The respondent is further stated to have informed the Board that he was doing his best to compel the said Messrs. Harakchand Mohanlal to pay the amounts due as early as possible and that after considerable negotiations the said Messrs. Harakchand Mohanlal had proposed to discharge its liability by giving to the Company 5,000 fully paid-up shares of the face value of Rs. 100 each of Storage Batteries, assigning to the Company loans and advances in the sum of Rs. 7,00,000 "by way of assigning through the Company the party's loans and advances to the Storage Batteries.

Payments of Rupees five lacs in cash within one year and Rs. 15 lacs in cash within two years." At the said meeting the other three directors who were present pointed out that the advances in question were made to Messrs. Harakchand Mohanlal prior to their joining the Board. They demanded from the respondent a personal guarantee for the amount due to the Company, which the respondent did not accept but ultimately agreed to give a guarantee in the sum of Rs. 10,00,000. The said Mohanlal had been called to the meeting and was made to wait outside. After the proposal made by the respondent was accepted by the Board, the said Mohanlal was called in and agreed to the proposed arrangement. At the said meeting of the Board the respondent was authorised to write a letter to the said Messrs. Harakchand Mohanlal setting out the terms which the Board had accepted and to obtain Mohanlal's confirmation in writing thereto as also to confirm in writing the guarantee of Rs. 10,00,000 which he had given to the Company. The said Mohanlal wrote a letter to the Company in which he stated that he had received the Company's letter dated June 20, 1958 along with the draft agreement and that he accepted the terms thereof without reservation. Along with the said letter the said Mohanlal returned the agreement enclosed in duplicate and signed by him, with a request that the Company should sign the counterpart and return it to him. The said agreement is dated June 23, 1958 and is made between the said Messrs. Harakchand Mohanlal and the Company and signed on behalf of the Company by the respondent. Under the said agreement the said Mohanlal agreed to repay the advances of about Rs. 33,00,000 by paying a sum of Rs. 10,00,000 within four months of the date of the said agreement and a further sum of Rupees 10,00,000 within a period of 12 months from the date of the said agreement and forthwith to deliver to the Company 5,000 fully paid-up shares of the face value of Rs. 100 each of Storage Batteries with transfer forms duly executed in favour of the Company and to secure transfer and registration of the said shares in the name of the Company and to arrange and secure to the Company a havalala or transfer of a credit of Rupees 7,00,000 which the said Messrs. Harakchand Mohanlal declared was due, owing

and payable by Storage Batteries to it as and by way of loans and advances. The letter dated June 23, 1958 from the said Messrs. Harakchand Mohanlal to Storage Batteries shows that Messrs. Harakchand Mohanlal had sold a complete battery manufacturing plant to Storage Batteries for a sum of Rs. 12,00,000. The bill in the said sum of Rs. 12,00,000 was enclosed with the said letter. The said letter records that the said Messrs. Harakchand Mohanlal had agreed to accept payment by receiving 4,999 fully paid-up shares of Rs. 100 each of Storage Batteries in the name of the sole proprietor of the said concern, the said Mohanlal, and by a credit for the balance of Rs. 7,00,200 in the books of account of Storage Batteries, carrying interest at the rate of 6 per cent per annum. The said letter further records that it was agreed that the said Mohanlal would be invited to join the Board of Directors of Storage Batteries. It is needless to mention that all the shares of Storage Batteries and the plant alleged to be sold by the said Messrs. Harakchand Mohanlal to Storage Batteries existed purely in the said letters and the agreement. To lend further verisimilitude to the fraud perpetrated upon the Company the said Mohanlal wrote a letter dated June 26, 1958 purporting to forward along with it 6,000 fully paid-up shares of Storage Batteries. It is equally needless to mention that no such shares were at all forwarded to the Company along with the said letter.

7. On March 10, 1959 a notice of closure on account of the losses suffered by the Company was put up and on April 6, 1959 the mills closed their doors. On April 24, 1959 the Central Government appointed a committee under Section 15 of the Industries (Development and Regulation) Act, 1951, to make an investigation into the circumstances which led to the closure of the Company. On June 25, 1959 all the books and records of the Company, including the books of account and minute-books of the meetings of the Board of Directors, were seized by the police. Several other documents were also seized from the said Mohanlal and from the Bank of Bikaner and others. On July 18, 1959 the Central Government issued a notification under S. 18A of the said Act authorizing one Hanuman Prasad Nevatia to take over the management of the whole of the undertaking, namely, the Model Mills Nagpur Limit-

ed, on the ground that it was being managed in a manner highly detrimental to public interest. The authorized controller, Nevatia, thereafter took charge of the management of the Company. In the absence of books of the Company which had been seized by the police, the accountant Dordi prepared provisional statements of account from the last balance-sheet. On March 7, 1960 a charge-sheet was filed by the police inter alia against the respondent. On July 6, 1960 the respondent was adjudicated an insolvent. Two criminal cases, namely, Criminal Cases Nos. 307 of 1962 and 309 of 1962, were registered by the police against the respondent and some others in which the accused were committed to the Court of Session. On Feb. 8, 1963 leave was granted by the Insolvency Judge to the Company to file the suit against the respondent and the suit was filed on Feb. 9, 1963.

8. When the cases against the respondent and the other accused came up for trial before the Court of Session, the respondent pleaded guilty to all the charges and was convicted and sentenced on his plea of guilty. The charges against the respondent and the other accused were entering into a criminal conspiracy with the said Mohanlal and Lakhmichand Daga to commit criminal breaches of trust of the funds of the Company over which the respondent in the way of his business as agent of the Company and in his capacity as director-in-charge or the managing director was entrusted with dominion and committing in pursuance of such criminal conspiracy the acts of criminal breaches of trust charged against the respondent. The other heads of charges set out the specific acts of criminal breaches of trust so committed by the respondent.

9. By a notification dated July 14, 1970 the Maharashtra State Textile Corporation was appointed the authorised controller of the Company in place of the said Nevatia. On Dec. 21, 1974 the Sick Textile Undertakings (Nationalisation) Act, 1974 (No. 57 of 1974), was passed by Parliament replacing an Ordinance which had been promulgated earlier by the President of India. The said Act came into force with retrospective effect from April 1, 1974. The Company is mentioned in item 63 of the First Sch. to the said Act. By reason of the

provisions of the said Act the appellants applied for and were by an order dated March 24, 1975 substituted as plaintiffs to the said suit in place of the Company.

10. At the hearing of the suit no evidence whatever, either oral or documentary, was led on behalf of the respondent. The appellants led voluminous evidence to prove each item of defalcation committed by the respondent and pleaded in the plaint except an item of Rupees 38,000. After the evidence was closed and during the course of the arguments learned counsel for the respondent applied for leave to amend the written statement by raising a contention that the appellants were not entitled to maintain the suit as the right to sue had not become vested in them. This application was opposed on behalf of the appellants on the ground that the point sought to be raised by the amendment would, were it upheld, displace the appellants' suit and was taken at a very late stage. By his order made on March 24, 1976 Mr. Justice Vimadalal rejected the said application for amendment but further stated in the said order, "it will, however, be open to Mr. Bharucha (learned counsel for the respondent who appeared at the trial of the suit) to contend that notwithstanding the rejection of the application for amendment the Court should not pass a decree in favour of a party who has no right to maintain the suit". The learned Judge then heard the arguments on the question of maintainability of the suit and came to the conclusion that the appellants had no right to continue the suit inasmuch as the Company's right to sue the respondent had not become vested in them under the provisions of the said Sick Textile Undertaking (Nationalisation) Act. As, however, a complete trial had taken place, the learned Judge proceeded to give his findings on all the issues which had been raised. He held that the appellants had on the facts proved their case but a part of the appellants' claim was barred by the law of limitation. According to the learned Judge, the suit was in substance under Sec. 88 of the Indian Trusts Act, 1882, in respect of which no specific period of limitation had been provided in the old Indian Limitation Act 1908 by which the case was governed and therefore, the residuary Article 120 of the said Act applied. In the plaint

postponement of the starting point of limitation had been sought by relying upon Section 18 of the Indian Limitation Act by pleading that the respondent had throughout fraudulently concealed the true facts from the Company and that the Company was by the fraud of the respondent kept from the knowledge of its right to take proceedings to recover the amounts claimed, until some time after March 7, 1970 when the Company for the first time became aware of the true facts. The learned Judge held that Section 18 had no application because all the directors of the Company had knowledge of the fraud committed by the respondent and that the knowledge of the directors was the knowledge of the Company. The learned Judge, therefore, opined that were the suit maintainable he would pass a decree in the sum of Rs. 23,35,600, being the aggregate of the amounts embezzled by the respondent within a period of six years prior to the date of the filing of the suit. It is against this judgment and decree of the trial Court that the present appeal has been preferred.

11. At the hearing of this appeal only two contentions have been urged on behalf of the Respondent, namely, (1) that the right to sue the respondent which the Company possessed had not become vested in the appellants and, therefore, the appellants were not entitled to continue the suit or to have any decree passed in their favour, and (2) that the whole suit was barred by the law of limitation.

12. Turning now to the first point, namely, that of maintainability, before we refer to the relevant sections of the Sick Textile Undertakings (Nationalisation) Act, 1974 (hereinafter for the sake of brevity referred to as "the Act"), we may observe that it is somewhat difficult to understand the order passed by the trial Court on the application for amendment of the written statement made on behalf of the respondent on June 24, 1976. As mentioned earlier, the application for amendment was opposed on the ground that if the application were allowed and the points raised thereby sustained, the appellants' suit would be displaced and that the application was made at too late a stage of the proceedings and, therefore, should not be permitted. The contention on behalf of the appellants was one founded on a principle well settled in law and in respect of which no discussion is necessary. This contention ap-

parently found favour with the learned Judge, for he rejected the application for amendment. It, however, appears from the order passed by the learned Judge that he gave the respondent's counsel liberty to urge this contention orally. We are unable to understand how, if the points sought to be raised by the amendment was one which could not be permitted to be taken in writing, namely, by incorporating it in the written statement, it could be allowed to be taken orally. It is needless to dwell further upon this aspect, because on a perusal of the relevant sections of the Act we find no substance in the contention of non-maintainability of the suit. Cl. (i) of S. 2 of the Act defines a "sick textile undertaking". That definition is in the following terms:

"(j) 'sick textile undertaking' means a textile undertaking, specified in the First Schedule, the management of which has, before the appointed day, been taken over by the Central Government under the Industries (Development and Regulation) Act, 1951, or as the case may be, vested in the Central Government under the Sick Textile Undertakings (Taking Over of Management) Act, 1972;"

It is not disputed that the Company is a "sick textile undertaking" within the meaning of the said cl. (j) of S. 2 of the Act. In fact, as mentioned earlier, it is one of the undertakings mentioned in the First Sch. to the Act. S. 3 of the Act provides as follows:

"3. Acquisition of rights of owners in respect of sick textile undertaking:

(1) On the appointed day, every sick textile undertaking and the right, title and interest of the owner in relation to every such sick textile undertaking shall stand transferred to, and shall vest absolutely in, the Central Government.

(2) Every sick textile undertaking which stands vested in the Central Government by virtue of sub-sec. (1) shall, immediately after it has so vested, stand transferred to, and vested in, the National Textile Corporation."

Clause (h) of S. 2 of the Act defines the term 'owner' as follows:

"(h) 'owner', when used in relation to a sick textile undertaking, means any person or firm who or which is, immediately before the appointed day, the immediate proprietor or lessee or occu-

pier of the sick textile undertaking or any part thereof, and in the case of a textile company which is being wound up or the business whereof is being carried on by a liquidator or receiver, includes such liquidator or receiver, and also includes any agent or manager of such owner but does not include any person or body of persons authorised under the Industries (Development and Regulation) Act, 1951, or the Sick Textile Undertakings (Taking Over of Management) Act, 1972, to take over the management of the whole or any part of the sick textile undertaking;"

Thus on April 1, 1974, which was the appointed day, the undertaking, namely, the Company, and the right, title and interest of its owners in relation to such undertaking stood transferred to and were vested absolutely in the Central Government and thereafter stood transferred to and vested in the National Textile Corporation. Under S. 6 (1) the National Textile Corporation may, if it considers it necessary so to do, form subsidiary corporations under the Companies Act, 1956, and register them under that Act and may, by an order in writing, transfer any sick textile undertaking or part thereof to such subsidiary textile corporation, and thereafter such subsidiary corporation becomes substituted for all practical purposes in place of the National Textile Corporation. The Appellants are a subsidiary corporation formed and registered by the National Textile Corporation to whom the sick undertaking of the Company has been transferred. Sub-sec. (1) of Sec. 4 contains an extensive definition of the expression "sick textile undertaking referred to in S. 3". That sub-section is in the following words:

"4. General effect of vesting.

(1) The sick textile undertaking referred to in S. 3 shall be deemed to include all assets, rights, lease-holds, powers, authorities and privileges and all property, movable and immovable, including lands, buildings, workshops, stores, instruments, machinery and equipment, cash balances, cash on hand, reserve funds, investments and book debts and all other rights and interests in, or arising out of, such property as were immediately before the appointed day in the ownership, possession, power or control of the owner of the sick textile undertaking, whether within or out-

side India, and all books of account, registers and all other documents of whatever nature relating thereto and shall also be deemed to include the liabilities and obligations specified in sub-sec. (2) of S. 5."

It is obvious on a bare reading of sub-sec. (1) of S. 4 that all assets, rights and property of the Company became vested in the Central Government and consequently in the National Textile Corporation and then in the Appellants. Such assets, rights and property included the right to recover from the respondent the moneys of the Company which had been misappropriated and embezzled by the respondent. The trial Court has, however, placed reliance upon sub-sec. (6) of the said S. 4. It, therefore, becomes necessary to reproduce that sub-section. That sub-section is as follows :

"(6) If, on the appointed day, any suit, appeal or other proceeding of whatever nature in relation to any matter specified in sub-sec. (2) of S. 5 in respect of the sick textile undertaking, instituted or preferred by or against the textile company, is pending, the same shall not abate, be discontinued or be, in any way, prejudicially affected by reason of the transfer of the sick textile undertaking or of anything contained in this Act but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the National Textile Corporation."

In order to understand sub-sec. (2) of S. 5 it is also necessary to have a look at sub-sec. (1) of S. 5. These two sub-sections provide as follows :

"5. Owner to be liable for certain prior liabilities.

(1) Every liability, other than the liability specified in sub-sec. (2) of the owner of a sick textile undertaking, in respect of any period prior to the appointed day, shall be the liability of such owner and shall be enforceable against him and not against the Central Government or the National Textile Corporation.

(2) Any liability arising in respect of—

(a) loans advanced by the Central Government, or a State Government, or both, to a sick textile undertaking (together with interest due thereon) after the management of such undertaking had been taken over by the Central Government,

(b) amounts advanced to a sick textile undertaking (after the management of

such undertaking had been taken over by the Central Government), by the National Textile Corporation or by a State Textile Corporation, or by both, together with interest due thereon,

(c) wages, salaries and other dues of employees of the sick textile undertaking, in respect of any period after the management of such undertaking had been taken over by the Central Government

shall, on and from the appointed day, be the liability of the Central Government and shall be discharged, for and on behalf of that Government, by the National Textile Corporation as and when repayment of such loans or amounts becomes due or as and when such wages, salaries or other dues become due and payable."

According to the trial Court, it is only the types of suits mentioned in S. 4 (6) which could be maintained and continued by the National Textile Corporation. In our opinion, sub-sec. (6) of S. 4 was designed for a very different purpose. As will be seen on a perusal of sub-secs. (1) and (2) of S. 5, every liability of the owner of a sick textile undertaking, other than the liability specified in Section 5 (2), in respect of a period prior to April 1, 1974 is to be the liability of such owner and is to be enforceable against him and not against the Central Government or the National Textile Corporation. The only liabilities which could be enforced against the Central Government or the National Textile Corporation are the liabilities set out in sub-sec. (2) of S. 5. These are the liabilities for repayment of loans advanced by the Central or State Government to a sick textile undertaking after the management of such undertaking had been taken over by the Central Government, amounts advanced to the undertaking by the National Textile Corporation or by a State Textile Corporation after the management of such undertaking had been taken over by the Central Government and wages, salaries and other dues of employees of the undertaking in respect of any period after the management of such undertaking had been taken over by the Central Government. Now, the taking over of the management by the Central Government in sub-section (2) of S. 5 refers to taking over the management inter alia under S. 18A of the Industries (Development and Regulation) Act, 1951. Under Sec. 5 (2) the

liabilities to repay loans given by the Government or by the National Textile Corporation or a State Textile Corporation after the management of the undertaking was so taken over and to pay the wages and salaries and other dues of employees of the undertaking in respect of a period after the management was so taken over is not to be the liability of the previous owner of the undertaking but is to be the liability of the Central Government and is to be discharged on behalf of that Government by the National Textile Corporation. All other liabilities are, however, to be those of the owner of the undertaking and become enforceable against him and not against the Central Government or the National Textile Corporation. Sub-section (6) of S. 4 was specially enacted to provide that if in respect of a liability mentioned in S. 5 (2) a suit, appeal or other proceeding instituted or preferred by or against the textile company was pending, the same was not to abate or to be discontinued or be in any way prejudicially affected by reason of the transfer of the sick textile undertaking but it could be continued, prosecuted and enforced by or against the National Textile Corporation. Now a question might well arise as to what are the suits of the nature specified in S. 5 (2) which the National Textile Corporation can maintain by reason of the provisions of S. 4 (6) of the Act. It is not possible to categorize all such suits, but a suit that immediately strikes one is a suit for redemption of a mortgage in respect of a secured loan advanced to the sick textile undertaking by the Government. Further, it is pertinent to bear in mind that S. 4 (6) does not speak only of suits. It also speaks of appeals and other proceedings of whatever nature. Thus it may be that a decree might have been passed against the sick textile undertaking in respect of a suit filed against it to enforce one of the liabilities specified in S. 5 (2) and against that decree the sick textile undertaking might have gone in appeal. Such an appeal could be continued by the National Textile Corporation. Other examples would be applications in execution. From this subsection, however, it does not follow that if the sick textile undertaking had assets to recover in respect of which it had filed a suit, the suit could not be continued by the National Textile Corpora-

tion. To take an example, supposing a sick textile undertaking owned an immovable property and was wrongfully deprived of the possession of such property by trespass and had filed a suit to recover it, on the appointed day the suit property being an asset of the undertaking would vest forthwith in the Central Government and thereafter immediately vest in the National Textile Corporation and the owner of the undertaking would cease to be the owner of the suit property and would have no right to obtain possession of the said property. If the construction placed by the trial Court upon S. 4 (6) were correct, the result would be startling. The owner of the undertaking could not continue the suit because he is no more the owner of the property. The person in whom the property had become vested, namely, the National Textile Corporation, could not bring itself on the record of the suit because it was not a suit of the type referred to in sub-sec. (2) of S. 5. The astounding result would be that the trespasser would continue to remain in possession of and enjoy for all time the property which belonged to the National Textile Corporation. Neither Parliament could have intended nor the ordinary canon of construction of statutes permit such an interpretation to be placed upon the provisions of the Act above referred to. What we have said with respect to an immovable property would apply equally to recovery of movable property belonging to the undertaking. The trial Court was not right in law in holding that the National Textile Corporation can prosecute only the suits mentioned in S. 5 (2) and not other types of suits. In our opinion, the National Textile Corporation and its subsidiary corporation when any sick textile undertaking is transferred to it is entitled to continue all suits filed by such undertaking to recover any of its assets or properties or to enforce any of its rights. The amount embezzled by the respondent from the funds of the company by perpetrating a fraud upon the Company was the property of the Company and the Company was entitled to have the benefit and advantage of such property restored to it by the respondent who was its managing director and the director-in-charge of the company and thus stood in a fiduciary relation to the Company. The appellants were, therefore, clearly entitled to have themselves substituted

on the record of the suit under R. 10 of O. XXII of the Civil P. C., 1908, and to prosecute further the suit and if successful therein to have a decree passed in their favour.

13. We next turn to the question of limitation. The learned Judge has held that the suit was under Sec. 88 of the Indian Trusts Act, 1882 (2 of 1882). The said S. 88 provides as follows :

"88. Advantage gained by fiduciary.—Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."

The section expressly mentions director of a company as being a person bound in a fiduciary capacity to protect the interests of another person, which in the case of the director would be the company of which he is the director. The respondent was not only the managing director but the director-in-charge of the Company. All unknown to the Company, he was also through his nominees the supplier or rather non-supplier of cotton to the Company and the person who received payment in respect of such non-supplies. It was argued before us that the article of the old Limitation Act which would apply would be either Art. 36 or Art. 95 of the First Sch. to that Act, and in either event the entire claim was time-barred. These articles provided as follows :

(See Articles below)

Mr. Mehta, learned counsel for the respondent, submitted that the acts of the respondent amounted to malfeasance and, therefore, Art. 36 applied to the

suit and the period of limitation would be two years from the date when the malfeasance took place. In the alternative, Mr. Mehta submitted that as the plea in the plaint was that of fraud, Art. 95 would apply and the period of limitation would be three years.

14. The appellants have sought to postpone the starting point of limitation by placing reliance upon S. 18 of the Indian Limitation Act. If they are right in this, the period of limitation would not begin to run until the Company obtained knowledge of the fraud, and it would be immaterial whether Art. 95 or Art. 120 applied, because in either event the suit would be in time since it was filed within three years of the date on which according to the plaint the company acquired knowledge of the fraud. If, however, Art. 36 applies, the suit would be barred by limitation, because according to the plaint the company came to learn about the fraud of the respondent more than two years prior to the date of the suit. Turning, therefore, first to Art. 36, the condition for the applicability of Art. 36 is that the malfeasance, misfeasance or nonfeasance must be independent of contract, which is not the case here as will be presently shown. Contentions similar to those taken before us were advanced before a Division Bench of this Court in Govind Narayan v. Rangnath Gopal, ILR 54 Bom 226 : (AIR 1930 Bom 572). In that case the liquidator of a bank filed an application under S. 235 of the Indian Companies Act, 1913, to recover from the agents and directors of the bank various sums of money on the ground of breach of trust, negligence and misfeasance, resulting in loss to the bank. It was contended that the said application was barred by the law of limitation. The Division Bench held that neither Art. 36 nor Art. 115 nor Art. 116 of the Limitation Act applied and the application was governed by Art. 120. Marten, C. J., disposed of the contention based upon Arti-

	"Description of suit	Period of limitation	Time from which period begins to run
36	For compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specially provided for.	Two years	When the malfeasance, misfeasance or nonfeasance takes place.
95	To set aside a decree obtained by fraud, or for other relief on the ground of fraud.	Three years	When the fraud becomes known to the party wronged."

cle 36 in these words (at pp. 246-7):

"As regards Art. 36 I feel no difficulty. In my judgment the present claim against the Directors for misfeasance or breach of trust is clearly not 'independent of contract' and consequently Article 36 does not apply. In this respect, therefore, I agree with the view of the Allahabad High Court in *In the matter of the Union Bank, Allahabad, Ltd.*, 47 All 669 : (AIR 1925 All 519), in preference to that expressed by the Lahore High Court in *Bhim Singh v. Liquidator, Union Bank of India*, ILR 8 Lah 167 : (AIR 1927 Lah 433). I say this because the relations between the Bank and its Directors are in part governed by numerous Articles in the Articles of Association, including their qualification shares and remuneration, and indeed the very indemnity which they are relying in this case. In my opinion these articles constitute part, though not the whole, of a contract between the Company and its Directors."

As we have seen, the respondent was not only a director but the managing director of the Company. Further, he had entered into an agreement dated Dec. 18, 1956 with the Company containing the terms and conditions of his appointment as managing director. Under cl. 2 of the said agreement the respondent had agreed to manage the business and affairs of the Company faithfully, diligently, honestly and to the best of his ability and power. The fraud and breaches of trust committed by the respondent cannot, therefore, be said to be independent of contract. In *India Sugar and Refineries Ltd. v. Estate of the late V. Ramalingam*, AIR 1953 Mad 694, it was held that Art. 36 contemplates an action for compensation for a wrong in the nature of a tort and that the suit to which that article would apply is a suit for compensation, but if the suit was for the recovery of a particular property or a sum of money as such, then the suit cannot fall within the scope of Art. 36. The case before the Madras High Court was also the case of a director and the sole managing agent of a company who had gained for himself a pecuniary advantage by availing himself of his fiduciary character. The Court held that in view of the nature of the claim made against him, the suit was under S. 88 of the Indian Trusts Act and the only article applicable to such a suit was Art. 120.

15. We are in respectful agreement with what was laid down in the above two cases, and in our opinion the trial Court was right in holding that Art. 120 applied to the suit.

16. The only question which now remains to be considered is whether the appellants were entitled to postpone the starting point of limitation under S. 18 of the Limitation Act, 1908. The said section provided as follows :

"18. Effect of fraud.— Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded,

or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit or making an application —

(a) against the person guilty of the fraud or accessory thereto, or

(b) against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production."

The learned Judge, relying upon a decision of the Judicial Committee of the Privy Council in *Rahimbhoy Habibbhoy v. Turner*, (1893) 20 Ind App 1 : ILR 17 Bom 341, and a decision of the Full Bench of the Calcutta High Court in *Biman Chandra v. Promotho Nath*, ILR 49 Cal 886 : (AIR 1922 Cal 157), held that it was for the plaintiff to prove in the first instance the circumstances which would prevent the statute from having its ordinary effect and a person who desired to invoke the aid of S. 18 must establish that there had been fraud and by use of such fraud he had been kept from the knowledge of his right to sue. The learned Judge further held that it was only when the initial onus was discharged by the plaintiff that the burden was shifted on the other side to show that the plaintiff had clear and definite knowledge of the transaction beyond the period of limitation and that in that connection it was not sufficient for the defendant to show that the plaintiff had nearly some 'clues' and 'hints' which perhaps might have led to a complete knowledge of the fraud. Ap-

plying the above ratio to the facts of this case, the learned Judge held that in view of his finding that the appellants had no right to continue the suit, the fact when the Authorised Controller Newatia acquired knowledge of the alleged fraud was irrelevant, and to have had him examined on commission as the appellants wanted to do both before and at the time of trial by reason of the serious illness of Newatia would have been futile. The learned Judge further held that for the purpose of question of limitation what was relevant was the knowledge of the directors of the Company. The learned Judge further held that the initial fraud had been committed at the time when each individual particular sum of money was fraudulently taken away by the respondent. According to him, the fraud which was committed by holding the said meeting of the Board of Directors on June 19, 1958 was not the initial fraud but was merely a consequential fraud, being a device to cover up the fraud initially practised. The learned Judge further held that the directors of the Company who attended the said meeting held on June 19, 1958 knew that it was a sham meeting and they had, therefore, knowledge of this fraud and their knowledge must be attributed to the Company. On this line of reasoning the learned Judge held that the part of the plaintiffs' claim which was more than 6 years prior to the date of the filing of the suit was barred by the law of limitation. With respect, we are unable to agree with any of the conclusions reached by the learned Judge on this aspect of the case. In holding that because the appellants had no right to continue the suit, the knowledge of the Authorised Controller Nevatia was irrelevant to the question, the learned Judge overlooked the fact that the suit as originally filed was filed by the Company in its own name and not in the name of the appellants, namely, National Textile Corporation (Maharashtra North) Ltd. The learned Judge also overlooked that under the Industries (Development and Regulation) Act, 1951, the entire management of the undertaking, namely, the Company became vested in the Authorised Controller and that after the notification dated July 18, 1959 under S. 18A of the said Act was issued the Company could only act through the Authorised Controller and not through

anyone else. Assuming the learned Judge was right in the conclusion on facts which he arrived at, namely, that the directors had knowledge that the meeting held on June 19, 1958 was sham one, the learned Judge overlooked that if knowing this the directors closed their eyes to such fraud and failed to take any steps to recover the property of the Company from the respondent, they thereby became parties to that fraud, and their knowledge of the fraud perpetrated by the respondent could not be attributed to the Company or characterised as knowledge of the Company. The knowledge of the directors of a company is knowledge of the company when it relates to acts which are *intra vires* the directors. It is no part of the duties or functions of a director to embezzle the funds of the company or to aid and abet a co-director or the managing director in embezzling the funds of the company or to join hands with him in ensuring that such fraud does not come to light. That would be an act on the part of the directors directly contrary to the interests of the company, and in committing such acts the directors would themselves be abusing the fiduciary character which they hold vis-a-vis the company in their capacity as its directors. We must also observe that the two decisions relied upon by the learned Judge have not been correctly appreciated and applied by him to the facts of this case. The facts of the case before the Judicial Committee were that a suit was brought by the Official Assignee in 1887, in which suit it was established that the defendant had received in 1869 upon a voluntary transfer some of the insolvent's assets, had joined and assisted the insolvent in defrauding his creditors and that no disclosure of this fraud was made to the Official Assignee, while the defendant did what he could to prevent the Official Assignee from seeing the accounts of the assets transferred. Dealing with the question of the onus of proof, the Judicial Committee observed (20 Ind App 1 at p. 5: ILR 17 Bom 341 at p. 347):

"Their Lordships consider that when a man has committed a fraud and has got property thereby, it is for him to show that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud, at a time which is too remote to allow him

to bring the suit. That is attempted in the present case. But their Lordships consider, and in this they agree with both the Courts below, that all that the appellant Rahimbhoy has done is to show that some clues and hints reached the assignee in the year 1881, which perhaps, if vigorously and acutely followed up, might have led to a complete knowledge of the fraud, but that there was no disclosure made which informed the mind of the assignee that the insolvent's estate had been defrauded by Rahimbhoy of these assets in the year 1867." (that being the year in which Rahimbhoy was adjudicated insolvent).

In the Calcutta case referred to by the learned Judge, it was held that S. 18 of the Limitation Act was not precisely identical with the provisions of S. 26 of the Real Property Limitation Act, 1833, of the United Kingdom which made time run from the date when the fraud was, or with reasonable diligence might have been, first known or discovered. The Full Bench further held that the true position was that when a suit was on the face of it barred, it was for the plaintiff to prove in the first instance the circumstances which would prevent the statute from having its ordinary effect, and if a person who in such circumstances desired to invoke the aid of Section 18, he must establish that there had been fraud and that by means of such fraud he had been kept from the knowledge of his right to sue, or of the title whereon it is founded, and once that was established, the burden was shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation and that such knowledge must be clear and definite knowledge of the facts constituting the particular fraud.

17. The evidence led by the appellants which was not controverted by the respondent clearly establishes that fraud was committed right from the date when the said proprietary concern of Messrs. Harakchand Mohanlal was formed up to the end and that the whole thing formed but one integral fraud having as its central object the embezzlement of the funds of the Company by the respondent. In a fraud so conceived, planned and systematically carried out over a period of three years each act is linked with the other and forms part of a continuous chain and must be taken as the components of an integrated whole. In such a

case it is not open to the Court to pick up individual acts of fraud and apply to each the period of limitation and say that the period of limitation commenced from the date of the commission of that particular act. Here, there was no question of any initial fraud or any fraud committed to cover up such fraud. The fraud lay in Messrs. Harakchand Mohanlal taking away by way of advances moneys from the Company against cotton alleged to be in transit and routing the moneys to the respondent. In the books of the Company these would be shown as advances made to Messrs. Harakchand Mohanlal against the cotton said to be in transit. As the cotton was not received by the Company, ultimately a large amount would be outstanding against Messrs. Harakchand Mohanlal, but neither in the books of account of the Company nor in any of its other books or papers would it ever appear that the moneys advanced to Messrs. Harakchand Mohanlal had gone into the pockets of the respondent. No officer or member of the Company nor even a director, unless he was a privy to the fraud, could have knowledge of this type of fraud practised by the respondent. It was sought to be argued by Mr. Mehta, learned counsel for the respondent, that the Company had knowledge of the fraud because the auditors of the Company had raised certain objections. It was also sought to be argued by Mr. Mehta that the Company had knowledge because the manager of the Company, J. P. Dordi, had written two letters dated Oct. 1, 1958 and May 20, 1958 respectively to the respondent. It was further contended by Mr. Mehta that when the Central Government appointed a Committee to investigate into the closure of the mills, the Central Government came to know about the respondent's fraud and, therefore, the Company must be deemed to have knowledge of the fraud. None of these contentions need detain us long. The auditors' objections related to the Board of Directors allowing the amount due from Messrs. Harakchand Mohanlal to remain outstanding and to the failure of the directors to take steps to recover such amount. From this it does not and cannot follow that the auditors knew that the amounts outstanding against Messrs. Harakchand Mohanlal had gone into the coffers of the respondent. The theme of both the said letters of Dordi related to

the bleak position which faced the mills by reason of paucity of funds, and in each of these two letters Dordi had made an earnest appeal to the respondent to recover the amounts due from Messrs. Harakchand Mohanlal. The very fact that the auditors and the manager wanted the directors to recover the outstandings of Messrs. Harakchand Mohanlal shows that they were not and could not be aware that these amounts had really been taken away by the respondent. The investigation which was conducted by the Central Government prior to the issue of the notification under S. 18A of the Industries (Development and Regulation) Act, 1951, was for the purposes specified in S. 15 of the said Act. It was not an investigation into the fraud committed by the respondent. The object of the said Act is to provide for the development and regulation of certain industries set out in the First Schedule to the said Act. As a result of the enquiry which was triggered by the closure of the mills, the Central Government came to the conclusion that the undertaking, namely, the Company, was being managed in a manner highly detrimental to the scheduled industry, namely, textile industry, and the management of the Company was vested by the Central Government in the Authorised Controller so that the mills could be revived. The question of the knowledge on the part of the directors of the fraud practised by the respondent is irrelevant. If they were not aware of the fraud practised by the respondent, they themselves were victims of such fraud and dupes of the respondent. If they or any of them knew of the fraud and took no steps with respect thereto, they became privy to the fraud and privy to concealing the knowledge of it from the Company. The question is when was anyone in charge of the management of the Company who was not a party to the fraud came to learn about it. On June 25, 1969 all books, papers, vouchers and documents of the Company, including the books of account and the minute-books of the meeting of the Board of Directors, were seized by the police and continued to remain in the custody of the police. Thereafter on July 18, 1959 Nevatia was appointed Authorised Controller. No books of account or other relevant documents or papers were available to Nevatia, and even had they been available, all that Nevatia would

have discovered from them would have been that a large amount was due to the Company from Messrs. Harakchand Mohanlal. That the respondent had committed criminal breach of trust in respect of the property of the Company and for the purpose of the commission of such fraud had entered into a criminal conspiracy came to light only when a copy of the charge-sheet which was filed by the police came to the knowledge of the Authorised Controller Nevatia. The charge-sheet was filed in Court on March 7, 1960 and a copy of it was forwarded to the Company and was received on March 11, 1960 by the said Desai who, after the issue of the notification under S. 18A of the Industries (Development and Regulation) Act, was appointed by Nevatia as his secretary. Desai thereafter forwarded the said copy to Nevatia, who thereupon discovered the fraud committed by the respondent. We do not have on record the date when Nevatia received the said copy of the charge-sheet, but in no event could it have been prior to March 11, 1960 when Desai himself received the said copy. The period of limitation must, therefore, be taken to have commenced on March 11, 1960. The suit having been filed on Feb. 9, 1963 was, therefore, well within time, whether Art. 120 or Article 95 applied. On this finding, the entire claim of the appellants would be in time, and in view of what we have held earlier that the appellants were entitled to continue the suit, a decree should have been passed in favour of the appellants in the sum claimed by them less a sum of Rs. 38,000 in respect of which there was no evidence and which position has been accepted by Mr. Chitoy. learned counsel for the appellants. This appeal must, therefore, succeed.

18. In the result, we allow this appeal, set aside the judgment and decree appealed against and in place of the decree passed by the trial Court, we pass in favour of the appellants and against the respondent a decree in the sum of Rs. 35,17,600 with interest thereon at the rate of 6 per cent per annum from Feb. 11, 1963 up to the date of the judgment, namely, July 21, 1982, and thereafter at the rate of 4 per cent per annum till payment or realization, that being the interest on the principal amount claimed by the appellants after giving up interest on the principal sum prior to the date of the suit. The respon-

dent will also pay to the appellants the costs throughout.

19. So far as the costs of the suit are concerned, the suit was filed and disposed of much prior to Jan 1, 1977, when the dual system was abolished, and the bill of costs of the then attorneys for the appellants would be required to be taxed by the Taxing Master of this Court. In view, however, of the long pendency both of the suit and the appeal, Mr. Chinoy, learned counsel for the appellants, has applied that the Court itself should tax the bill of costs. Several factors have to be borne in mind in taxing the bill of costs of this suit. They are the elaborate evidence which was required to be led in respect of each item in the account of the said Messrs Harakchand Mohanlal, linking such item with the particular voucher, invoice, hundi and the respondent's bank account, the voluminous nature of such evidence produced at the trial, the fact that until the appellants' evidence closed, the appellants could not be aware whether the respondent was going to step into the witness-box or not and whether he was going to lead any evidence or not, and the fact that in his written statement the respondent had denied fraud and had denied that he had misappropriated any money whatever from the funds of the Company, the labour which attorneys and counsel would have had to put in for the preparation of the case, the time which was taken for proving each of the above documents, the number of days which the hearing lasted and the number of days which were taken in the benesse examination of the said Mohanlal. Taking into consideration all these factors and the out-of-pocket-expenses incurred, we fix the costs of the suit, including the out-of-pocket-expenses and the instructions item, at Rs. 1,26,000. So far as the costs of the appeal are concerned, under R. 503 of the Rules of the High Court of Judicature at Bombay (Original Side), 1980, the Court will have to quantify the amount of such costs after taking into consideration the work done through attorneys prior to Jan. 1, 1977. This appeal was filed on Nov. 5, 1978. We have seen the various items of expenditure, including the amount of the Court-fees paid by the appellants, and such out-of-pocket-expenses come to Rs. 25,000. According to the present scale of taxation, the advocates' fees

would be Rs. 23,550. This, together with the out-of-pocket-expenses, would aggregate to Rs. 48,550. Bearing this in mind and the work which would have been done by the attorneys in filing this appeal, we quantify the costs of this appeal at Rs. 55,000.

Appeal allowed.

AIR 1982 BOMBAY 553

DESHPANDE, C. J. AND REGE, J.

Empire Industries Ltd. and another, Petitioners v. M. C. Subarna and others, Respondents.

Misc. Petns. Nos. 677, 692, 725, 726, 814, 822, 1039 and 747 of 1977, D/- 16-1-1981.

(A) Essential Commodities Act (1955), Section 3 — Cotton Textiles (Control) Order (1948), Clause 20 and Notification No. CER/24/77 dated 15-4-1977 issued thereunder — Vires — Said clause and notification are not ultra vires the powers conferred under Section 3 of the Act.

Clause 20 of the Cotton Textiles (Control) Order, 1948, cannot be said to be beyond the scope of powers conferred on the Joint Textile Commissioner under Section 3 of the Act of 1955. It is clear that the Order and Notification No. CER/24/77 dated 15-4-1977 issued thereunder is intended to protect essentially the hand printers. This work provides employment to a large number of hand printers residing in villages and the impugned Notification seeks to protect this village industry. Hand printed saris are very much in demand in rural area. The hand printed cloth is thus one of the essential supplies for the rural community. Section 3 of the Act of 1955 aims amongst others at ensuring maintenance of essential supplies. The impugned Notification seeks to ensure the supply of hand printed cloth so needed particularly in villages. It thus carries out the object of Section 3 of the Act of 1955. It cannot be said to be ultra vires of the powers conferred under Section 3 of the said Act. Judgment D/- 10-10-1978 in Spl. Civil Appls. 2732 of 1977 and 93 of 1978 (Bom) and Judgment dated 12th and 13th Nov., 1968 in Misc. Petn. No. 274 of 1968 (Bom), Rel. on. (Para 9)

(B) Constitution of India, Art. 19 (1) (g) — Cotton Textiles (Control) Order (1948), Cl. 20 — Notification No. CER/24/77 dated 15-4-1977 issued under — Validity — Notification prohibiting printing of powerloom produced cloth — Is not violative of Art. 19.

IZ/IZ/D975/82/HR/RSK

The contention that Notification No. CER/24/77 dated 15-4-77 issued under Cl. 20 of the Cotton Textiles (Control) Order, 1948, is violative of Article 19 (1) (g) is without any force. It is true that the Notification does not prohibit printing with the aid of power on the hand-made cloth. In other words, prohibition is not absolute but is restricted against printing the powerloom produced cloth. But this by itself cannot affect the validity. Even the limited prohibition is enough to subserve the underlying purpose. The remote possibility of handloom cloth being printed with the aid of the power appears to be the basis of this limited prohibition. It is also consistent with the restriction being limited to the need of the situation to avoid the possible breach of Art. 19 of the Constitution. Judgment D/- 10-10-1978 in Spl. Civil Appns. Nos. 2732 of 1977 and 93 of 1978 (Bom) and Judgment D/- 12th and 13th Nov., 1968 in Misc. Petn. No. 274 of 1968 (Bom), Rel. on.

(Paras 10, 11)

(C) Constitution of India, Article 14 — Cotton Textiles (Control) Order (1948), Cl. 20 and Notification No. CER/24/77 dated 15-4-1977 issued thereunder — Validity — Power conferred on the authorities by Cl. 20 of said order and provisions of Notification — Are not uncanalised or unguided as to be violative of Article 14. Judgment D/- 10-10-1978 Spl. Civil. Appns. Nos. 2732 of 1977 and 93 of 1978 (Bom) and Judgment D/- 12th and 13th Nov., 1968 in Misc. Petn. No. 274 of 1968 (Bom), Rel. on. (Para 10)

(D) Constitution of India, Art. 14 — Cotton Textiles (Control) Order (1948), Cl. 20 — Notification No. CER/24/77 dated 15-4-1977 issued under — Validity — Notification differentiating between hand printers and printers with the aid of power — Is not discriminatory and violative of Art. 14.

The classification between hand printers and printers with the aid of power made under Notification No. CER/24/77 dt. 15-4-1977 issued under Cl. 20 of the Cotton Textiles (Control) Order, 1948, is based on intelligible differentia and the said classification is aimed at ensuring protection of the village industries so essential for the development of village economy. Therefore, the notification cannot be said to be violative of Article 14. (Para 10)

(E) Constitution of India, Article 226 — Natural justice — Opportunity of hearing — Notification No. CER/24/77 dated 15-4-1977 issued under Clause 20 of Cotton Textiles (Control) Order, 1948, without affording op-

portunity of hearing to adversely affected persons — Is not violative of principles of natural justice.

The contention that Notification No. CER/24/77 dated 15-4-1977 issued under Cl. 20 of the Cotton Textiles (Control) Order, 1948, is violative of rules of natural justice on the ground that the same was issued without giving any opportunity of hearing to the class of persons who were thereby affected adversely is devoid of any substance. The question of giving hearing to a class of persons does not arise where the Government is required to do something to implement its policies. Policy decisions of the Government fall in a different class altogether and are distinct from the administrative Order of the Government affecting the citizens of the country. (Para 10)

Cases Referred: Chronological Paras
(1978) Spl. Civil Appns. Nos. 2732 of 1977 and 93 of 1978, D/- 10-10-1978 (Bom) 9
AIR 1977 SC 1516 4
(1968) Misc. Petn. No. 274 of 1968, D/- 12/13-11-1968 (Bom) 9

P. L. Nain, for Petitioners; C. J. Shah with M. I. Sethna, for Respondents.

DESHPANDE, C. J.:— These seven Miscellaneous Petitions along with Miscellaneous Petn. No. 747 of 1977 were referred to a Division Bench, in view of the complexity of the questions involved therein, by a learned single Judge at the time of granting rule itself. When these petitions were taken up for hearing Mr. Nain, the learned Advocate appearing for the petitioners, stated that he wanted to withdraw Miscellaneous Petition No. 747 of 1977. We accordingly allowed Mr. Nain to withdraw the said petition. The surviving seven petitions involved the same points of law and can, therefore, be conveniently disposed of by this common judgment.

2. It is necessary to refer to certain background to appreciate the contentions raised by Mr. Nain before us in these petitions. All the petitioners are processors. They print cloth with the aid of power. The petitioners challenge the validity of Notification No. CER/24/77 issued by the Joint Textile Commissioner on 15th Aprl., 1977. The said Notification is issued by the Joint Textile Commissioner in exercise of the powers conferred on him under Cl. 20 of the Cotton Textiles (Control) Order of 1948 (hereinafter referred to as "the Order"). The said Order, in turn, is promulgated under Section 3 of the Essential Supplies (Temporary Powers) Act, 1946 (hereinafter referred to as "the

Act"). The said Act was repealed with effect from 25th Jan., 1955 firstly by the Essential Commodities Ordinance of 1955 and subsequently by the Essential Commodities Act of 1955, which became effective from 1st Apr., 1955. The Ordinance saved the Orders passed earlier under the said Act while the Essential Commodities Act of 1955 (hereinafter referred to as "the Act of 1955") saved the said Orders as if the same have been made or issued under the provisions of the Act of 1955.

3. Before the present Notification dated 15th Apr., 1977, two Notifications were issued by the Deputy Textile Commissioner on 22nd Dec., 1966 and 12th Apr., 1967. The language of the impugned Notification dated 15th Apr., 1977 is substantially identical with that of the Notification dated 12th Apr., 1967. The alterations and modifications therein are not really relevant to the points that are raised by Mr. Nain in these petitions. The validity of the Notification dated 12th Apr., 1967 was challenged earlier in this Court by several petitioners in their petitions. One of the said petitions i.e. Miscellaneous Petition No. 274 of 1968, was disposed of by Tulzapurkar J. (as he then was) sitting as a single Judge on the Original Side of this Court, by his judgment dated 12th and 13th Nov., 1968. Appeal No. 6 of 1969 came up for hearing before us on 5th Jan., 1981.

4. The very same Notification was also challenged by some petitioners in the Gujarat High Court in Special Civil Application No. 1346 of 1969. The learned Judges of the Gujarat High Court did not deal with the several points raised in the petition as two points out of them appeared to them to be sufficient to dispose of the said petition. The Gujarat High Court quashed the said Notification firstly on the ground that the Notification dated 12th Apr., 1967 did not indicate any period during which the said Notification was to remain in operation, though prescribing of such period was necessary under Clause 20 of the said Order and secondly on the ground that what the petitioners before the Court were printing were not saris at all. The Union Government preferred an appeal against the said judgment of the Gujarat High Court before the Supreme Court. The Supreme Court upheld the judgment of the Gujarat High Court on the point that omission to prescribe such period in the said Notification was fatal to the validity thereof. The Supreme Court did not feel it necessary to go into the correctness of the other point decided by the

Gujarat High Court. This judgment of the Supreme Court is reported in the case of Textile Commr. v. Sagar Textile Mills (P.) Ltd. (AIR 1977 SC 1516). Following the said judgment of the Supreme Court, we allowed the said Appeal No. 6/69 upholding the same point raised by the petitioners in the said appeal.

5. It is after the said judgment of the Supreme Court that the Joint Textile Commissioner issued the impugned Notification. The Notification makes it clear that the same will remain in operation up to 31st March, 1982. The defect with which the earlier Notification dated 12th Apr., 1967 was found to have suffered thus is now eliminated in this fresh Notification impugned in these petitions. The validity of this Notification, however, is challenged in all these petitions on several other grounds.

6. Mr. Nain raised the following points, in support of the alleged invalidity of the Notification :

(1) The Clause 20 of the said Order is ultra vires of the powers conferred on the Joint Textile Commissioner under Section 3 of the Act of 1955 under which the said Order is deemed to have been issued;

(2) The said Clause 20 cannot be said to have been saved by the provisions of the Act of 1955, as the provisions of the said clause are inconsistent with the provisions of the Act of 1955.

(3) The provisions of Clause 20 of the said Order as also the impugned Notification place unreasonable restrictions on the fundamental rights of citizens, to carry on business, guaranteed under Art. 19 (1) (g) of the Constitution of India.

(4) The impugned Notification is violative of Article 14 of the Constitution, in that it discriminates the printers by machine and favours hand printers without any rational basis.

(5) The impugned Notification is violative of principles of natural justice as the same was issued without giving any opportunity to the class of persons who are thereby affected adversely.

(6) The petitioners did not print saris but merely rolls of cloth and as such the impugned Notification is not applicable to them.

7. Coming first to the last point, Mr. Nain strongly relied on the judgment of a Division Bench of the Gujarat High Court dated 4th Aug., 1971 referred to above. The Gujarat High Court did hold that the petitioners before it were not printing saris and

as such the Notification dated 12th April, 1967 did not apply to them. The question whether the petitioners herein print saris or merely rolls of cloth is purely a question of fact and the answer depends on what is pleaded in this behalf. Our attention was drawn by Mr. Nain not to any detailed averments in support of this contention but only to ground (1) of para 16 of the petition. This ground was introduced by amending the petition with the leave of the Court. The averments merely disclose how the printing is made on the cloth lengthwise. These do not disclose the instructions under which printing is done or the terms of the contract of the printing or in what manner widthwise printing is effected on the cloth. In the absence of these details it is difficult for us to decide whether the petitioners print saris or merely rolls of cloth. We are also unable to see how any occasion is furnished to the petitioners for challenging the Notification in question, if, in fact, the processes carried on at their workshop do not involve printing of saris which alone is prohibited under Clause (3) of the impugned Notification. No action is taken by the authorities against the petitioners for printing such saris. On the scanty material before us, we do not think it safe to record any finding on this point raised by the petitioners.

8. The averments in the petition also do not show in what manner the Notification or the Order is in conflict with the provisions of the Act of 1955. It cannot, therefore, be said that the Order is not saved under the Act of 1955.

9. Each of the remaining four points raised by Mr. Nain before us is covered by a Division Bench judgment of this Court consisting of Dharmadhikari and Kurdukar, JJ. delivered in Spl. Civil Appns. No. 2732 of 1977 and 93 of 1978 on 10th Oct., 1978. The contentions to the same effect raised by the learned Advocate for the petitioners in these cases have been expressly overruled by the Division Bench. We are unable to see any reason why we should differ from the view taken by the Division Bench in the above case. The same points have also been overruled by Tulzapurkar J. in his judgment dated 12th and 13th Nov., 1968 in the case referred to above. The contention that Clause 20 of the said Order is beyond the scope of powers conferred on the Joint Textile Commissioner under S. 3 of the Act of 1955 is held to have been without substance. It is clear that the Order and the impugned Notification issued thereunder is intended to protect essentially the

hand printers. This work provides employment to a large number of hand printers residing in villages and the impugned Notification seeks to protect this village industry. Hand printed saris are very much in demand in rural areas. The hand printed cloth is thus one of the essential supplies for the rural community. Section 3 of the Act of 1955 aims amongst others at ensuring maintenance of essential supplies. The impugned Notification seeks to ensure the supply of hand printed cloth so needed particularly in villages. It thus carries out the object of Section 3 of the Act of 1955. It cannot be said to be ultra vires of the powers conferred under Section 3 of the said Act.

10. While overruling the contentions as to the impugned Notification being violative of Articles 19 and 14 of the Constitution, Dharmadhikari J. and Tulzapurkar J. have in their judgments traced the genesis of the Order and the Notification issued thereunder including the one impugned before us. The learned Judges in their elaborate judgments have indicated how protection to village industries and to a large number of hand printers is essential to the smooth functioning of our village economy. In their judgment both the learned Judges have extensively referred to the reports of various Committees constituted by the Government of India for the purpose of ascertaining as to what extent these industries can be developed and what protection is called for in the interests of village community. The contention as to the impugned Notification being violative of Article 19 (1) (g) of the Constitution has been overruled in both these cases, and we are unable to see any good reason to take a different view of the matter. The contention as to violation of Article 14 of the Constitution is equally misconceived. The contention that Clause 20 of the said Order and the provisions of the impugned Notification confer uncanalised or unguided powers on the authorities has been held to be devoid of any substance. Similarly, the classification between hand printers and printers with the aid of power, appears to us to have been based on intelligible differentia and the said classification is aimed at ensuring protection of the village industries so essential for the development of village economy. The contention as to the impugned Notification being violative of the principles of natural justice appears to us to be equally devoid of any substance. It is well settled that the question of giving hearing to a class of persons does not arise where the Government is required to do something to implement its policies.

Policy decisions of the Government falls in different class altogether and are distinct from the administrative Order of the Government affecting the citizens of the country.

11. It is true that the Notification does not prohibit printing with the aid of power on the hand-made cloth. In other words, prohibition is not absolute but is restricted against printing the powerloom produced cloth. But this by itself cannot affect the validity. Even the limited prohibition is enough to subserve the underlying purpose. The remote possibility of handloom cloth being printed with the aid of the power appears to be the basis of this limited prohibition. It is also consistent with the restriction being limited to the need of the situation to avoid the possible breach of Art. 19 of the Constitution.

12. Mr. Nain contends that the provisions of the impugned Notification go to impose restrictions on the petitioners in the matter of printing cloth with the aid of power. It was obligatory on the Joint Textile Commissioner to find out what the situation exactly in this behalf was in the year 1977 when the Notification is issued afresh. Reliance by the Joint Textile Commissioner on the situation, as was existing in 1965 or when the reports of Shreeraman Committee and Ashok Mehta Committee were made, was not sufficient, so contends Mr. Nain, to make the restrictions reasonable. Now, it is true that the original Notifications issued in the year 1966 were based on the reports of several of those Committees. The affidavit filed on behalf of the respondents does not expressly indicate that the Government had made any attempt to review the position in this behalf afresh at the time when the impugned Notification of 1977 was issued. The affidavit further makes it clear that implementation of the Notifications issued in the year 1966 was virtually stayed because of the challenge to them in several Courts and therefore fresh notification had become necessary. This creates an impression as if the situation as in existence in 1966 alone is relied on. But the affidavit also avers that the situation as it existed at the time of issuing of the said Notifications in 1966 continued to exist even till this day. We have no material to doubt this and justify our taking a different view from the one indicated in the affidavit filed on behalf of the respondents. The contention thus is untenable.

13. Before we close, it is necessary to notice how measures initiated to meet the

urgent and crying needs of the society get bogged down due to sheer indifference or incapacity of the department to adjust its pursuit with the requirements of the rule of law. As such measures affect the vested interests, challenges to them in the Court are inevitable. Every citizen has a right to get the validity of such measures tested by judicial reviews in the High Court and the High Court has a duty to examine and pronounce its views on the challenges, hurled against them. The authors of the measures and the administration have to be vigilant and pursue the challenges in the Court vigilantly and defend or rectify the same if found necessary in time. The original Notification dated 12th Aprl., 1967 is struck down by the Gujarat High Court on 4th August, 1971, because the period for its operation was not indicated in the Order. The judgment of the Supreme Court dated 27th Jan., 1977 in *Textile Commissioner v. Sagar Textile Mills* (AIR 1977 SC 1516), approving this view, does not show that Government had any answer to the defect discovered by the Gujarat High Court. Why the Government wasted so many years and did not remove the defect discovered from 4th Aug., 1971 to 15th Aprl., 1977 passes one's imagination when the measures are claimed to be so essential.

14. When the said Notification was challenged in this case, admission Court was cautious enough on 30th June, 1977 in expediting the hearing and directing Government to file affidavit in reply within four weeks. The Government filed its affidavit in reply on 9th January, 1981 and thus itself prevented early disposal of this petition. Mr. Shah, the learned counsel for the Government, could not explain why no affidavit in reply was filed within four weeks and why opportunity to have the matter disposed of immediately was not availed of. In fact another Division Bench upheld the validity of the Notification on Aug., 1978. Government slept over the matter for two years without any move. Judicial process thus comes into disrepute due to sheer negligence and inaction of the Government.

15. In the result, the petitions are liable to be rejected. Rules accordingly discharged in all the petitions. There will be no order as to costs in all the petitions.

16. Mr. Nain applies for leave to appeal to the Supreme Court under Art. 133 of the Constitution of India. Leave refused.

Petitions dismissed.

AIR 1982 BOMBAY 558

(AT NAGPUR)

WAIKAR, J.

Taj Mohammad and others, Applicants v. Agricultural Produce Market Committee, Nagpur, Non-Applicant.

Civil Revn. Appns. Nos. 818 and 819 of 1980 and C. R. As. Nos. 2 to 12 of 1981, D/-28-1-1981.

Maharashtra Agricultural Produce Marketing (Regulation) Act (20 of 1964), Ss. 29, 46 — Maharashtra Agricultural Produce Marketing (Regulation) Rules (1967), Rr. 7 (4), 120 (e) — Agricultural Produce Market Committee — Power to file civil suits — Committee filing civil suits restraining persons from encroaching its statutory right — Mere remedy of criminal prosecution provided under Section 46 — Jurisdiction of Civil Court would not be barred — Committee would be justified in moving Civil Court. (Civil P. C. (1908), S. 9, O. 39, R. 1).

Where an Agricultural Produce Market Committee had filed separate civil suits restraining the certain persons who had no valid licence from working as commission agents within the market area and restraining the rest of certain persons from recovering the commission from the cultivators in excess of the rate prescribed under the licences, the Committee would not be said to be unjustified in moving the Civil Court for issue of a writ of temporary injunction against such persons when the Committee wanted to prevent such persons from encroaching upon its statutory right to regulate the marketing of agricultural and other produce in the market areas, for the proper and efficacious enforcement of which, the criminal prosecution as provided under Section 46 could not be a remedy. Therefore, merely because the statute provides for a remedy at criminal law, the jurisdiction of the Civil Court would not be barred by necessary implication. Case law discussed.

(Paras 17, 24)

Further, the jurisdiction of the Civil Court would not be ousted either expressly or by necessary intendment, as the Committee is endowed with certain monopoly powers for regulating the marketing of agricultural produce within the specified market areas. It is also charged with a duty to enforce the provisions of the Act. The conferral of such plenary powers and right, though by a statute, certainly constitutes a civil right in the Committee, and merely because penal con-

sequences are provided for that, by itself, would not deprive the Committee of its civil right to seek enforcement of the provisions of the Act or to prevent breach or infringement of its civil right. Therefore so far as the Commission agents who were acting in flagrant violation of the terms of the licence and trying to fleece the poor agriculturists were concerned, the Committee would be entitled to ask the issue of a writ of temporary injunction to prevent the breach of the terms of the licence by which those persons had bound themselves. (Paras 23, 24)

Cases Referred : Chronological Paras

(1977) 3 All ER 70 : (1977) 3 WLR 300 :	
1978 AC 435, <i>Gouriet v. Union of Post Office Workers</i>	12
AIR 1976 SC 425 : 1976 Lab IC 303	13
AIR 1975 SC 2238	14
AIR 1973 Bom 348	19
AIR 1969 SC 78	21
1970 Lab IC 115 : 1969 Mah LJ 710	15
AIR 1957 Bom 34	18, 19
AIR 1944 All 66	17
AIR 1921 Cal 129	20
(1859) 6 CB (NS) 336 : 7 WR 464 : 141 ER 486, <i>Wolverhampton New Waterworks Co. v. Hawkes Ford</i>	15

M. G. Bhangde, for Applicants; K. H. Deshpande, for Non-Applicant in all C. R. Applications.

ORDER:— This judgment shall dispose of Civil Revision Applications Nos. 818 and 819 of 1980 and Civil Revision Applications Nos. 2 to 12 of 1981.

2. The non-applicant (original plaintiff), namely Agricultural Produce Market Committee, Nagpur, is common in all these revision applications. This non-applicant had filed separate suits against each of these applicants for perpetual injunction and had applied for a writ of temporary injunction. The trial Court rejected these applications, but the first appellate Court allowed them and hence these revisions by the original defendants. As common question of law and fact was involved in all these matters, the trial Court as well as the first appellate Court also disposed of these applications for temporary injunction by common judgment.

3. The Non-applicant Agricultural Produce Market Committee (hereinafter called the Committee) was duly established under Section 11 of the Maharashtra Agricultural Produce Marketing (Regulation) Act, 1963 (hereafter called the Act). The present revisions fall in two categories. Four revision applications Nos. 5, 10, 11 and 12 fall in one category, in that the applicants in these revi-

sion applications admittedly have been operating as commission agents in the market area, without any valid licence. The applicants in the rest of the revisions, no doubt, hold a valid licence as Adtiyas or Commission Agents, but admittedly again they have been recovering the commission from the agriculturists at a higher rate of 6 per cent in contravention of the terms of their licences.

4. The non-applicant-Committee, therefore, filed separate suits restraining the first four applicants from working as Commission Agents within the market area and restraining the rest of the applicants from recovering the commission from the cultivators in excess of the rate prescribed under the licences.

5. The applications made by the Committee for temporary injunction were all dismissed by the trial Court holding that the plaintiff-Committee has no locus standi or right to file the civil suits as Section 46 of the Act provides for a penalty.

6. In the appeals preferred by plaintiff-Committee, the first appellate Court found that the plaintiff-Committee had made out a prima facie case that the Civil Court has jurisdiction to entertain the suits and to issue injunction and allowed the applications of the plaintiff.

7. In these revisions preferred by the original defendants, Shri Bhangde, the learned counsel, submitted that Section 6 of the Act itself enacts a prohibition and an injunction against all persons not to operate without licence or in violation of the terms of the licence issued. Thus this statutory provision itself operates (as) an injunction against such persons and the first appellate Court by granting temporary injunction against these applicants in a way only re-enacted the provisions of Section 6 of the Act. He further submitted that there could be no injunction to prevent the breach of any provision of law. In other words, what was complained of was prevention of a public wrong and there was no infringement of any private right. The Committee, according to him, receives cess from the purchasers and if these applicants are charging more commission from the cultivators, or are operating as Commission Agents within the market area without licences, there is no damage or loss to the Committee. The alleged conduct of the applicants, therefore, does not entail in civil wrong to the Committee. His further argument is that the Act itself is a self-contained code creating rights and liabilities and

also providing remedies in case of breach of the provisions of the said Act. He also submitted that grant of a licence by the committee in favour of an applicant does not constitute a contract and as such the provisions of O. 39, R. 2 of the Civil P. C. dealing with cases of breach of contract can have no application. So far as cases of those who are operating without a licence, there is no question of any contract at all, or of breach of any contract. Thus, according to him, neither the provisions of R. 1 or R. 2 of O. 39 of the Civil P. C. are attracted. He relied upon several authorities which would be referred to in due course.

8. Shri K. H. Deshpande, the learned counsel appearing for the non-applicant-Committee, submitted that the object of the Act is to regulate the marketing of agricultural produce in market areas and to confer powers upon market committees to be constituted for the purposes connected with such markets. The various provisions of the Act, he submitted, make it clear that the Market Committee is endowed with certain powers and is also enjoined certain duties to enforce the provisions of the Act for the above purposes. He submitted that if the Market Committee cannot take steps to prevent violation of its monopoly rights, the object of investing the Committee with such powers would be defeated. He submitted that there is no doubt a remedy in Criminal Law as provided by Section 46 of the Act, but there is no provision in the Act itself to prevent recurrence of such acts. Again there is no provision in the Act which ousts the jurisdiction of the Civil Court, either expressly or by necessary implication. The Act in that sense, therefore, cannot be said to be a self-contained Code as to oust the jurisdiction of the Court. The impugned conduct of the applicants, he submitted, constituted a wrong, in that they had directly infringed the right that is conferred on the Committee and in the absence of any such provision in the Act itself, expressly or by necessary implication ousting the jurisdiction of the Civil Court, the plaintiff could file a civil suit in vindication of such civil right.

9. The crux of the matter is whether the Committee has or has no civil right under the provisions of this Act, and whether these civil suits that are filed are in vindication of a civil right, or only for enforcing the penal provisions of Section 46 of the Act and as such barred.

10. To begin with, I may refer to certain provision of the Act. Firstly, the object of the Act, as can be seen, is to regulate the

marketing of agricultural and certain other produce in market areas and to establish markets therefor in the State and to confer powers on the Market Committee to be constituted in connection with or acting for purposes connected with such markets. Section 6 of the Act which deals with regulation of marketing of agricultural produce prohibits or injuncts any person from operating in the market area as a trader or commission agent, or a broker without any licence or otherwise than in conformity with the terms of the licence. Section 11 then refers to establishment of Market Committees and says that the Market Committee so established shall have all such powers and discharge all such functions as are vested in it by or under the Act. Section 12 says that every Market Committee shall be a body corporate and shall have perpetual succession and a common seal and may in its corporate name sue or be sued and shall be competent to contract, acquire and hold property and do all other things necessary for the purposes for which it is established. Section 29 deals with the powers and duties of a Market Committee and sub-cl. (k) of sub-section (2) of Section 29 is in these words :

"29 (2) (k) enforce the provisions of this Act and rules, bye-laws and conditions of the licences granted under this Act;"

Section 46 provides penalty for contravention of the provisions of Section 6. Thus a person operating without any licence or acting in contravention of the terms of the licence is no doubt liable for criminal prosecution and for punishment as is prescribed under this section.

11. Rule 7 (4) of the Maharashtra Agricultural Produce Marketing (Regulation) Rules, 1967 is in these terms :

"7. (4). The applicant, on a licence being granted, shall execute an agreement in such form as may be approved by the Director or under the bye-laws, agreeing to abide by the provisions of the Act, these rules and the bye-laws."

Rule 120 (e) empowers a Committee to make bye-laws in respect of the form of an application for grant and renewal of a licence and an agreement to be executed before the grant of a licence. Under the prescribed form of the agreement a licensee has to give an undertaking that he would abide by and observe the conditions and terms of the licence. It is thus clear that the Committee is not only endowed with certain power but charged with a duty to enforce the provisions of this Act. The Committee is thus

constituted the sole authority to regulate the marketing of the agricultural produce in market areas and the persons who are granted the licence to operate as commission agents or brokers or traders are also bound to act in accordance with the terms thereof. Section 46, no doubt, prescribes penal consequences for a person who uses any place in market area for marketing agricultural produce, or operates as a trader or a commission agent without any valid licence, but that would not necessarily mean that no civil action can, therefore, lie. The answer to the question whether an action in a Civil Court for an injunction can lie or not depends on a proper answer to the question whether the plaintiff has or has no civil right and not by pointing out to the penal provision as contained in Section 46 of the Act. Existence of a penal provision rendering certain acts punishable under the criminal law does not necessarily imply negation of a civil liability, for it is well known that a certain act may give rise to a criminal action and at the time to an actionable civil wrong.

12. In *Gouriet v. Union of Post Office Workers* (1977-3 All ER 70), which was relied upon by Shri Bhangde, an action was commenced by a citizen seeking an injunction as the Union of the Post Office Workers had resolved not to accept mail from England to South Africa from a particular date. Though such an action was punishable, the Attorney General took no steps and the question posed was if the Attorney General does not act himself, "Are the Courts to stand idly by?" as such suggesting impliedly that the Civil Courts have some executive authority in relation to the criminal law. The injunction prayed for was refused as it was an offence against the public and no remedy was provided for enforcement of the public wrong. Though this ruling has no application to the facts of the present case, the following observations of Lord Diplock are, however, relevant and apposite :

"The second reason why they are important is that they are relevant to the distinction between an injunction in restraint of crime simpliciter and an injunction to restrain conduct which although amounting to a crime would also infringe some right belonging to the plaintiff who is applying for the injunction which is enforceable by him in private law. The supersession of private revenge for wrongs by remedies obtainable from Courts of justice and enforceable by the executive authority of the State

lies at the common origin both of the criminal law and of the civil private law of tort. So from the outset there have been many crimes which at common law were private wrongs to the person who suffered particular damage from them as well as public wrongs; and the policy of the law has been not to deprive the victim of a private wrong of his redress in civil private law against the wrong-doer merely because the wrong-doer is subject also to punitive sanctions under the criminal law for the same conduct, ...

13. Next ruling Rohtas Industries Ltd. v. Rohtas Industries Staff Union (AIR 1976 SC 425) that was relied upon by Shri Bhangde was a decision under the Industrial Disputes Act. There was a strike and the terms of the agreement inter alia provided that the employees' claim for wages and salaries for the period of strike and the Company's claim for compensation for losses due to strike shall be submitted to the Arbitrators. The award that was passed said that the workmen were not entitled to wages and salaries, but the Company was found entitled to recover from the striking workmen the compensation assessed at Rs. 80,000/-. As the strike was held illegal and the Industrial Disputes Act nowhere provided payment of compensation to the employer, the award, as the Supreme Court held, could not be enforced with these observations (para 27):

"It is common case that the demands covered by the strike and the wages during the period of the strike constitute an industrial dispute within the sense of S. 2 (k) of the Act. Section 23, read with S. 24, it is agreed by both sides, make the strike in question illegal. An 'illegal strike' is a creation of the Act. As we have pointed out earlier, the compensation claimed and awarded is a direct reparation for the loss of profits of the employer caused by the illegal strike. If so, it is contended by the respondents, the remedy for the illegal strike and its fall-out has to be sought within the statute and not dehors it. If this stand of the workers is right, the remedy indicated in S. 26 of the Act, viz, prosecution for starting and continuing an illegal strike, is the designated statutory remedy. No other relief outside the Act can be claimed on general principles of jurisprudence. The result is that the relief of compensation by proceedings in arbitration is contrary to law and bad."

14. Relying upon *The Premier Automobiles Ltd. v. Kamalakar Shantaram Wadke* (AIR 1975 SC 2238) Shri Bhangde submitted that where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it, the party must adopt the form of remedy given by the statute and the jurisdiction of the Civil Court is impliedly barred. This was again a case under the Industrial Disputes Act and it was observed that the object of the Act, as its preamble indicates, is to make provision for the investigation and settlement of industrial disputes, which means adjudication of such disputes also. The Act envisages collective bargaining, contracts between Union representing the workmen and the management, a matter which is outside the realm of the common law or the Indian law of contract. Thus having observed that the powers of the authorities deciding industrial disputes under the Act were very extensive — much wider than the powers of a Civil Court while adjudicating a dispute which may be industrial dispute, the party must adopt the form of remedy given under the statute itself.

15. Shri Bhangde relying upon *The Pigment Lakes and Chemical Mfg. Co. Pvt. Ltd. v. Sitaram Kashiram*, 1969 Mah LJ 710 : (1970 Lab IC 115) referred me to the following observations of Willes J. in *The Wolverhampton New Waterworks Co. v. Hawkesford* ((1859) 6 CB (NS) 336 at p. 356) appearing in this decision which are extracted therein (at p. 119 of Lab IC):—

"There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely; but provides no particular form of remedy; there, the party can only proceed by action at common law. But there is a third class, viz. where liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the statute must be followed and it is not com-

petent to the party to pursue the course applicable to cases of the second class."

16. It may be pointed out in this connection that S. 29 (2) of the Act confers two kinds of powers on the Committee under clauses (e) and (k) which are in these terms:

"(e) Prosecute persons for violating the provisions of this Act, the rules and bye-laws made thereunder;

(k) enforce the provisions of this Act and Rules, Bye-laws and conditions of the licences granted under this Act";

Thus two distinct types of remedies are contemplated under these clauses. Section 46 of the Act, no doubt, provides for a remedy of criminal prosecution, but there is no remedy either sufficient or efficacious for enforcing the provisions of the Act. The remedy that is provided under Section 46 cannot be said to be a remedy at all so as to enable the Committee to regulate the marketing within its limits in an orderly manner for which no specific provision is made. As such it cannot be said that the present case falls under the third category of cases as submitted by Shri Bhangde, or that the jurisdiction of the Civil Court is impliedly barred.

17. As observed in *Firm Kishore Chand Shiva Charan Lal v. Budaun Electric Supply Co Ltd.* (AIR 1944 All 66) it would not be correct to say that there is no remedy in India for the breach of statutory obligation where the statute itself has not provided for the remedy. What the Committee prays for in the present action is to prevent persons from encroaching upon its statutory right to regulate the marketing of agricultural and other produce in the market areas, for the proper and efficacious enforcement of which, the criminal prosecution as provided under Section 46 of the Act cannot be a remedy. In my opinion, therefore, merely because the statute provides for a remedy at criminal law, the jurisdiction of the Civil Court is not barred by necessary implication and the Committee was justified in moving the Civil Court for issue of a writ of temporary injunction against those who tried to infringe the statutory right of the Committee and which the Committee is entitled to seek in effective and efficacious enforcement of its statutory right.

18. Shri Bhangde then relied upon *Thana Borough Municipality v. Akbaralli* (AIR 1957 Bom 34). This case was under Bombay Municipal Boroughs Act where an owner of the building had started construction of a second floor in contravention of

the bye-laws and in spite of the refusal by the Municipality. The Municipality thereupon filed a criminal complaint against him under S. 123 (7), but inasmuch as there was a congestion in the Criminal Courts, it filed simultaneously a civil suit for an injunction restraining the owner from occupying the suit building either by himself or his tenants and for a direction to demolish the unauthorised construction. On the question whether the civil suit was maintainable, it was held that the obligation imposed upon the owner by the bye-laws was not for the benefit of the Municipality and injunction, therefore, was refused. It is pertinent to note that the provisions of the Bombay Municipal Boroughs Act did not provide for the consequences of building without permission and as such it was held that a direction as prayed for could not be issued.

19. The decision in *Thana Borough Municipality v. Akbaralli* (supra) was referred to in *The Agricultural Produce Market Committee, Sholapur v. Pantappa Sayanna* (AIR 1973 Bom 348) which was also relied upon by Shri Bhangde. It appears that certain traders were prosecuted and convicted for trading without licence and the limited question was whether a civil suit therefor was barred for recovery of the licence fee from them at the instance of the Market Committee. It was held that there was no express bar in the Act or in the Rules made thereunder for filing such a suit. It was observed that trading without a licence is a public wrong and therefore such a trader is liable to be prosecuted. But non-payment of fees is also a wrong to the corporate body the funds of which are meant for services under the Act. The Civil Court's jurisdiction, therefore, it was held, was not impliedly barred. The observations made in *Thana Borough Municipality's* case were pressed into service for non-suiting this claim for recovery of licence fee, but the said argument was repelled by Vaidya, J. with these observations (para 20):

"That case can have no application to the present case where the suit is for the recovery of licence fees or damages. The suit is not for damages or for an injunction regarding trading without a licence which is a public wrong."

Though the above observations are relied upon by Shri Bhangde to show that a suit for injunction regarding trading without a licence would not lie, I find that no such principle was laid down in this decision. In repelling the argument that no suit for re-

covery of licence fee can lie in view of the decision reported in the aforesaid case, the above observations came to be made. This decision, therefore, cannot be taken as an authority for the decision that no suit for injunction under the Act can lie.

20. In the present cases so far as the applicants, who admittedly are charging at a higher rate than agreed as per terms of the licence, are concerned, they are obviously violating their legal obligation. This legal obligation as contained in the terms of the licence not only restrict their freedom to charge more, but it is impliedly co-related to a right in the plaintiff. In this connection Shri K. H. Deshpande relied upon the following observations to be found in *Bhudeb Mookerjee v. Kalachand Mallik* (AIR 1921 Cal 129):

"Obligation may be taken to be a tie or bond which constrains a person to do or suffer something; it implies a right in another person to which it is correlated, and it restricts the freedom of the obligee with reference to definite acts and forbearances; but in order that it may be enforced by a Court, it must be a legal obligation, and not merely moral, social or religious."

21. As observed by the Supreme Court in *Dhulabhai v. State of Madhya Pradesh* (AIR 1969 SC 78) (para 32):

"Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intentment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right of liability and further lays down that all questions about the said right and liability shall be determined by the Tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not."

22. In the instant case, as pointed out earlier though Section 46 of the Act provides for criminal prosecution there is no remedy provided to the Committee to enforce its statutory right as contemplated under Section 29 (e) to enforce the provisions of the Act, the Rules or the Bye-laws and the conditions of the licence granted under the Act.

23. On a conspectus of all the relevant provisions of the Act referred to above, it is manifest that the Committee is endowed with certain monopoly powers for regulating the marketing of agricultural produce within the specified market areas. It is also charg-

ed with a duty to enforce the provisions of the Act. The conferral of such pleary powers and right, though by a statute, certainly constitutes a civil right in the plaintiff, and merely because penal consequences are provided for that, by itself, would not deprive the plaintiff of its civil right to seek enforcement of the provisions of the Act or to prevent breach or infringement of its civil right. The jurisdiction of the Civil Court, therefore, is not ousted either expressly or by necessary intendment. So far as the commission agents who are acting in flagrant violation of the terms of the licence and trying to fleece the poor agriculturists are concerned, the Committee is entitled to ask for issue of a writ of temporary injunction to prevent the breach of the terms of the licence by which these persons have bound themselves.

24. In the result, I find that the non-applicant-plaintiff made out a prima facie case and the lower appellate Court was justified in granting the applications for temporary injunction. These revisions, therefore, have to be dismissed. All these revisions are dismissed with costs.

25. Shri Bhangde prays for grant of leave to appeal to the Supreme Court. Leave refused.

Revisions dismissed.

AIR 1982 BOMBAY 563

CHANDURKAR AND PENDSE, JJ.

Jaypal Bandu Adke and another, Petitioners v. Basavali Gurulingappa and another, Respondents.

Special Civil Appns. Nos. 1812 and 1866 of 1977, D/- 16/17-3-1982.

(A) *Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 12 (3) (a) and Explanation 1 — Mode of raising dispute with regard to standard rent — Dispute raised in reply to S. 12 (2) notice within one month from receipt of S. 12 (2) notice — Cannot take case out of S. 12 (3) (a).* AIR 1980 Bom 307 : 1980 Bom CR 716 Overruled; AIR 1977 Guj 15 : 18 Guj LR 32 (FB) Dissented from.

Considering the legal position as now settled by the decisions of the Supreme Court, it is clear that the only way to prevent a decree for eviction being passed under the provisions of S. 12 (3) (a) is that the tenant must make an application raising a dispute regarding standard rent and must ask for

fixation of standard rent under Section 11 (3) as required by Explanation I to Section 12. There is no other mode permissible for raising a dispute as to standard rent for the purposes of Section 12. By raising a dispute with regard to standard rent by the tenant in a reply to the demand notice before the expiry of one month without making an application under Section 11 (3) read with Explanation I to Section 12, the Court will not be prevented from passing a decree for eviction under the provisions of S. 12 (3) (a). The fact that there was some dispute about standard rent prior to the notice under Section 12 (2) would also be immaterial and would not affect the power of the Court to pass a decree under Section 12 (3) (a) if the conditions referred to in Section 12 (3) (a) are satisfied if no application has already been made under Section 11 (3) of the Act. AIR 1968 SC 1109; AIR 1976 SC 2005 and (1978) 2 Mah LR 175 (Bom), Followed; AIR 1980 Bom 307 : 1980 Bom CR 716, Overruled; AIR 1977 Guj 15 : 18 Guj LR 32 (FB), Dissented from. (Para 32)

(B) **Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 12 (3) (b) — Condition as to payment of rent regularly — Tenant seeking benefit of section must strictly comply with condition — Court has no discretion to grant relief to tenant on basis of substantial compliance.** (1958) 60 Bom LR 1359, Held not good law in view of AIR 1968 SC 1109 and AIR 1978 SC 955; AIR 1980 Bom 307 : 1980 Bom CR 716, Overruled. (Para 39)

Cases Referred : Chronological Paras

AIR 1980 Bom 307	1, 7, 9, 11, 27, 34
AIR 1978 SC 955	34, 36, 37, 38, 39
1978 Mah LJ 611	34
(1978) 2 Mah LR 175	6, 8, 31
AIR 1977 Guj 15 (FB)	4, 23, 30
AIR 1976 SC 2005	1, 5, 6, 8, 9, 11, 12, 14, 17, 18, 20, 21, 23, 26, 27, 28, 30, 31, 37
AIR 1976 Bom 288 : 1976 Lab IC 263	35, 36, 38
AIR 1976 Bom 336 : 1977 Mah LJ 261	33
(1971) Spl. Civil Appln. No. 859 of 1967, D/- 31-3-1971 (Bom)	14, 17
AIR 1971 Bom 396 : 73 Bom LR 371 (FB)	13, 14
(1969) 71 Bom LR 607 : 1969 Mah LJ 808	34-A, 38
AIR 1968 SC 1109	1, 6, 8, 9, 12, 20, 21, 29, 30, 31, 36, 37, 38
AIR 1968 Guj 172	37
AIR 1964 SC 1341	9, 24, 25, 27, 28
AIR 1964 Guj 9	11, 23, 28

(1958) 60 Bom LR 1359 : ILR (1959) Bom 437 34, 36, 37, 38, 39
(1954) 56 Bom LR 619 33
In Spl. Civil Appln. No. 1812 of 1977 :

Ajit P. Shah and M. D. Gangakhedkar, for Petitioners: B. P. Apte, for Respondent No. 1.

In Spl. Civil Appln. No. 1866 of 1977 :

S. M. Dange for M. V. Sali, for Petitioner; V. P. Tipnis, for Respondent No. 1.

CHANDURKAR, J.:— These two petitions have been referred to the Division Bench on an order of reference made by a learned single Judge, who experienced some difficulty in following decision of Jahagirdar, J. in Gulabchand v. Noorbeg, AIR 1980 Bom 307. The questions referred relate to the construction of the provisions of Section 12 (3) (a) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the "Rent Act") and the determination of the correct ratio of two decisions of the Supreme Court in Dhan-sukhlal Chhaganlal v. Dalichand Virchand, AIR 1968 SC 1109 and Harbanslal Jag-mohandas v. Prabhudas Shivilal, AIR 1976 SC 2005. Since the only points on which the decisions of both the petitions will really turn related to the construction of the provisions of Sections 12 (3) (a) and 12 (3) (b) of the Rent Act, we have heard the learned Counsel for the petitioners and the respondents in these cases not only on the questions of law referred but also on the merits of the two petitions and this judgment will, therefore, dispose of both the petitions.

2. The three questions of law which have been referred by the learned single Judge in his order of reference are as follows:—

(1) Whether in order to take the case out of the provisions of Section 12 (3) (a), it is obligatory on the tenant to make an application for fixation of standard rent under Section 11 (3) of the Bombay Rent Act as required by the 1st Explanation to Sec. 12?

(2) Whether the raising of the standard rent dispute by the tenant by reply to the demand notice before expiry of one month without making an application under Sec. 12 and the Explanation, or existence of such a dispute prior to the demand notice without the tenant making an application under Section 11 (3) would take the case out of the provisions of Section 12 (3) (a)?

(3) Whether it is obligatory for the tenant to make an application under Section 11 (3)

before the expiration of the period of one month from the date of service of demand notice even when his application under Section 11 (1) is pending on the date of demand notice?

3. We shall briefly refer to the facts in the two petitions before us. Special Civil Application No. 1812 of 1977 is filed by the landlords and it arises out of a suit filed by them claiming possession of the suit premises which consist of house property which was occupied by the tenant-respondent on a monthly rent of Rs. 55/- in Ward B of Kolhapur. The notice terminating the tenancy on the ground of arrears of rent was issued by the landlords on 29th January, 1973 and the arrears claimed were for the period 1st Aug., 1970 to 31st Dec., 1972. The tenant by a notice dated 15th Feb., 1973 disputed that Rs. 50/- was standard rent and claimed that the standard rent was Rs. 45/-. The suit for possession was filed on 4th September, 1973. The trial Court held that the standard rent of the premises was Rs. 50/- per month and that the tenant was entitled to the benefit of Section 12 (3) (b) of the Rent Act. Giving credit for the amount of Rs. 252.56. which was paid by the defendant by way of municipal taxes, the trial Court passed a money decree for Rs. 1,547.44 but dismissed the suit for possession.

4. In appeal filed by the landlord, the Appeal Court relying on a Full Bench decision of the Gujarat High Court in Ramniklal Dwarkadas Modi v. Mohanlal Laxmichand, AIR 1977 Guj 15, took the view that the tenant having raised a dispute with regard to standard rent in the reply to the notice under Section 12 (2) of the Rent Act within one month of the receipt of the notice, the tenant was not obliged to make a full payment immediately or file a separate application for fixation of standard rent under the provisions of Section 11 (3) of the Rent Act read with Explanation 1 to Section 12 of the Rent Act. The Appeal Court further held that when the tenant gives a reply to the landlord's notice within one month disputing the standard rent, it becomes obligatory on the landlord to apply to the Court and get the standard rent fixed. The claim of the landlord under Section 12 (3) (a) was thus negatived, recording a finding that non-payment of arrears of rent did not amount to neglect since the evidence showed that the tenant was always ready and willing to pay the rent. It does not appear that the question as to whether the tenant was entitled to the protection of Section 12 (3) (b) of the

Rent Act was agitated before the Appeal Court.

5. Special Civil Application No. 1866 of 1977 is filed by the tenant. The tenant is in occupation of a ground floor of the suit house as a monthly tenant at Rs. 4/-. Claiming that the tenant was in arrears of rent for 28 months, a notice terminating the tenancy of the tenant was issued on 5th January, 1968 by the landlord. The tenant replied to this notice on 21st January, 1968 disputing that Rs. 4/- per month was the standard rent. After the suit was filed on 11th January 1971, a written statement came to be filed on 27th August, 1971 and an application for determination of standard rent also came to be filed by the tenant on the same day. The trial Court fixed the standard rent of the premises at Rs. 4/- per month and passed a conditional decree for possession if the tenant failed to pay rent of Rs. 176/- within one month from the date of the decree. The trial Court took the view that the tenant was not a wilful defaulter and that he was willing to pay the rent of the suit premises to the plaintiff. In appeal filed by the plaintiff, the District Judge, Jalgaon, took the view that though the tenant had "raised a dispute about standard rent in the written statement or by an application filed on the same day", he had not preferred any application within the period of one month from the date of the notice and, therefore, in view of the decision in Harbanslal's case cited (AIR 1976 SC 2005) (supra), it could not be said that there was a dispute about standard rent within the meaning of Section 12 (3) (a) of the Rent Act. He, therefore, held that the case would be covered under Sec. 12 (3) (a) of the Rent Act and the plaintiff would be entitled to a decree for possession. With regard to Section 12 (3) (b) of the Rent Act, the District Judge held that he had not complied with the provisions of Section 12 (3) (b) also inasmuch as he had not paid rent regularly as required and the defendant would, therefore, not be entitled to the benefit of Section 12 (3) (b).

6. When both these petitions were taken up for hearing by the learned single Judge, it was argued on behalf of the landlord that in view of the decision in Dhansukhlal's case (AIR 1968 SC 1109) and Harbanslal's case cited (AIR 1976 SC 2005) (supra), the tenant can only be considered to be ready and willing to pay rent if before the expiry of the period of one month after the notice referred to in sub-section (2) of S. 12 he makes an application to the Court under S. 11 (3) of the Rent Act and thereafter pays or tenders

the amount of rent and permitted increases specified by the Court. Apart from the two decisions of the Supreme Court, a decision of a Division Bench of this Court in Special Civil Appln. No. 2810 of 1971 (Champalal Pratapmal by his Vahiawatdar Mishrilal Chhogalal v. Municipal School Board (Primary School, Nandurbar) decided on 28th June, 1977* was also brought to the notice of the learned Judge. In that decision, the Division Bench after referring to the decision in Harbanslal's case (AIR 1976 SC 2005) observed as follows:—

"It is therefore now clear that where rent is payable by month and there are arrears of more than six months and the tenancy is terminated by valid notice, either the entire arrears of rent must be paid within one month or if a dispute regarding standard rent has to be raised, the tenant must apply within one month of the date of the receipt of the notice under S. 11 (3) and obtain appropriate direction from the Court. If he complies with those directions, he must be deemed to be a person who is ready and willing to pay. No third mode is now available for getting the protection of the Rent Act on the basis that the tenant is one who is ready and willing to pay."

(Underlining ours.)

7. On behalf of the tenants the contention raised before the learned single Judge was that if the dispute exists either on the date of the notice or if such dispute is raised within one month after the notice by a proper reply to the said notice, even without making an application under S. 11 (3) of the Rent Act, the tenant was entitled to protection under S. 12 (3) (b) of the Rent Act and the matter was taken out from the mischief of S. 12 (3) (a). This argument was advanced on the basis of the decision of Jahagirdar J. in Gulabchand's case cited (AIR 1980 Bom 307) (supra). The learned single Judge could not persuade himself to agree with the view taken by Jahagirdar J.

8. Mr. Shah appearing on behalf of the petitioner in Spl. Civil Appln. No. 1812 of 1977 and Mr. Tipnis appearing on behalf of the landlord in the other petition have contended that in view of the decision in Dhansukhlal's case (AIR 1968 SC 1109) and Harbanslal's case (AIR 1976 SC 2005) as well as the Division Bench decision of this Court in Champalal Pratapmal v. Municipal School Board (Primary School), Nandurbar, decided on 28th June, 1977* it is no longer open to a

tenant to contend that even if the tenant does not make an application under S. 11 (3) of the Rent Act, as required by Explan. I to S. 12, he could still contend that there is a dispute with regard to standard rent because the tenant has raised the dispute in a reply to the notice served on him under S. 12 (2) and, therefore, his case does not fall within the provisions of S. 12 (3) (a) of the Rent Act.

9. On the other hand, Mr. Apte and Mr. Dange appearing on behalf of the tenants in the two petitions have wholly relied on the decision of Jahagirdar J. in Gulabchand's case (AIR 1980 Bom 307) and, according to the learned counsel, that decision takes the correct view that making an application under Sec. 11 (3) after the receipt of the notice under S. 12 (2) of the Rent Act is not the only mode of raising a dispute with regard to standard rent and that even if a dispute with regard to standard rent is raised in a reply to the notice given within one month from the date of the receipt of the notice under S. 12 (2), the Court must find that the tenant is ready and willing to pay rent and that in such a case, the provisions of S. 12 (3) (a) of the Rent Act will not be attracted. The learned counsel have contended that the only ratio of Harbanslal's case (AIR 1976 SC 2005) is that a dispute with regard to standard rent cannot be raised beyond one month from the date of the receipt of the notice and the decision of the Supreme Court in Abbasbhai v. Gulamnabi, AIR 1964 SC 1341, had specifically laid down that a dispute with regard to standard rent can be raised by giving a reply to the notice issued by the landlord under S. 12 (2) of the Rent Act within one month of the receipt of the notice and this view has been upheld by the Supreme Court in Dhansukhlal's case (AIR 1968 SC 1109). In other words, the contention appears to be that in Harbanslal's case, the Supreme Court only decided that the dispute should be raised within one month and the Supreme Court was not concerned with the mode of raising a dispute and so far as the mode of raising a dispute was concerned, there was express authority in the decision in Abbasbhai's case that such a dispute could be raised by a reply to a notice under S. 12 (2).

10. Since the correctness of the view taken by Jahagirdar J. in Gulabchand's case is challenged, it is necessary to refer in some detail to that judgment. Prior to that, it would be necessary to refer to the material provisions in S. 12 and S. 11 (3) of the Rent Act which read as follows:—

*Reported in (1978) 2 Mah LR 175.

"12. (1) A landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of this Act.

(2) No suit for recovery of possession shall be instituted by a landlord against tenant on the ground of non-payment of the standard rent or permitted increases due, until the expiration of one month next after notice in writing of the demand of the standard rent or permitted increases has been served upon the tenant in the manner provided in Section 106 of the Transfer of Property Act, 1882.

(3) (a) Where the rent is payable by the month and there is no dispute regarding the amount of standard rent or permitted increases, if such rent or increases are in arrears for a period of six months or more and the tenant neglects to make payment thereof until the expiration of the period of one month after notice referred to in sub-section (2), the Court shall pass a decree for eviction in any such suit for recovery of possession.

(b) In any other case, no decree for eviction shall be passed in any such suit if, on the first day of hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in Court the standard rent and permitted increases then due and thereafter continues to pay or tender in Court regularly such rent and permitted increases till the suit is finally decided and also pays costs of the suit as directed by the Court.

(4)

Explanation I.— In any case where there is a dispute as to the amount of standard rent or permitted increases recoverable under this Act the tenant shall be deemed to be ready and willing to pay such amount if, before the expiry of the period of one month after notice referred to in sub-section (2), he makes an application to the Court under sub-section (3) of Section 11 and thereafter pays or tenders the amount of rent or permitted increases specified in the order made by the Court."

"11 (3). If any application for fixing the standard rent or for determining the permitted increases is made by a tenant who has received a notice from his landlord under sub-section (2) of S. 12, the Court shall

forthwith specify the amount of rent or permitted increases which are to be deposited in Court by the tenant, and make an order directing the tenant to deposit such amount in Court or at the option of the tenant make an order to pay to the landlord such amount thereof as the Court may specify, pending the final decision of the application. A copy of the order shall be served upon the landlord. Out of any amount deposited in Court, the Court may make an order for payment of such reasonable sum to the landlord towards payment of rent or increases due to him as it thinks fit. If the tenant fails to deposit such amount or, as the case may be, to pay such amount thereof to the landlord, his application shall be dismissed."

11. In Gulabchand's case (AIR 1980 Bom 307), the petitioner before this Court was the tenant who was in occupation of house premises at a rent of Rs. 500/- per annum. A suit was filed by the landlord for possession on the ground that the tenant had failed to pay arrears of rent which were for a period of more than six months within a month after the notice under S. 12 (2) of the Rent Act was served upon him. The other grounds on which possession was claimed are not relevant for our purpose. The tenant denied that there was any default on his part. The suit was decreed by the trial Court on the ground that the tenant was in arrears of rent and the landlord was held entitled to a decree for eviction in view of the provisions of S. 12 (3) (a) of the Rent Act. This part of the decree was upheld in appeal. The tenant then filed a writ petition in this Court. The contention of the tenant was that there was a dispute with regard to standard rent even before the issue of the notice by the landlord and the case should have been dealt with as one falling under S. 12 (3) (b) of the Rent Act. It may be pointed out that the Appeal Court had recorded a finding that the tenant had not complied with the conditions under Section 12 (3) (b) of the Rent Act. An additional fact which has to be noticed is that prior to the issue of the notice following which the suit for eviction was filed, the landlord had issued a notice earlier on 1st May, 1968 calling upon the tenant to pay rent and to this notice, the tenant had sent a reply dated 24th May, 1968 mentioning therein that the landlord was demanding excessive rent and that agreed rent was not the standard rent. No action was, however, taken by the landlord on this notice and the suit was filed only after the second notice was issued. While disposing of the writ peti-

tion the learned Judge found that on the date on which the suit notice was sent on 12th March, 1971, there was already a dispute relating to the standard rent. The learned Judge then posed a question, namely, "whether it is necessary that the dispute about the standard rent should be raised after the notice under S. 12 (2) of the Bombay Rent Act is issued or whether it is sufficient that such a dispute existed on the date on which the notice is issued or even prior to that". The learned Judge referred to the decision in Abbasbhai's case and read that decision as an authority for the proposition that "in order to establish that there is a dispute about the standard rent, it is not necessary for a tenant to make an application under S. 11 (3) read with Explanation I of Section 12 of the Bombay Rent Act within one month after the receipt of the notice under S. 12 (2)." The learned Judge further went on to observe: "Such a dispute could be raised in a manner other than by the filing of an application for fixation of standard rent". It is the correctness of this view which has been the subject of debate at the bar before us. The learned Judge then referred to the decision in Harbanslal's case (AIR 1976 SC 2005) and found that in Harbanslal's case, the Supreme Court had approved of the law laid down by the Gujarat High Court in Ambalal v. Babaldas, AIR 1964 Guj 9. The law laid down in Ambalal's case, according to the learned Judge, was as follows (at p. 2010):—

"In order to attract the applicability of S. 12 (3) (a) of the Act there must be non-existence of the dispute at the date of the notice and such non-existence must continue right up to the expiration of one month from the date of service of the notice so that if the dispute is raised at any time prior to the expiration of the said period of one month, the operation of S. 12 (3) (a) would be excluded."

The learned Judge noticed the observations of the Supreme Court in Harbanslal's case (AIR 1976 SC 2005) that in order to escape from the consequences mentioned in Section 12 (3) (a) of the Rent Act, the tenant should make an application under Sec. 11 (3) of the Rent Act within one month of the service of the notice under S. 12 (2) but went on to observe: "This of course is one of the ways in which a case is taken out of the clutches of S. 12 (3) (a) of the Act" and then further observed as follows (at p. 311 of AIR Bom):—

"Since it has been in unmistakable terms mentioned by the Supreme Court (reference

is to Harbanslal's case) that a dispute can exist either on the date of the notice or within one month after the notice by an appropriate reply to the notice (without making an application under S. 11 (3) of the Bombay Rent Act), it is clear that an application under S. 11 (3) read with Explan. I to Section 12 of the Bombay Rent Act is not the only way of showing that there is a dispute about the standard rent."

In support of this, the learned Judge quoted the decision of the Full Bench of the Gujarat High Court in Ramniklal's case.

12. It will be our endeavour to find out and ascertain on a reading of the two judgments of the Supreme Court in Dhansukhlal's case (AIR 1968 SC 1109) and Harbanslal's case (AIR 1976 SC 2005) whether the proposition which has been laid down by the learned single Judge that if a reply has been given by a tenant to a notice issued by the landlord under S. 12 (2) of the Rent Act and in that reply he had disputed the standard rent, that is a permissible way of raising a dispute for the purposes of taking the case out of the clutches of S. 12 (3) (a) of the Rent Act.

13. Before we refer to the two decisions of the Supreme Court, it would be appropriate to refer to a Full Bench decision of this Court in Dattu Subhana v. Gajanan Vithoba, 73 Bom LR 371: (AIR 1971 Bom 396), in which the Full Bench was considering the provisions of Ss. 12 (3) (a) and 12 (3) (b) of the Rent Act and the Full Bench took the view that a tenant can raise a dispute as to the standard rent even after a suit is filed against him for eviction on the ground of non-payment of rent for more than six months, by his written statement and that would be a dispute for the purposes of Sec. 12 of the Act. The Full Bench further took the view that the dispute contemplated in S. 12 (3) (a) is not limited to the dispute within one month of the notice under S. 12 (2) as required by Explan. I.

14. Now, the decision in Harbanslal's case (AIR 1976 SC 2005) was given in two appeals. The appeal of Harbanslal was an appeal from a judgment of the Gujarat High Court, while the other appeal Rev. Everett M. Fasanachat v. West End Works was an appeal from a decision of this Court in Special Civil Appln. No. 859 of 1967 decided on 31st March, 1971. We have sent for the original record of that petition. The facts in that case show that the tenancy of the tenants was terminated by notice dated 5th April, 1963 because they were in arrears

of rent from 15th March, 1960 to 15th March, 1963 amounting in all to Rs. 3,600/-. Some amounts by way of insurance premia were also claimed from the tenant. Apart from other grounds on which the suit was contested, a plea introduced by way of amendment to the written statement was that the standard rent of the premises was Rs. 50/- and the landlords could not demand anything more. The trial Court found in favour of the plaintiffs and found the standard rent to be Rs. 100/- per month and the tenants were found to be defaulters in respect of rent from March 15, 1960. A decree for possession came to be passed along with the decree for arrears. The tenant's appeal against the decree came to be dismissed by the Assistant Judge who held that the provisions of the Bombay Rent Act were not applicable as the suit premises were used for the purpose of manufacture, but a finding was recorded, if necessary, that the case fell under S. 12 (3) (a) and not under S. 12 (3) (b) and that the standard rent was Rs. 100/-. The tenant then filed a petition under Art. 227 of the Constitution of India in this Court. One of the arguments advanced on behalf of the tenant was that though the tenancy was validly terminated, no decree for eviction could be passed against the tenants because the tenants were always ready and willing to pay the rent and there was a dispute with regard to the amount payable by the tenants in view of the damage caused to the building and also in view of the fact that in 1939, the rent was fixed at Rs. 50/- per month for the same premises and in 1951 the rent was increased to Rs. 100/-. The learned Judge, who decided the petition, took the view that the Assistant Judge was in error in applying the provisions of S. 12 (3) (a) to the facts of the case as there was a dispute about standard rent payable by the tenants and in such a case, S. 12 (3) (a) would not apply. The learned Judge noticed the view taken by the learned Assistant Judge that a dispute raised by the tenant was not a bona fide dispute and went on to observe that the words "bona fide dispute" were not to be found in Section 12 (3) (a) and that if there is a dispute, whether the dispute is bona fide or mala fide, it is a dispute within the meaning of Section 12 (3) (a). The learned Judge found that the written statement having been allowed to be amended, the Assistant Judge was not right in referring to the original written statement and in holding that there was no bona fide dispute. The learned Judge then made the following observations:—

"It is now settled by the decision of the Full Bench of this Court in Special Civil Application No. 781 of 1968 decided on Aug. 17, 1970 (Dattu Subhana v. Gajanan Vitthoa, 73 Bom LR 371: (AIR 1971 Bom 396)):

'Explanation I is not the only mode in which the tenant's readiness and willingness to pay can be established. It is no doubt one mode and if fulfilled will give the tenant protection under Sec. 12 itself, but there is nothing in the provisions of S. 12 to indicate that the tenant cannot raise a dispute such as is contemplated in S. 12 when he comes to be sued in the Court for recovery of rent by raising the issue as to standard rent in his written statement in answer to the suit. In our opinion, the cumulative effect of Section 11 (4) read with the provisions of Sec. 12 squarely will be that he can do so.'

The defendants in the present case did so. Therefore, the learned Assistant Judge was wrong in applying the provisions of Section 12 (3) (a) to the facts of the case."

The observations quoted above will thus clearly indicate that when the learned Judge took the view that the case was not covered by S. 12 (3) (a) of the Rent Act, he had taken the view that it was permissible to raise a dispute in a mode other than the one prescribed by Explan. I to S. 12 read with Section 11 (3) of the Rent Act and for this he found support in the decision of the Full Bench. That is how the applicability of Sec. 12 (3) (a) of the Rent Act to the facts of the case was negated. Now, it was this decision which became the subject matter of appeal before the Supreme Court in Harbanslal's case and that decision must now be read in the light of these facts.

15. It is important to point out that in the other appeal with which the Supreme Court was dealing and which had come to the Supreme Court from the Gujarat High Court, the view taken by the Gujarat High Court was that the dispute as to standard rent was to be raised within one month from the service of the notice on the tenant. It appears that the finding in the Gujarat case was that after the notice was given by the landlord on 6th Dec., 1966 to the tenant, a letter was alleged to have been sent by the tenant on 16th Feb., 1967 though two earlier letters mentioned in that letter were found to have been fabricated. Referring to the decision of this Court the Supreme Court observed as follows (at p. 20 of AIR 1977 Guj):—

"The view of the Bombay High Court overlooks the limitation of time within which

a dispute is to be raised as to standard rent. The view of the Bombay High Court is that disputing within one month of the service of the notice terminating the tenancy is one mode of raising a dispute and there is another mode of raising the dispute at any stage of the suit. The view of the Bombay High Court nullifies the provisions contained in Sec. 12 and Explanation thereto and confers a right on the tenant where the legislation does not contemplate such a right."

Now, when the Supreme Court in the above quoted paragraph did not approve of the view taken by this Court that disputing the standard rent within one month of the service of the notice is one mode of raising a dispute and observed that this view nullifies the provisions contained in Sec. 12 and Explanation thereto, the Supreme Court must be held to have positively taken the view that apart from the mode referred to in the Explanation to S. 12, the tenant has no other mode in which the tenant can raise a dispute about standard rent for the purposes of S. 12 (3) (a). When the Supreme Court observed that the view of this Court nullifies the Explanation and overlooks the limitation, it is obvious that the reference was to the limitation of one month prescribed by Explan. I to Sec. 12. That Explanation in unmistakable terms requires that in any case where there is a dispute as to amount of standard rent or permitted increases recoverable under the Act, the tenant shall be deemed to be ready and willing to pay such amount if before the expiry of the period of one month after notice referred to in sub-section (2) of S. 12, he makes an application to the Court under sub-section (3) of Sec. 11 and thereafter pays or tenders the amount of rent or permitted increases specified in the order made by the Court. When the Supreme Court observed that the provisions of S. 12 were being nullified, the reference was to the provisions of Sec. 12 (1) and S. 12 (3) (a).

16. Section 12 (1) disables a landlord from recovering possession of any premises so long as the tenant pays or is ready and willing to pay the amount of standard rent and permitted increases and observes and performs the other conditions of the tenancy so far as they are consistent with the provisions of the Rent Act. In a case where there is a dispute, the Legislature has provided for a deeming fiction whereby a tenant can be considered to be ready and willing to pay only if he acts in the manner provided by Explan. I. Explanation I contemplates two things. It firstly requires the

tenant to make an application for fixation of standard rent within the specified period, namely, before the expiry of one month after the notice under S. 12 (2) is received by him and the second condition is that he has to pay or tender the amount of rent or permitted increases specified in the order made by the Court. Unless these two conditions are satisfied, it cannot be said that the tenant is ready and willing to pay the amount of standard rent as contemplated by Sec. 12 (3) (a). The Explanation clearly provides for what the tenant is to do where he wants to raise a dispute about the standard rent before he can claim to be out of the rigour of S. 12 (3) (a) of the Rent Act.

17. When the appeal of the landlord was allowed by the Supreme Court in the West End Works' case and Harbanslal's case (AIR 1976 SC 2005), the only result of the decision of the Supreme Court can be that the view which this Court had taken in the judgment appealed against that the mode provided by Explanation I to Sec. 12 was only one of the modes of raising a dispute and that there were other modes and the first mode was not the exclusive mode, must naturally be taken to have been overruled.

18. The matter, in our view, is clinched by the observations of the Supreme Court in para 25 of the judgment in Harbanslal's case (AIR 1976 SC 2005). These observations are as follows (at p. 211):—

"The provisions in S. 11 (3) of the Act deal with orders which may be passed by the Court during the pendency of the application disputing the rent. Provisions in Sec. 11 (4) of the Act deal with orders which may be passed consequent upon dispute as to rent. It is only when an application disputing rent is made within the time contemplated by Explan. I to S. 12 of the Act that the provisions in sub-sections (3) and (4) of S. 11 are attracted."

(Underlining ours.)

The Supreme Court in these observations has emphasised the time element which is prescribed by Explan. I because it is by this Explanation that there is an obligation on the tenant, if he wants to raise a dispute with regard to standard rent, that he must make an application under S. 11 (3) within a period of one month.

19. Now, if you go to S. 11 (3) of the Rent Act, it expressly refers to an application for fixing standard rent by a tenant who has received a notice from his landlord

under sub-section (2) of S. 12. When such application is made, there is an obligation on the Court to forthwith specify the amount of rent or permitted increases which are to be deposited in Court by the tenant and the Court is further obliged to make an order directing the tenant to deposit such amount in Court or at the option of the tenant make an order to pay to the landlord such amount thereof as the Court may specify pending the final decision of the application. It is important to point out that under S. 11 (3) it is provided that if the tenant fails to deposit such amount or, as the case may be, to pay such amount thereof to the landlord, his application shall be dismissed. In other words, the effect of the provisions of Section 11 (3) is that if the tenant fails to comply with the order made by the Court in the application under S. 11 (3), the tenant will be relegated to the same position in which he was before making the application and the result will be that it will have to be held that no dispute has been raised by him.

20. Now, in Harbanslal's case (AIR 1976 SC 2005), the Supreme Court has referred to the earlier decision in Dhansukhlal's case. In Dhansukhlal's case (AIR 1968 SC 1109), the Supreme Court has considered the provisions of S. 12 (1) and the Explanation and the following observations are relevant (at p. 1112):—

"Section 12 (1) must be read with the Explanation and so read it means that a tenant can only be considered 'to be ready and willing to pay' if, before the expiry of the period of one month after notice referred to in sub-section (2), he makes an application to the Court under sub-section (3) of S. 11 and thereafter pays or tenders the amount of rent or permitted increases specified by the Court."

In that case, it was found as a fact that the tenant had made no payment within the period of one month of the notice of ejectment and although in his written statement he raised a dispute about the standard rent, he had made no application in terms of Section 11 (3) of the Rent Act. In that context, the Supreme Court pointed out that where a suit is filed on the ground that the tenant was in arrears for a period of more than six months and although raising a dispute as to the standard rent or permitted increases recoverable under the Act, the tenant makes no application in terms of Section 11 (3), he cannot claim the protection of S. 12 (1) by merely offering to pay or even paying all arrears due from him when

the Court is about to pass a decree against him. The Supreme Court then observed as follows (at p. 1112):—

"..... if sub-section (3) (a) is not attracted the tenant, if he is in arrears, cannot sit quiet and offer to pay all the amount due from him at the time of the hearing of the suit so as to get the protection of Sec. 12 (1). To be within the protection of sub-sec. (1) where he raises a dispute about the standard rent payable he must make an application to the Court under sub-section (3) of S. 11 and thereafter pay or tender the amount of rent and permitted increases, if any, specified in the order made by the Court. If he does not approach the Court under S. 11 (3), it is not open to him thereafter to claim the protection of S. 12 (1)."

The observations quoted by us, in our view, clearly indicate that the tenant can only be considered ready and willing to pay if he makes an application to the Court under sub-section (3) of S. 11 and thereafter pays or tenders the amount of rent or permitted increases specified by the Court. We shall presently refer to the decision of the Full Bench of the Gujarat High Court where a view has been expressed that the use of the word 'only' by the Supreme Court in its decision was not intended to exclude any other mode of raising a dispute, though we are inclined to take the view that this controversy is now academic in view of the observations of the Supreme Court in Harbanslal's case. As we have already pointed out, that decision has the effect of overruling the earlier decision of this Court which had taken the view that there was more than one mode of raising the dispute as to standard rent.

21. Referring to the decision in Dhansukhlal's case (AIR 1968 SC 1109), the Supreme Court in paragraph 23 has observed as follows:—

"This Court found in Chhaganlal's case (AIR 1968 SC 1109) (supra) (Reference is to Dhansukhlal Chhaganlal's case) that the tenant made no payment within the period of one month of the notice of ejectment and further that although in his written statement he raised a dispute about the standard rent he made no application in terms of Sec. 11 (3) of the Act. The tenant can claim protection from the operation of S. 12 (3) (a) of the Act only if the tenant makes an application within one month of the service of the notice terminating the tenancy by raising a dispute as to standard rent."

(Underlining ours.)

It is significant to point out that the decision in Dhansukhlal's case has been so read by the Supreme Court as laying down that the only way in which a tenant can claim the protection from the operation of Section 12 (3) (a) is that the tenant must make an application within one month of the service of the notice terminating the tenancy by raising a dispute as to standard rent. Apart from the other observations of the Supreme Court in Harbanslal's case (AIR 1976 SC 2005), it is difficult for us to see how any controversy can now survive as to whether there is any other mode of raising a dispute in view of the above quoted observations of the Supreme Court while construing Dhansukhlal's case.

22. Referring to these above quoted observations, Jahagirdar J. has in para 10 observed: "It is true that in Harbanslal's case the Supreme Court has mentioned that in order to escape from the consequences mentioned in S. 12 (3) (a) of the Bombay Rent Act, the tenant should make an application under S. 11 (3) of the said Act within one month of the service of the notice under Sec. 12 (2). This of course is one of the ways in which a case is taken out of the clutches of S. 12 (3) (a) of the Act." With respect, in our view, the construction placed on the observations of the Supreme Court that the Supreme Court was referring to only one of the modes in which a case is taken out of the clutches of S. 12 (3) (a) is not justified. The consequence which must necessarily follow from the use of the word 'only' by the Supreme Court in the observations quoted above at the end of para 23 has not been given effect to by the learned Judge and if the observations in para 24 are properly read, they, in our view, leave no room for doubt that the only mode of raising a dispute is by making an application under S. 11 (3) of the Act. We are, therefore, unable to concur with the view taken by the learned Judge that an application under S. 11 (3) is only one of the ways in which the case is taken out of the clutches of Sec. 12 (3) (a) of the Rent Act. These observations, in our view, are directly contrary to the decision of the Supreme Court in Harbanslal's case.

23. It is no doubt true that such a view has been taken by the Full Bench of the Gujarat High Court in Ramniklal's case (AIR 1977 Guj 15). In Ramniklal's case, the Full Bench of the Gujarat High Court has approved of the view taken in an earlier decision in Ambalal v. Babaldas, AIR 1964 Guj 9, as regards the stages at which the

dispute as to the standard rent could be raised and also the manner in which it could be raised and three propositions of law were laid down. The third proposition is the relevant proposition for our purpose and it was as follows:—

"The tenant can also claim protection from the operation of S. 12 (3) (a) of the Act by raising a dispute as to the standard rent either prior to the notice under Section 12 (2) of the Act or by reply to the notice but in this case the tenant must do so within one month from the receipt of the notice referred to in S. 12 (2) of the Act."

We have already pointed out that in view of the fact that the decision in Harbanslal's case (AIR 1976 SC 2005) was given in an appeal directed against the judgment of this Court which followed a Full Bench decision of this Court in which it was held that an application under S. 11 (3) was only one of the modes of raising a dispute and that decision has been set aside, the third proposition in so far as it holds that the dispute can be raised by a reply to the notice under Section 12 (2) of the Rent Act within one month must now, in our view, be no longer held to be good law. Apart from the controversy as to whether there can be any other mode than the one provided by Explan. I read with S. 11 (3), it is difficult for us to find any sanction for the element of limitation introduced in this proposition for giving a reply to the notice. The period of one month is statutorily fixed by Explan. I to Section 12, but that is for making an application under S. 11 (3). The other reference to a period of one month is in S. 12 (3) (a), but that is in the context of the tenant neglecting to make a payment of the arrears. No other provision under the Rent Act has been brought to our notice on the basis of which this element of limitation for replying to the notice can be substantiated.

24. One of the decisions on which Jahagirdar J. has relied for holding that a dispute with regard to standard rent could be raised in a manner other than by filing of an application under S. 11 (3) of the Rent Act is the decision of the Supreme Court in Vora Abbasbhai's case (AIR 1964 SC 1341). In Vora Abbasbhai's case, the notice served by the landlord on the defendant (tenant) calling upon him to deliver possession of the premises on the ground that he had failed to pay rent since Oct. 1, 1955 was given on 1st Dec., 1956 and was served on 3rd Dec., 1956. On 7th Dec., 1956 the tenant sent a reply that he had paid rent at the agreed rate up to 1st April, 1956 and on 5th Jan.,

1957 he made an application under S. 11 (1) of the Bombay Rent Act for an order fixing the standard rent and also for an order under S. 11 (3) specifying interim rent. The tenant sent a letter to the landlord on 7th Jan., 1957 informing him about the application moved by him. The suit for ejectment was instituted on 27th Jan., 1957. The suit was dismissed by the trial Court which held that the standard rent was Rs. 50/- and taking into account the aggregate amount deposited, it was held that the defendant was not liable to be evicted for non-payment of standard rent and in any event, it was established that the defendant was ready and willing to pay the amount of standard rent and permitted increases. The Appeal Court treated the case as one under Section 12 (3) (b) and the decree of dismissal was confirmed. However, in revision, the High Court set aside the dismissal holding that the defendant was not ready and willing to pay the standard rent at the date of the suit and that he did not comply with the requirement of S. 12 (3) (b) of the Rent Act because he had not deposited in Court the amount of standard rent at the rate determined by the order of the District Court and had not paid even the interim rent at the rate fixed by the Court of first instance and further that he had not paid costs of the suit which he was bound to pay under Section 12 (3) (b).

25. Referring to Explan. I to S. 12 of the Rent Act, the Supreme Court observed that the Explanation enacts a rule of evidence and if after service of the notice upon the tenant by the landlord under sub-section (2) of S. 12 the tenant makes an application under sub-section (3) of S. 11 before the expiry of a month and thereafter pays or tenders regularly the amount of interim rent specified by the Court till the disposal of the suit, the Court is bound to presume that the tenant is at the date of the decree ready and willing to pay the standard rent and permitted increases. The judgment discloses that the question as to whether the case was covered by S. 12 (3) (a) or not was never debated before the Supreme Court. What was contended on behalf of the plaintiff in that case was that the dispute concerning standard rent contemplated by S. 12 (3) (b) should have been raised before the service of the notice under S. 12 (2). This contention was rejected. The observations in paragraph 13 of the judgment were as follows:—

“The claim made by the defendant fell within the terms of S. 12 (3) (b) and not S. 12 (3) (a). The defendant had contended

by his reply dated Dec. 7, 1956, to the notice served by the plaintiff, that the contractual rent was excessive; he had then raised the same contention in the application filed for fixation of standard rent and in his written statement filed in the suit. There is nothing in S. 12 to support the contention raised by Mr. Chatterjee on behalf of the plaintiff that the dispute concerning standard rent contemplated by Cl. (b) of sub-section (3) is one which must have been raised before service of the notice under S. 12 (2). The entire tenor of the section is against that interpretation.”

We are unable to find anything in the decision of the Supreme Court in *Vora Abbasbhai's case* (AIR 1964 SC 1341) which can be read as an authority for the proposition that a dispute for the purposes of S. 12 (3) (a) need not necessarily be raised only by an application under S. 11 (3) but that even if a reply is given by the tenant to the landlord disputing the standard rent, the case will be taken out of the provisions of S. 12 (3) (a).

26. What was exactly decided in *Vora Abbasbhai's case* has been considered by the Supreme Court in the decision in *Harbanslal's case* (AIR 1976 SC 2005). In para 21, the Supreme Court observed as follows:—

“The only point in controversy in *Abbasbhai's case* (AIR 1964 SC 1341) (Reference is to *Vora Abbasbhai's case*) was whether the second condition in S. 12 (3) (a) of the Act, viz., that there was no dispute regarding the amount of standard rent was fulfilled. The landlord's contention was that the dispute concerning standard rent is one which must have been raised before service of the notice and since there was admittedly no dispute in regard to standard rent or permitted increases at the date of service of the notice under S. 12 (2) of the Act the second condition in S. 12 (3) (a) that there was no dispute was satisfied. The Court did not accept the landlord's contention there and held that the defendant in that case raised the contention by reply dated 7th Dec., 1956 that the contractual rent was excessive and raised the same contention in the application filed for fixation of standard rent.”

27. It is important to point out that if we read the decision in *Vora Abbasbhai's case* (AIR 1964 SC 1341) as an authority for the proposition that a dispute with regard to standard rent can be raised by more than one mode, that would run counter to the ratio of *Harbanslal's case* (AIR 1976 SC 2005) in which we have already pointed

out the Supreme Court has positively laid down that the only way to get protection from the operation of S. 12 (3) (a) is for the tenant to make an application within one month from the service of the notice terminating the tenancy by raising a dispute with regard to standard rent. We are, therefore, unable to hold that the decision in Vora Abbasbhai's case in any way supports the view which was taken by the learned Judge in Gulabchand's case (AIR 1980 Bom 307).

28. Now, what is argued is that the Supreme Court in Vora Abbasbhai's case (AIR 1964 SC 1341) has approved of the judgment of the Gujarat High Court in Ambalal's case (AIR 1964 Guj 9). The passage quoted by Jahagirdar J. in Gulabchand's case (AIR 1980 Bom 307) from the decision in Ambalal's case is as follows:—

"In order to attract the applicability of S. 12 (3) (a) of the Act there must be non-existence of the dispute at the date of the notice and such non-existence must continue right up to the expiration of one month from the date of service of the notice so that if the dispute is raised at any time prior to the expiration of the said period of one month, the operation of S. 12 (3) (a) would be excluded."

Now, there is no doubt that these observations have also been approved by the Supreme Court in Harbanslal's case (AIR 1976 SC 2005). But what was the question before the Gujarat High Court in Ambalal's case (AIR 1964 Guj 9) has been stated by the Supreme Court in Harbanslal's case as follows:—

"In Ambalal's case (supra) the conclusion is a single one and it is that in order to exclude the operation of S. 12 (3) (a) of the Act the dispute must be in existence latest within one month after service of the notice."

Ambalal's case, therefore, did not deal with the mode of raising a dispute but merely dealt with the outer limit of time with regard to the existence of the dispute and that, according to the decision in Ambalal's case, was within one month after the service of the notice.

29. The Full Bench decision of the Gujarat High Court no doubt holds that the tenant can also claim protection from the operation of section 12 (3) (a) by raising a dispute as to the standard rent either prior to the notice under Section 12 (2) of the Act or by reply to the notice, but in this case,

the tenant must do so within one month from the receipt of the notice referred to in Section 12 (2). However, the Full Bench in that case, while considering the decision of the Supreme Court in Harbanslal's case, the reference to that case was made only in the context of the fact that the Supreme Court had to resolve the question as to whether on receipt of a notice from the landlord terminating the tenancy on the ground of arrears of rent, the dispute as to standard rent had to be raised before expiry of one month after the service of the notice. The Full Bench also further pointed out that the Supreme Court had made clear that Sec. 12 (1) of the Rent Act had to be read with the Explanation to that section and the ratio of the decision in Dhansukhlal's case (AIR 1968 SC 1109) was stated to be as follows:—

"The ratio of this decision is clearly that protection under Section 12 (1) of the Act can be availed of only if before the expiry of the period of one month after the notice referred to in sub-section (2) of Section 12 of the Act the tenant makes an application under Section 11 (3) of the Act and thereafter he pays or tenders the amount of rent or permitted increases specified by the Court." (see paragraph 7).

The Full Bench then pointed out in the same paragraph that "the clear and specific proposition of law laid down therein is to the effect that in order to avoid the provisions of Section 12 (3) by claiming protection under Section 12 (1), the tenant has to make an application under Section 11 (3) of the Act before the expiry of one month of the receipt of the notice under S. 12 (2) of the Rent Act or, to put in other words, the tenant can get protection under Section 12 (1) provided he has made an application under Section 11 (3) of the Act within one month of the receipt of the notice under Section 12 (2) of the Act." Referring to the use of the word 'only' by the Supreme Court in Dhansukhlal's case, the Full Bench has taken the view that "the word 'only' is used to emphasise as to when the factum of readiness and willingness of the tenant is said to be established by the statutory presumption under Section 12 (1) read with the Explanation and it is so established provided the provisions of Section 12 (1) read with the Explanation are complied with." The Full Bench then observed that "the word 'only' supplies an emphasis to the expression 'to be ready and willing to pay' and the readiness and willingness can also be proved by statutory presumption which arises on the provisions of the Explanation being satis-

fied." "The word 'only' ", according to the Full Bench of the Gujarat High Court, "has not the effect that the tenant can obtain protection by raising a dispute as to the standard rent only in one manner, namely, if the tenant makes an application within one month of the service of the notice terminating the tenancy by raising a dispute as to the standard rent." According to the Full Bench, "if the tenant wants to avail himself of the statutory presumption arising under Section 12 (1) and the Explanation, he has to make the application under Section 11 (3) of the Act within one month after the notice referred to in Section 12 (2) of the Act and to pay or tender the amount of rent and permitted increases specified in the order made by the Court."

30. As already pointed out, we are unable to read the judgment of the Supreme Court in Dhansukhlal's case (AIR 1968 SC 1109) in the manner it has been read by the learned Judges of the Full Bench of the Gujarat High Court, in view of the observations made by the Supreme Court in Harbanslal's case (AIR 1976 SC 2005) where while dealing with Dhansukhlal's case the Supreme Court categorically and in unequivocal terms had observed as follows:—

"The tenant can claim protection from the operation of Section 12 (3) (a) of the Act only if the tenant makes an application within one month of the service of the notice terminating the tenancy by raising a dispute as to standard rent." (Underlining ours).

It is no doubt true that in Ramniklal's case (AIR 1977 Guj 15) the Full Bench has observed that in Dhansukhlal's case (AIR 1968 SC 1109) and Harbanslal's case (AIR 1976 SC 2005) the Supreme Court has not considered all the methods or manners in which the dispute as to standard rent can be raised under Section 12 (2) of the Act to avoid a decree of eviction under Section 12 (3) of the Act. These observations presume that apart from the mode provided by the Act there are any other modes of raising a dispute about standard rent. Such an approach is, however, in our view, not at all open having regard to the decision of the Supreme Court that the only mode of raising a dispute is as provided in the Act if protection from operation of Section 12 (3) of the Act is to be claimed by the tenant. With respect, therefore, we dissent from the view taken in Ramniklal's case.

31. We may also point out that the decision of the Supreme Court in Harbanslal's

case (AIR 1976 SC 2005) was earlier considered by a Division Bench of this Court in Champalal Pratapmal v. Municipal School Board (Primary School), Nandurbar, Special Civil Appln. No. 2810 of 1971 decided on 28th June, 1977.* In view of certain conflicting views as to when the provisions of Section 12 (3) (b) of the Rent Act would be attracted, one of us (Chandurkar J.) had made a reference to a Division Bench in respect of two questions as follows:—

"(1) Whether in a suit for eviction it is not obligatory for the tenant to apply for an order under Section 11 (4) of the Rent Act, if he wants to avail of protection under Section 12 (3) (b) of the Act, and

(2) Whether in view of the decision of the Supreme Court in Dhansukhlal's case (70 Bom LR 714) : (AIR 1968 SC 1109) the Rent Court has discretion not to pass a decree for eviction in a case governed by Section 12 (3) (a) of the Rent Act, if the tenant has deposited the entire arrears of rent before the decision of the suit?"

This reference was made before the decision in Harbanslal's case was rendered by the Supreme Court. When the matter was dealt with by the Division Bench, the Division Bench found that the answer to the above two points could be found in the latest judgment of the Supreme Court in Harbanslal's case. While dealing with the decision in Harbanslal's case, the Division Bench observed as follows:—

"When a tenancy is being terminated on the ground of arrears of rent for more than six months, what the tenant must do in order to obtain the protection of the Rent Act has now been clarified. In Harbanslal's case, the Supreme Court points out that in order to avoid the operation of Section 12 (3) (a) of the Act the dispute in regard to standard rent or permitted increases must be raised at the latest before the expiry of one month from the date of service of notice under Section 12 (2) of the Act and it is not enough to raise a dispute for the first time in written statement. They specifically point out that the view taken by this Court at one time in the past, viz., that disputing within one month of the service of the notice terminating the tenancy is one mode of raising a dispute and there is another mode of raising the dispute at the stage of the suit nullifies the provisions contained in Section 12 and Explanation thereto and confers a right on the

* Reported in (1978) 2 Mah LR 175.

tenant where the legislation does not contemplate such a right." (underlining ours)

Pointing out that the only mode of raising a dispute with regard to standard rent was by making an application under Section 11 (3) of the Rent Act, the Division Bench observed as follows:—

"It is therefore now clear that where rent is payable by month and there are arrears of more than six months and the tenancy is terminated by valid notice, either the entire arrears of rent must be paid within one month or if a dispute regarding standard rent has to be raised, the tenant must apply within one month of the date of the receipt of the notice under Section 11 (3) and obtain appropriate direction from the Court. If he complies with those directions, he must be deemed to be a person who is ready and willing to pay. No third mode is now available for getting the protection of the Rent Act on the basis that the tenant is one who is ready and willing to pay."

(Underlining ours.)

It does not appear that this decision of the Division Bench was cited before Jahagirdar, J.

32. On giving our anxious consideration to the legal position as now settled by the decisions of the Supreme Court, we are of the considered view that the only way to prevent a decree for eviction being passed under the provisions of Section 12 (3) (a) of the Rent Act is that the tenant must make an application raising a dispute regarding standard rent and must ask for fixation of standard rent under Section 11 (3) of the Rent Act as required by Explanation I to Section 12. There is no other mode permissible for raising a dispute as to standard rent for the purposes of Section 12 of the Rent Act. By raising a dispute with regard to standard rent by the tenant in a reply to the demand notice before the expiry of one month without making an application under Section 11 (3) read with Explanation I to Section 12, the Court will not be prevented from passing a decree for eviction under the provisions of Section 12 (3) (a). The fact that there was some dispute about standard rent prior to the notice under Section 12 (2) would also be immaterial and would not affect the power of the Court to pass a decree under Section 12 (3) (a) if the conditions referred to in Section 12 (3) (a) are satisfied if no application has already been made under Section 11 (3) of the Act. This will answer

the first two questions raised in the order of reference.

33. So far as the third question is concerned, it has not been canvassed before us by either side that the view taken by Jahagirdar, J. in paragraph 12 of the judgment, where the learned Judge follows two earlier decisions of this Court in Karamsey v. Velji, (1954) 56 Bom LR 619 and Sayed Umar Sayed Ahmed v. Dadamiya, 1977 Mah LJ 261 : (AIR 1976 Bom 336) is in any way erroneous. The view taken by Jahagirdar J. following these two decisions was that where a dispute about standard rent has already been raised by filing an application under Section 11 (1) of the Rent Act even before the issue of a notice under Section 12 (2) by the landlord, it was not necessary for the tenant to file a further application under Section 11 (3) read with Explanation I to Section 12 of the Rent Act in order to attract the provisions of S. 12 (3) (b) of the Rent Act.

34. Before we deal with the two petitions before us on their own merits, since one of the arguments advanced in Special Civil Application No. 1866 of 1977 on behalf of the tenant was that the tenant was entitled to the benefit of Section 12 (3) (b) in any case because he had deposited the entire amount of arrears by the time the judgment came to be passed and reliance was placed on the decision of Jahagirdar J. in Gulabchand's case (AIR 1980 Bom 307) it is necessary to refer to the view which Jahagirdar J. has taken with regard to the construction of Section 12 (3) (b) of the Rent Act. The learned Judge has taken the view that if the Court allows explicitly or by necessary implication the payment of rent on dates other than the first date of hearing and the tenant makes payments which are treated as payments as per the Court's order, it would be compliance with the provisions contained in S. 12 (3) (b) because the orders relating to the deposit of rent in the Court are orders of procedural nature and the Court must have power to condone the delay, if any, in the said payments under Section 148 of the Code of Civil Procedure. The learned Judge has further taken the view that even under the provisions of Section 12 (3) (b) of the Rent Act there is enough latitude to the Court to reschedule the dates of payment after they are once fixed. In Gulabchand's case, the learned Judge reiterated the view taken by him earlier in Mohanlal v. Khimraj, 1978 Mah LJ 611, where the learned Judge had held that any defaults made by the tenant in payment of rent as directed by the Court could be condoned by the Court and reliance

was placed on the decision of this Court in *Kalidas Bhavan v. Bhagvandas*, (1958) 60 Bom LR 1359, where the view taken was that when the Court accepts the deposits made by the tenant, in the eye of law the Court must be taken to have permitted the tenant to make these deposits and to make them on dates on which these deposits were accepted. It was pointed out in that case that the deposit could not be made in the Court without the permission of the Court and the Court if knowing that the tenant has not made the deposit on the first day permits him to make the deposit on the subsequent date would in doing so, in substance if not in form, be permitting the tenant to make the deposit on the date on which it accepted the deposit. In *Gulabchand's case*, the learned Judge took the view that his view in *Mohanlal's case* following *Chagla, C. J.'s* judgment in *Kalidas's case* was in no way affected by the judgment of the Supreme Court in *Ganpat v. Sashikant*, AIR 1978 SC 955.

34-A. Now, it is well-known that Section 12 (3) (b) is attracted to a case which does not fall within Section 12 (3) (a). Section 12 (3) (a) applies to a case where rent is payable by the month and there is no dispute regarding the amount of standard rent or permitted increases. In such a case, if the rent or permitted increases are in arrears for a period of six months or more and the tenant neglects to make payment thereof until the expiration of the period of one month after the notice under Section 12 (2), the Court is bound to pass a decree for eviction. In a case which does not fall under Section 12 (3) (a), the power of the Court to pass a decree is regulated by Section 12 (3) (b) which is worded in a negative language. Section 12 (3) (b) provides that the Court will not pass a decree for possession if on the first day of hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in Court the standard rent and permitted increases due from him and thereafter the tenant continues to pay or tender in Court regularly such rent and permitted increases till the suit is finally decided and also pays costs of the suit as directed by the Court. In *Venkatrao Anant v. Narayanlal*, (1969) 71 Bom LR 607, this Court has taken the view that the obligation of the tenant to continue to pay or tender in Court standard rent or permitted increases continues even during the pendency of the appeal. It was held in that case that where the trial Court has fixed the standard rent

under the Rent Act, it is obligatory for the tenant to pay the amount so fixed during the pendency of his appeal to the higher Court and non-payment of such rent will disentitle him to the protection under the Rent Act.

35. Now, in the case of *Kalidas Bhavan v. Bhagvandas*, (1958) 60 Bom LR 1359 *Chagla C. J.* had taken the view that the emphasis in Section 12 (3) (b) was not on payment on the first day of hearing but the emphasis is that the arrears should be paid before judgment is delivered in the suit for eviction. A Division Bench of this Court in *Shantabai v. Ganpat* (AIR 1976 Bom 288 : 1976 Mah LJ 332), took the view that the principle laid down by *Chagla C. J.* in *Kalidas Bhavan v. Bhagvandas*, should also be extended to the second condition in Section 12 (3) (b), namely, the obligation of the tenant to continue to pay or tender in Court regularly standard rent till the suit is finally decided. In *Shantabai v. Ganpat*, the Division Bench had taken the view that if on the facts of each case there is found to be substantial compliance with the provisions of Section 12 (3) (b), the Court may exercise its discretion and refrain from passing a decree for eviction.

36. It is necessary to refer in some detail to the facts of the case in *Shantabai v. Ganpat* because the decision of the Supreme Court in *Ganpat v. Sashikant* (AIR 1978 SC 955 : 1978 Mah LJ 550) was given in appeal against the Division Bench decision of this Court in *Shantabai v. Ganpat*. A dispute as to standard rent between the landlord and the tenant came to an end by a decision dated 1st September, 1960 whereby the standard rent was fixed at Rs. 54.25. *Ganpat*, the landlord, issued a notice on 29th June, 1960 demanding arrears of rent from May 1956 to 1960 at the rate of standard rent. A summary suit for eviction as well as for recovery of arrears of rent was filed by the landlord on 6th November, 1960. The Summons for Judgement came up for hearing on 13th April, 1961. On that date, the tenant paid a sum of Rs. 3,200/- into the Court, being the amount of standard rent up to 31st March, 1961. Leave was granted to the tenant to defend the suit. The suit came up for hearing on 30th August, 1962 when issues were framed. On that day, a sum of Rs. 1,042.10, being rent for the period 1st April, 1961 to 31st August, 1962, was paid. The suit was then adjourned from time to time from 4th October, 1962 to 5th June, 1963 and on one of these dates, which was

28th November 1962, the tenant paid a further sum of Rs. 162.75 as rent for the period 1st September 1962 to 30th November, 1962. Additional issues were framed on 5th June, 1963 and on that day, the tenant paid Rs. 325.50 as rent for the period December, 1962 to May, 1963 together with the amount of permitted increases. On 6th June 1963 evidence was recorded and a decree for possession was given on 18th June, 1963. This decree was, however, set aside on a technical ground by the appellate Bench of the Small Cause Court which held that the notice to quit was not a valid notice, but that decision was set aside by this Court and the matter was sent back to the appeal Bench. The appeal Bench took the view that the landlord was entitled to a decree for eviction under Section 12 (3) (a) and that even if the case was governed by Section 12 (3) (b), the tenant had not complied with the conditions thereof, so that it could not be said that the discretion vested in the Court to refuse to pass a decree for eviction. This decision of the appeal Bench was challenged before a Division Bench of this Court. In view of the fact that a dispute as to standard rent was pending in a civil revision application even on the expiry of the period of one month from the date on which notice under Section 12 (2) was given, the Division Bench ruled out the application of Section 12 (3) (a). So far as Section 12 (3) (b) was concerned, when it was contended before the Division Bench of this Court that the decision in Kalidas Bhavan v. Bhagvandas, (1958) 60 Bom LR 1359 was no longer good law, in view of the decision of the Supreme Court in Dhansukhlal's case (AIR 1968 SC 1109) where it was observed by the Supreme Court (at pp. 1112-1113):

"To be within the protection of that provision (Section 12 (3) (b)) the tenant must thereafter continue to pay or tender in Court regularly the rent and permitted increases till the suit is finally decided."

The Division Bench took the view that:

"... .. this appears to us to be only a paraphrase of the relevant provision and we are unable to appreciate how it can be said that the Supreme Court has even dealt with, much less overruled the decision of this Court in Kalidas Bhavan v. Bhagvandas, (1958) 60 Bom LR 1359."

The Division Bench found as a fact that the tenant had not strictly complied with the provision as to payment of rent regularly but observed that all payments required to be made were made before the judgment was delivered and if this was so, then the Court's

discretion not to pass a decree for eviction was clearly not taken away. The Division Bench further observed:

"... .. even if the conditions of Section 12 (3) (b) are not strictly complied with, the Court has discretion, on the facts and circumstances of each case, to decline to pass a decree for eviction."

On facts the Division Bench held that there was substantial and sufficient compliance by the tenant of the provisions of S. 12 (3) (b) and that the circumstances of the case were such that the discretion of the Court be exercised in favour of the tenant. The effect of the Division Bench decision was that even if rent was not paid regularly during the pendency of the suit but if it was found that on the day on which the judgment was to be delivered the entire amount of arrears due up to that date had been paid, the tenant was entitled to the protection of S. 12 (3) (b).

37. The correctness of this judgment was challenged by the landlord in the Supreme Court. The Supreme Court referred to the earlier decision in Dhansukhlal's case and observed:

"... .. we think that the problem of interpretation and application of S. 12 (3) (b) need not trouble us after the decision of this Court in Dhansukhlal Chagganlal's case (AIR 1968 SC 1109) (supra) followed by the more recent decision in Harbanslal Jagmohandas v. Prabhudas Shivilal (AIR 1976 SC 2005) which completely covers the case before us."

We have earlier referred to the decision in Dhansukhlal's case. Referring to the provisions of Section 12 (3) (b) of the Rent Act, the Supreme Court had in that case observed as follows in paragraph 13:—

"To be within the protection of that provision, the tenant must not only pay all the arrears due from him on the first day of hearing of the suit, but he must thereafter continue to pay or tender in Court regularly the rent and permitted increases till the suit is finally decided."

These were the observations which the Division Bench of this Court had described as mere paraphrase of the section but which, according to the Supreme Court in Ganpat's case (AIR 1978 SC 955) had really concluded the construction of Section 12 (3) (b). After pointing out that the Rent Act interfered with the landlord's right to property and freedom of contract only for the limited purpose of protecting tenants from misuse of the landlord's power to evict them, in these days of scarcity of accommodation, by asserting his superior rights in property or trying to

exploit his position by extracting too high rents from helpless tenants, the Supreme Court pointed out in Ganpat's case that the object of the Rent Act was not to deprive the landlord altogether of his rights in property which have also to be respected. Another object of the Rent Act was stated to be to make possible eviction of tenants who failed to carry out their obligation to pay rent to the landlord despite opportunities given by law in that behalf. The following observations are important:—

"Thus, Section 12 (3) (a) of the Act makes it obligatory for the Court to pass a decree when its conditions are satisfied as was pointed out by one of us (Bhagwati, J.) in *Ratilal Balabhai Nazar v. Ranchodbhai Shankerbhai Patel*, AIR 1968 Guj 172. If there is statutory default or neglect on the part of the tenant, whatever may be its cause, the landlord acquires a right under Section 12 (3) (a) to get a decree for eviction. But where the conditions of Section 12 (3) (a) are not satisfied, there is a further opportunity given to the tenant to protect himself against eviction. He can comply with the conditions set out in Section 12 (3) (b) and defeat the landlord's claim for eviction. If, however, he does not fulfil those conditions, he cannot claim the protection of Section 12 (3) (b) and in that event, there being no other protection available to him, a decree for eviction would have to go against him. It is difficult to see how by any judicial valour discretion exercisable in favour of the tenant can be found in Section 12 (3) (b), even where the conditions laid down by it are satisfied, to be strictly confined within the limits prescribed for their operation. We think that Chagla, C. J., was doing nothing less than legislating in *Kalidas Bhavan's case* ((1958) 60 Bom LR 1359) (supra), in converting the provisions of Section 12 (3) (b) into a sort of discretionary jurisdiction of the Court to relieve tenants from hardship. The decisions of this Court referred to above, in any case, make the position quite clear that Section 12 (3) (b) does not create any discretionary jurisdiction in the Court. It provides protection to the tenant on certain conditions and these conditions have to be strictly observed by the tenant who seeks the benefit of the section. If the statutory provisions do not go far enough to relieve the hardship of the tenant the remedy lies with the legislature. It is not in the hands of Courts."

The Supreme Court in these observations has in unambiguous words "disapproved of the decision in *Kalidas Bhavan v. Bhagvan-*

das, the effect of which decision, according to the Supreme Court, was that the provisions of Section 12 (3) (b) were converted into a sort of discretionary jurisdiction of the Court to relieve tenants from hardships. The effect of the observations of the Supreme Court quoted above clearly is that the conditions specified in Section 12 (3) (b) have to be strictly observed if the tenant seeks the benefit of that section.

38. Section 12 (3) (b) prescribes two conditions, as already pointed out, namely, that the arrears will be deposited or paid on the first day of hearing and thereafter rent must be paid or tendered in Court regularly till the suit is decided, and now in view of the decision of this Court in *Venkatrao Anant v. Narayanlal*, (1969) 71 Bom LR 607, cited above, till the appeal is also decided. In *Ganpat v. Sashikant* (AIR 1978 SC 955) the decision of the Division Bench of this Court was set aside by the Supreme Court. The effect of setting aside the decision of this Court can only be that the approach which was adopted by the Division Bench in holding that the tenant was entitled to the protection of Section 12 (3) (b) because the entire amount had been paid before the date of the judgment though it was not paid regularly, and that there was, therefore, a substantial compliance with Section 12 (3) (b) was not approved. The Division Bench in *Shantabai v. Ganpat* (AIR 1976 Bom 288) applied the principle enunciated by Chagla C. J. in *Kalidas Bhavan v. Bhagvandas*, (1958) 60 Bom LR 1359. In our view, the effect of the decision of the Supreme Court in *Dhansukhlal's case* (AIR 1968 SC 1109) and in *Ganpat v. Sashikant* can be nothing else except that the decision in *Kalidas Bhavan v. Bhagvandas* must be treated as no longer good law.

39. Now, when these decisions were cited before Jahagirdar J., the learned Judge seems to have read the decision in *Ganpat's case* as merely holding that if the conditions in Section 12 (3) (b) were not satisfied, the Court has no discretion to pass a decree for eviction and, according to the learned Judge, the other part of Chagla C. J.'s judgment in *Kalidas's case* laying down that there is compliance with the provisions contained in Section 12 (3) (b) even if the tenant has made payments after the dates originally fixed by the Court and if the said delay was condoned and payments were accepted by the Court, has not been touched at all by the Supreme Court in *Ganpat's case*. As we have already pointed out, the judgment of the Division Bench against which the Su-

preme Court was deciding the appeal in Ganpat's case expressly proceeded on the footing that where payments had been accepted by the Court, the tenant will be entitled to the benefit of Section 12 (3) (b) on the principle of substantial compliance. It is this view which has been set aside by the Supreme Court. The observations of the Supreme Court that the conditions contained in S. 12 (3) (b) have to be strictly observed by the tenant who seeks the benefit of the section emphasise the fact that there was no question of any substantial compliance and if the conditions laid down are not satisfied, there is no power in the Court to grant any relief to the tenant. The very concept of extending the time for deposit which is specifically provided by the provisions in Section 12 (3) (b) as a condition which is strictly to be satisfied by the tenant would imply that the Court has a discretion to accept payment which is made otherwise in accordance with the requirement of Section 12 (3) (b). It is this discretion which the Supreme Court has held the Court did not have and which was being exercised so far by Courts in view of the decision in Kalidas Bhavan v. Bhagvandas, (1958) 60 Bom LR 1359. We are, therefore, unable to concur with the view taken by Jahagirdar, J. that the decision of the Supreme Court in Ganpat v. Sashikant does not overrule the decision of Chagla C. J. in Kalidas Bhavan v. Bhagvandas.

40. We shall now deal with the two petitions on facts. Now, so far as Special Civil Application No. 1872 of 1977 is concerned, admittedly within one month from the date of the receipt of the notice under Sec. 12 (2) of the Rent Act, there was neither an application made for fixation of standard rent, nor were the arrears due paid. That was, therefore, a case where the provisions of Section 12 (3) (a) were clearly attracted. The view which the learned Assistant Judge had taken was based on the fact that a dispute with regard to standard rent could be raised also by a reply to the notice. If that was not the correct view and there was no other circumstance which took the case out of Section 12 (3) (a), in our view, the learned Assistant Judge was in error in holding that the plaintiff was not entitled to a decree for eviction. Consequently the petition will have to be allowed. The judgment of the learned Assistant Judge and the judgment of the Joint Civil Judge, Junior Division, declining the plaintiff a decree for possession will have to be set aside and the plaintiff will be entitled to a decree for possession in addition

to the decree for Rs. 1,547.44 passed by the Civil Judge, Junior Division, Kolhapur. The plaintiff will also be entitled to mesne profits from the date of the decree. The plaintiff will be entitled to the cost of the suit and the appeal. There will, however, be no order as to costs of this petition.

So far as the other petition, being Special Civil Application No. 1866 of 1977, is concerned, it is also difficult to resist the conclusion that the claim of the plaintiff fell within the provisions of Section 12 (3) (a) of the Rent Act because the tenant had neither paid the amount of arrears of rent nor filed an application for fixation of standard rent under Section 11 (3) read with Explanation 1 to Section 12. Even otherwise, the view taken by the Appeal Court that the provisions of Section 12 (3) (b) were also not complied with appears to be correct because the finding is that the tenant had not paid rent regularly as required. There is thus no reason to interfere with the decree passed by the learned District Judge in favour of the landlord. Special Civil Application No. 1866 of 1977 must, therefore, stand dismissed. Rule will stand discharged. However, in the circumstances of the case, we make no order as to costs of this petition.

Order accordingly.

AIR 1982 BOMBAY 580

BHARUCHA, J.

Mukand Iron and Steel Works Ltd., Petitioners v. Maharashtra State Electricity Board and another, Respondents.

Misc. Petn. No. 717 of 1978, D/- 25-8-1982.

Electricity Act (9 of 1910), Section 22, Proviso — Minimum charge — Contract for supply of electricity — Inability of Board to supply the contract demand due to power cut — Consumer if liable to pay the minimum demand charge.

Held, as the Board was obliged to maintain in a state of readiness the requisite generating capacity and facilities even during the period of the power cut, so as to be able to supply the quantum of the contract demand the moment the power cut was lifted, the consumer was liable to pay the minimum demand charge even during the period of the power cut. AIR 1975 SC 2235 and (1975) 16 Guj LR 90, Refd. AIR 1976 SC 1100, Disting. (Para 12)

Cases	Referred :	Chronological	Paras
AIR 1976 SC 1100			6
AIR 1975 SC 2235			7
(1975) 16 Guj LR 90 : 44 Com Cas 127			8

K. H. Bhabha with S. N. Variava, for Petitioners; T. R. Andhyarujina with S. N. Naik (for No. 1) and G. K. Nilkhant (for No. 2), for Respondents.

ORDER:— The effect of a power cut upon minimum demand charge payable by a consumer of electricity to the supplier thereof has to be determined in this writ petition.

2. The petitioners, Mukand Iron and Steel Works Ltd., are manufacturers of iron and steel products. They have a plant at Kalwe, Thane. They are large consumers of electricity supplied to them by the 1st respondent, the Maharashtra State Electricity Board. On 3rd August, 1965 the Board entered into an agreement with the company. Clause 3 of the agreement states that the Board shall supply to the company and the company shall take from the Board all the electrical energy required at its plant at Kalwe up to a maximum of 15,000 K. V. A. (kilo volt amperes), which quantum is referred to as the "contract demand". Under Clause 7 (a) the company is entitled to apply to the Board for supply in excess of the contract demand and the Board is obliged to make it available within the stated period provided it has the additional energy available and it is economical to do so. Under Clause 7 (c), if additional supply is made available, the contract demand specified in Clause 3 is increased to that extent. (It must here be stated that the contract demand was in fact raised at the company's request to 48, 500 K. V. A.). Under Clause 8 (a) the company is obliged to pay to the Board every month charges "for electrical energy supplied to the consumer during the preceding month at the rates specified in the suppliers' standard tariff schedule", which is attached to the agreement, and in force from time to time. If, during the "currency of this agreement the above referred standard tariff schedule is revised, increased or decreased, such revised, increased or decreased, tariff from the date specified shall apply to the consumer during and for the unexpired period of the present agreement". Under clause 9, the agreement is to operate for a minimum period of 7 years and from year to year thereafter terminable by six months' notice on either side. Under clause 10, if the supplier discontinues electrical supply in consequence of any breach or default on the

part of the company entitling the Board to do so, the amount of charges for electrical energy already supplied and all other moneys then payable under the agreement become due and recoverable forthwith, and during the period of such discontinuance the company continues to remain liable "to pay the minimum charges and minimum guarantee payable hereunder". Under the terms of the tariff annexed to the agreement the "demand charge" is stated to be Rs. 16.00 per month per K. V. A. of the billing demand. The "energy charge" is separately stated. The tariff states that for consumers opting for payment of monthly minimum charges, demand charges based on the KVA of the billing demand would be the minimum bill. A minimum annual bill at Rs. 240.00 per K. V. A. demand would be charged on the actual highest demand established by the consumer during the 12 month period or 75% of the contract demand. "Maximum demand" is defined to mean the average KW/KVA supplied during the 30 minutes' period (or any such shorter period as may be prescribed by the Board) of maximum use. "Contract demand" is defined to mean the maximum KW/KVA for the supply of which the Board undertakes to provide facilities from time to time. "Billing demand" is defined to mean the demand used for billing purposes and is computed as the highest of the following: the maximum demand established during the month; 75% of the contract demand.

3. It will be seen that for the purposes of billing a two-tier system is adopted. For the units of energy supplied there is one form of charge based on the kilo watt hours (KWH) of supply and for the energy demand there is a rate of charge based upon the K. V. A. The contract sets out the contract demand; the Board is obliged to supply to the company the contract demand and the company is liable to pay to the Board a minimum of 75% of the contract demand.

4. A power cut was imposed by the Government of Maharashtra on 1st Oct., 1974 by reason whereof the Board could not supply and the consumer could not consume more units of energy and more than the K. V. A. therein specified. The permissible quotas imposed by the power cut varied from time to time.

5. The petitioner submits that it was incumbent upon the Board to take the permissible quota as the revised contract demand under the agreement and to take into consideration 75% thereof for the purposes of computing the minimum billing demand.

It was urged by Mr. Bhabha, learned counsel for the company, that, for the purposes of billing, the basis had to be the permissible quota available to the company; the same had to be treated as the contract demand and the billing demand, consequently, had to be either 75% of the permissible quota or the actual consumption, whichever was higher. In Mr. Bhabha's submission, this was a reasonable and commercial way to read the agreement, having regard to the supervening circumstance namely, the imposition of the power cut. He placed reliance in this regard upon clause 8 of the agreement.

6. Mr. Bhabha relied upon the judgment of the Supreme Court in *M/s. Northern India Iron & Steel Co. v. State of Haryana*, AIR 1976 SC 1100. One of the questions before the Court was whether the Haryana State Electricity Board was entitled to claim the demand charge from the appellant-company. There was a contract between the appellant and the H. S. E. B. It contained a force majeure clause. A substantial power cut was imposed and the appellant was not able to get the supply of energy according to the contract. A dispute arose as to whether the H. S. E. B. was, in the circumstances, entitled to get any demand charge. The two-tier system of the tariff was employed. The Supreme Court stated that it was meant for big consumers of electricity and it comprised (a) demand charges to cover investment, installation and the standing charges to some extent, and (b) energy charges for the actual amount of energy consumed. It was argued by the appellant that since the H. S. E. B. was not ready to serve it when it was ready to consume the maximum energy, the H. S. E. B. was not entitled to ask for the demand charge. On behalf of the H. S. E. B. it was asserted that it was entitled to assess and claim the full demand charge, irrespective of whether it was in a position to supply energy according to the demand of the consumer. The Supreme Court felt that the difficulty was not easy to solve. If it were to hold that for the H. S. E. B.'s inability to supply a fraction of the contract demand it could claim only the energy charge and not the demand charge, it would be very hard and injurious to it and the consumer would unjustifiably get energy at a very cheap rate. If, on the other hand, it were to hold that the consumer was liable to pay the entire demand charge even when, for no fault of it, it could get only a fraction of its demand resulting in its not being able to run its in-

dustry to its full capacity, it would be liable to pay a huge amount per month, which would not only be uneconomical but would seriously affect its economic structure. The Supreme Court was happy to find a just, equitable and legal solution of the difficulty by reason of the force majeure clause and it, therefore, felt that it was not necessary to resolve the extreme stands taken on either side. The Supreme Court held that the circumstances of the power cut which disabled the H. S. E. B. from giving the full supply to the appellant undoubtedly was a circumstance which disabled the appellant from consuming electricity as per the contract; this was a circumstance which was beyond its control and could not be considered otherwise by the Board. It entitled the appellant to a proportionate reduction of the demand charge under the force majeure clause.

7. Mr. Andhyarujina, learned counsel for the Board, drew my attention to the judgment of the Supreme Court in *Amalgamated Electricity Co. Ltd. v. Jalgaon Borough Municipality*, AIR 1975 SC 2235. He placed emphasis upon para 9 of that judgment which reads thus:

"Moreover it is obvious that if the plaintiff-company was to give bulk supply of electricity at a concessional rate of 0.5 anna per unit it had to lay down lines and to keep the power ready for being supplied as and when required. The consumers could put their switches on whenever they liked and therefore the plaintiff had to keep everything ready so that power is supplied the moment the switch was put on. In these circumstances it was absolutely essential that the plaintiff should have been ensured the payment of the minimum charges for the supply of electrical energy whether consumed or not so that it may be able to meet the bare maintenance expenses."

8. Mr. Andhyarujina also referred to a judgment of the Gujarat High Court in *Gujarat Electricity Board v. Shri Rajratna Naranbhai Mills Co. Ltd.*, (1975) 16 Guj LR 90. After considering decisions of the Bombay, Calcutta, Madras and Punjab High Courts, Divan, C. J. observed that they correctly pointed out that the provision of a minimum charge in the agreement between a consumer and a supplier of electricity was but one of the modes of providing for a reasonable return to the supplier for the investment and capital outlay that it had made.

9. Mr. Andhyarujina drew my attention to the affidavit in reply to the petition filed by W. D. Paraskar, Superintending Engineer

of the Board, in which it is stated that the requirement of billing a consumer for a minimum of 75% of the contract demand was because, according to the agreement between the consumer and the Board, the Board was obliged to make available the supply to the extent of the contract demand at all times during the currency of the agreement. A minimum charge was justified in view of the fact that the Board had to maintain in constant readiness such generating capacity irrespective of whether it was utilised by the consumer or not. It required an amount of capital cost to keep such generating capacity and facilities in constant readiness for a large consumer like the company. The Board also incurred the cost of maintaining the plant and provided for depreciation. The Board was entitled to be reimbursed for these. The Board had built a major grid receiving station at Kalwe where power was received from the Koyna Hydro Project, the Nasik Thermal Station and the Nuclear Station at Tarapur. It had a capacity of 500 MVA. It received power at 2,20,000 volts transmission, stepped-down to 1 lakh voltage through 4 step-down transformers of 125 MVA capacity. There were two more transformers of 25,000 KVA capacity which stepped-down voltage from 1,00,000 to 20,000 volts. The Board had laid a network of 100 K. V. transmission feeders emanating from Kalwe and reaching various load centres. The Board had also constructed 100 KV (1 lakh voltage) transmission feeders to serve major industrial loads like Standard Alkali, Nocil and the petitioner-company. To serve the company exclusively two circuits of 100 KV transmission feeders had been laid and two circuits were provided so that adequate capacity was available even in case of the breakdown of one circuit.

10. Mr. Andhyarujina submitted that the Board remained liable to supply to the company the contract demand the moment the power cut was lifted. To do so, the Board had to maintain in readiness the requisite generating capacity and facilities. The authorities showed that the minimum charge was levied for this purpose. The company, therefore, remained liable to pay the minimum charge even during the period of the power cut.

11. Mr. Bhabha contended that the Board was not required to maintain generating capacity and facilities for supply up to the contract demand during power cuts. He submitted that, in any event, what was stat-

ed in the affidavit made on behalf of the company in rejoinder showed that the Board was not in a position to supply the contract demand by reason of its own defaults and it could not take advantage of its own wrong. A statement in the Board's publicised figures showed that while the Board's generating capacity had in the period 1960-61 to 1977-78 gone up 3.55 times its connected load had increased 32.96 times. Mr. Bhabha also referred in this connection to the statements made in a letter written by the Board's instructing attorneys to the company's instructing attorneys.

12. As I see it, Mr. Andhyarujina's submission is justified. The authorities show and, in fact, Mr. Bhabha has not disputed that the minimum charge is intended to compensate the supplier for keeping in a state of readiness the generating capacity and facilities for supplying to a large consumer the quantum of the contract demand. The power cut operates for periods of time, not forever. The Board remains liable to supply to the consumer the quantum of the contract demand no sooner the power cut is lifted. Therefore, even during the period of the power cut the Board is obliged to maintain in a state of readiness the requisite generating capacity and facilities. Obviously, the Board cannot dismantle or even cease to maintain all its facilities and equipment during the period of the power cut. It must follow that even during the period of the power cut the company is obliged to make payment of the minimum charge. There is no provision in the agreement which contemplates a diminution of the minimum billing demand. I am not impressed by the argument on behalf of the company that the Board was not in a position to supply the quantum of the contract demand by reason of its own default. This case is made out in the company's affidavit in rejoinder. This case would, even if pleaded in the petition, require an investigation of facts outside the scope of a writ petition. And, if this were a fact, the company would have asked for a reduction of the contract demand, which it is entitled to do, not merely a reduction of the minimum charge during power cuts.

13. It must be pointed out that the Board has taken the existence of the power cut into account where the power cut has imposed a permissible quota which is lower than 75% of the contract demand; the Board has then treated the permissible quota as the minimum billing demand. As for example: The contract demand is 1000 KVA and the minimum billing demand is 750 KVA. If the

permissible quota under the power cut is 650 KVA, the Board treats 650 KVA as the minimum billing demand. Mr. Bhabha's argument was, of course, that this was not enough and that in all cases the minimum billing demand should be deemed to be 75% of the permissible quota under the power cut. For the reasons that I have already stated, I am not inclined to accept this argument. It is also true that, as the Board has pointed out, where the permissible quota is greater than the minimum billing demand nothing prevents the consumer from consuming energy, roughly, up to the former. The power cut does impose, as Mr. Bhabha emphasised, a ceiling both on units of energy and on KVA but there is little material on record to uphold Mr. Bhabha's assertion that the company could not possibly reach the minimum billing demand having regard to the ceiling on the units of energy consumable by the company.

14. There is, in my judgment, nothing in the agreement which warrants the company's contention. In fact, to accept the contention would be tantamount to rewriting it. Nor can it be said that the Board is being unreasonable, which—as a public body—it cannot be permitted to be, in not adopting 75% of the permissible quota under the power cut as the minimum billing demand.

15. I pass on the two subsidiary contentions. On 25th February, 1975 the Board issued a circular giving a concession in minimum charges due to the power cut. The circular recorded that in view of the power cut the Board had decided "to give percentage pro rata concession in minimum monthly billing demand to H. T. consumers equal to relevant percentage of energy cuts applicable from time to time.". The circular made it clear that the concessions were not to be extended to consumers who defaulted even once in observing the power cut. On 6th April, 1976 the Board issued a circular modifying the circular of 28th February, 1975 and stated inter alia that "..... the relief in minimum charges due to power cut should be based on the percentage of either energy cut or demand cut (whichever is higher) as may be applicable from time to time to the relevant class of consumers, with effect from 1-4-1975."

16. On 11th June, 1976 the Board wrote to the company that the concession in minimum charges was not applicable for the period from October 1974 to December 1974 because the company had violated the power cut order and for the periods from January

1975 to April 1975, June 1975 to August 1975 and December 1975 to April 1976 it was under dispute and the matter was referred to the Head Office and field officers for necessary clarification. The concession was not made available to the company.

17. It is the case of the company that by reason of clause 5 (2) (a) of the Maharashtra Electricity Consumption of Electrical Energy (Restriction) Order, 1974, (the power cut order) as amended in April 1975, no consumer could be said to have committed a violation of the power cut unless the excess consumption exceeded one day's quota, and that it had not exceeded the consumption by one day's quota in any of the relevant months. Clause 5 (2) (a) as amended reads thus :

"Industrial consumer :— If a consumer consumes electrical energy in any week/two weeks/month, as the case may be in excess of his ceiling per week/per two weeks/per month, then his supply of electrical energy shall be disconnected forthwith and shall remain disconnected for such number of days as are equivalent to the excess consumption." I am at a loss to understand, nor has any explanation been given by Mr. Bhabha, how this clause enables the company to submit that no consumer could be said to have committed a violation of the power cut unless its excess consumption exceeded one day's consumption.

18. Pursuant to the circulars of 25th February 1975 and 6th April, 1976 refunds were given by the Board to the company between May 1975 and February 1977 in the aggregate sum of Rs. 7,75,330/-. Between March, 1977 and January, 1978 bills were issued on a different billing pattern and the company paid them under protest. On 23rd February, 1978 a circular was issued by the Board purporting to clarify the correct interpretation of the concessions contained in the two earlier circulars. The clarification was that the billing demand should be the higher of the actual maximum demand registered or 75% of the contract demand. On 18th March 1978 the Board wrote to the company that the earlier bills were under revision in view of revised instructions received and the total amount of Rs. 7,75,330/- would be recoverable from the company in six equal instalments effective from February, 1978. On 23rd April, 1978 this petition was filed and a stay was obtained.

19. It is contended in the affidavit in reply, but not seriously pressed by Mr. Andhyarujina, that the circular of 23rd Feb., 1978 sets out the correct interpretation of the two earlier circulars and, since the re-

fund in the sum of Rs. 7,75,330/- was given upon an erroneous interpretation of the earlier circulars, the Board was entitled to recover that sum from the company. The circular of 23rd Feb., 1978 purports to place upon the earlier circulars an interpretation which they cannot possibly bear. In the guise of interpreting the earlier circulars, the Board cannot retrospectively revise the terms thereof. The Board has acted on the earlier circulars and has conferred the benefit thereof on consumers, including the company. The Board's claim for repayment of the sum of Rs. 7,75,330/- is, therefore, not tenable.

No prayer of the petition seems to be apposite in this regard.

20. In the circumstances, it is ordered that the 1st respondent is permanently restrained from recovering from the petitioners in any manner the sum of Rs. 7,75,330/- or any part thereof.

21. Having regard to the fact that the petitioners have succeeded only in respect of the Board's claim to recover the sum of Rs. 7,75,330/-, there shall be no order as to costs.

22. The 1st respondent shall not take any action to recover from the company the amounts stated in the letter dated 18th Mar., 1978 and consequential arrears for a period of 8 weeks from today.

Ordered accordingly.

AIR 1982 BOMBAY 585

TULPULE, J.

Abdul Samad Makhadum Baksh Sheikh and etc., Petitioners v. Sau. Sudha Anant Parakhe, Respondent.

Special Civil Applns. Nos. 2528 to 2531 of 1978, D/- 30-1-1982.

Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 13 (1) (g) — Suit for eviction on ground of bona fide personal requirement — Evidence at variance with allegations in plaint — Held, decree of eviction on basis of case not made out in suit could not be sustained. (Civil P. C. (1908), O. 6, R. 2).

In civil cases no party should be taken by surprise and whatever case he has, has to be made out in the pleadings so that the defendant or the adversary has an adequate and reasonable opportunity to meet that case. In the absence of any such pleading the adversary would not be in a position to meet

such a case. No case, which is not pleaded in civil cases, is or can be allowed to be made out by any amount of evidence. Such evidence has really to be ignored. (Para 14)

The plaintiff filed a suit for eviction under S. 13 (1) (g) on the ground that she required the premises for her bona fide personal occupation. She stated in the plaint that there were 30 to 32 persons in her family and that for want of accommodation they had to reside at different places, that the plaintiff herself was a tenant of another premises and the members of the family of the plaintiff went to reside in that premises and for that purpose she reasonably and bona fide required the premises in suit. The evidence that was led was however at variance with the allegations in the plaint. The evidence disclosed that the premises were nominally purchased in the name of the plaintiff by her husband and his 3 brothers jointly. The 3 brothers, apart from the family of the plaintiff consisting of her husband and three children, together contributed for the 30 to 32 members of the family. The four brothers were residing separately in different houses and they contributed in equal shares towards the dilapidated suit premises which they proposed to demolish for the purpose of constructing a new building comprising of four self-contained blocks for the use and residence of the 4 brothers. The brothers had jointly given money and deposited it for the purpose of construction and had made all preparations therefor. On the basis of the evidence adduced, the Court held that the plaintiff required the premises bona fide for her occupation and that she also required them reasonably and consequently granted a decree of eviction.

Held, the decree of eviction passed on the basis of a case which was never made out in the plaint allegation could not be sustained. The tenants were unaware that it was going to be the case of the plaintiff that she was a mere benamidar. The tenants did not know that the premises were purchased by the four brothers jointly by their joint income and that therefore, they held that property as tenants-in-common. The tenants did not also know that it was the requirement of these four families whose interest in the property was not disclosed at all and no claim on their behalf was made, that they were sought to be evicted. In spite of this absence of pleadings and absence of any such case, the Court allowed the plaintiff to lead evidence on matters which were not pleaded and granted a decree of eviction on basis of such evidence. Such a

decree could not be upheld. AIR 1976 Bom 70 and 1979 Mah LJ 545, Rel. on.

(Paras 14, 15)

Cases Referred: Chronological Paras

1979 Mah LJ 545: (1980) 1 Rent LR 101

14

AIR 1976 Bom 70: 1975 Mah LJ 746

14

AIR 1975 Bom 225: 1974 Mah LJ 774

14

(1966) 70 Cal WN 967: ILR (1967) 1 Cal

17

112

A. C. Agarwal with Smt. Anita A. Agarwal, for Petitioner; C. G. Solshe, for Respondent.

ORDER:— These four petitions raise common question of law and fact. The respondent is the landlord and owner of Houses Nos. 136 and 137 situate in the Railway Line area at Solapur. The petitioners are tenants of the said premises along with others. The two houses which adjoin have in all amongst them seven tenants and seven tenements each occupied by a tenant.

2. The respondent purchased House No. 136 in a Court sale on 23rd April, 1969. Later House No. 137 was purchased under a deed in Feb., 1971. After thus purchasing the two houses, the respondent served upon the petitioners a notice to quit. That was on 3rd Sept., 1971. That notice claimed possession on several grounds. It appears that in the meantime on 6th Sept., 1976 the Municipal Corporation at Solapur has served a notice under Section 264 of the Corporations Act requiring the landlord-respondent to demolish the southern wall as it had become dangerous and was liable to fall. The respondent claimed possession on the ground that she required these premises for her bona fide personal occupation. She stated in the plaint that there are 30 to 32 persons in her family and that for want of accommodation they have to reside at different places at present, that the plaintiff herself is a tenant of another premises and the members of the family of the plaintiff went to reside in that premises and for that purpose she reasonably and bona fide required the premises in suit. She has stated that notices were issued to five tenants of these premises out of seven. In addition another ground which was made out was that the plaintiff wanted to construct a new building and that she has made arrangements therefor. Unless the tenements are vacated she would not be able to construct a new building thereon.

3. The tenants resisted the suit. They denied that the plaintiff required the premises bona fide for her occupation. They

also contended that there was no necessity for recovering possession for the purposes of demolition and compliance with the notice issued by the Municipal Corporation.

4. The trial Court held that the plaintiff was entitled to a decree. It appears that during the pendency of these suits one of the tenants entered into a settlement with the plaintiff and surrendered possession. The plaintiff, therefore, is in possession at any rate of two rooms in the premises in question. - The other four suits came to be decreed.

5. Appeals were carried by the unsuccessful tenants to the District Court, Solapur, being Civil Appeals Nos. 251 to 254 of 1975. The appellate Court by its order dated 10th Jan., 1977 remitted the matter for recording evidence on the question of the dangerous condition of the suit premises and their immediate demolition "under the order of the Solapur Municipal Corporation", and directed it to return the finding along with the record.

6. After the finding was so returned by the trial Judge, the learned II Extra Assistant Judge, Solapur who heard these appeals, held that the plaintiff-landlady required the premises reasonably and bona fide for her occupation and that they were also required for the purposes of being demolished as required by the local authority. In that view of the matter, he dismissed the appeals and confirmed the decree passed by the trial Court. Aggrieved by those decisions and decrees the present petitions are filed.

7. In holding that the landlady required the premises bona fide for her occupation and that she also required them reasonably, the learned Extra Assistant Judge observed that the premises in question "seem to have been nominally purchased in the name of the respondent-landlady by her husband and husband's three brothers jointly". He also further pointed out that the husband of the plaintiff who was examined had stated that the four brothers had contributed in equal shares and that they have been residing separately in different houses. The learned Judge observed that they are probably doing so for want of sufficient accommodation. He also further found on the basis of the evidence which was adduced that the four brothers "propose to construct a new building after demolishing the present dilapidated houses for their residence"; that in this building they propose to construct four self-contained blocks for the use and residence of four brothers, that the brothers have jointly given money and deposited it for the purpose

of construction and have made all preparations therefor. The learned Judge also found that the appellant-tenants seem to have "no personal knowledge as to why and with what purpose the respondent's husband and his brother purchased the suit houses in the name of the respondent". He observed that there was no evidence adduced by these tenants in that behalf.

8. The record discloses that during the trial and pendency of these proceedings the northern wall of the suit house had fallen. It appears that the premises are not in a satisfactory state of repairs. Affidavits were also filed when these petitions came for hearing that the southern wall in respect of which a notice for demolition has been issued by the Solapur Municipal Corporation and on the basis of which notice was issued and proceedings commenced was also demolished. It seems, therefore, to be clear that both the southern and northern walls of these premises have fallen leaving the intervening portion intact which is in the occupation of these four petitioners-tenants.

9. Shri Agarwal, who appeared for the petitioners, contended firstly that the cause of action on the basis of which the plaintiff-landlady had to claim possession on the ground that the premises are required for the immediate purpose of demolition as required by the local authority no more survives. The wall having fallen and the demolition achieved without requiring any of the petitioners to vacate, that ground on which possession was granted to the landlady-respondent no more survives and is not available to the landlady.

10. Shri Agarwal's second contention was that the Courts below have come to an erroneous conclusion that the plaintiff-landlady required the premises reasonably and bona fide for her personal occupation on the basis of a case which was never made out in the suit. He referred to the plaintiff's allegations and pointed out that it was nowhere stated in the plaint that she was a mere benamidar for the four brothers who had purchased the property in equal shares by their joint contribution. He further pointed out that the evidence was at variance with the allegations in the plaint. The plaint suggests as if it is the plaintiff's family which has about 30 to 32 persons, while that is not the fact. The four brothers including the plaintiff's husband and the four families have been staying separately in separate houses at separate places. They have grown up children and the tenor of the evidence suggests that

they must have been living separately since a long time. If they are so staying separately, then it cannot be said that they were members of the plaintiff's family. The tenants were unaware that the property was purchased Benami in the name of the plaintiff by the four brothers jointly. The tenants were also unaware, as that was not disclosed, that it is for the combined families of the four brothers that the premises in question were claimed. In the absence of any pleading there could be no case made out by the defendants-tenant. Shri Agarwal made a serious grievance that the plaintiff could not succeed on a case which was never made out and never disclosed. He submitted that the statement in para. 7 of the plaint that the plaintiff wants to construct a new structure in the premises is neither in compliance with sub-section (1) (hhh) of S. 13 of the Rent Act nor can be utilized to assist the case of the plaintiff of her personal bona fide and reasonable requirement of the premises in question. He pointed out that no case under S. 13 (1) (hh) was made out at all. There is no allegation as was necessary, no certificate has been produced, and there was no compliance with the provisions of sub-section (3A) of S. 13 and no undertaking by the plaintiff. The case of the plaintiff, therefore, which has remained and which remains for consideration was only one of reasonable and bona fide requirement of the premises for herself. Shri Agarwal also pointed out that the learned appellate Judge did not consider or deal with the plaintiff's case as one falling under S. 13 (1) (hh) and only under S. 13 (1) (g) and one under Section 13 (1) (hhh). In the circumstances, he prayed that petitions be allowed, the decree passed by the Court below be set aside and the suits of the plaintiff be dismissed.

11. The plaintiff's allegations which are relevant are to be found and contained in paragraphs 4 to 7. We are not concerned with the allegations relating to alternative accommodation having been secured by the tenants as that does not seem to have figured at the time of the trial. The only two cases which survive and were agitated in the Courts below were whether the premises were required for the purposes of immediate demolition thereof as ordered by a local authority and the plaintiff bona fide and reasonably required the premises in question. Those are paras. 4 and 6.

12. It is in paragraph 6 that the plaintiff stated what I have extracted earlier above. In para. 7 the plaintiff has referred to the construction which she wants to make in the

suit premises. But it is significant to note that the plaintiff did not say in that para. that she wants to demolish the premises and construct new premises therein for the purposes of her own occupation and that is how she requires the premises in question reasonably and bona fide. I have referred to some argument that was tried to be raised on behalf of the respondent on the basis of para. 7. It is conceded, and there was no alternative in view of the plaint allegations, that the plaintiff has not stated that she was a mere benamidar and the property was purchased by the four brothers including her husband. It was urged, however, that the plaintiff had alleged in the plaint that there were 30 to 32 persons in her family, and that it was a matter of evidence as to how these 30 to 32 members in the family were. The three brothers, apart from the family of the plaintiff consisting of her husband and three children, together contributed for these 30 to 32 members of the family. It was conceded, however, that the plaint does not say that the families of the three brothers in addition to the plaintiff's family also require accommodation. It was not stated in what way their need would entitle the plaintiff to file the suit. Ordinarily, in view of the statements made and the evidence such a possibility could not be urged and could not arise for consideration.

13. Section 13, sub-section (1) uses the expressions "himself or by any person for whose benefit the premises are held" and "a landlord shall be entitled to recover possession of any premises". The expression "himself" has been defined to mean not only the landlord alone but also his wife and children. It would cover the case of a family and all persons staying together including the dependants and other relations and also in certain circumstances a servant. A dependant may not be a member of the family. Nevertheless if he is staying with the landlord and is depending upon him he would be considered as a member of the family and one whose requirements will have to be considered in the expression 'himself'. Such a position does not exist in the present case. The evidence given by the plaintiff's husband clearly indicates that the four brothers have been staying separately and the same must have been the position since a long time though the exact dates have not been given. What he says is that they started living separately when they got married and when there were children the accommodation became insufficient. At the time of the evidence the total number of the members of the family

from 32, as alleged in the plaint, came down to only 23 including children and family members of the other three brothers.

14. It is quite clear, therefore, that the case on which the plaintiff succeeded in the Court below was never made out on the plaint allegation. In *Janba Daulatrao v. Rajeshkumar Ramjiwan*, 1975 Mah LJ 746: (AIR 1976 Bom 70) following the decision in *Ganpat v. Rameshwar*, 1974 Mah LJ 774: (AIR 1975 Bom 225), it was observed that a plaintiff must "place before the Court all necessary details which are required for granting relief. A mere ipse dixit of the landlord that he requires the accommodation for his personal occupation is not enough. Unless the landlord gives such details, the tenant cannot be expected to meet the case of the landlord. I had occasion in similar circumstances to observe as to what must be stated by the plaintiff in cases where he claims that he required the premises bona fide for his personal occupation. In *Sukha-deo v. Laxmibai*, 1979 Mah LJ 545 I had observed, "It is not enough that this can be established (bona fide requirement) by a landlord by adducing evidence. The tenant has to meet such a case, and can only do so provided he is posted in advance as to what he has to meet". There it was a case of an application under the Rent Control Order before the Rent Controller. But that does not make any difference as the principle is the same. There the application filed by the landlord was devoid of particulars and was bare. It was, therefore, held that the tenant was necessarily prejudiced. In the absence of such comparative data and material being available indicating as to how the landlord requires the premises bona fide for his personal occupation, the tenant in meeting the case of the landlord would be gravely prejudiced and "it would permit a landlord to make out a case at the time of trial in any manner he liked, and the tenant would have no opportunity and occasion to meet such a case which is sprung in his face for the first time. This is exactly what has happened in the present case. The tenants were unaware that it was going to be the case of the plaintiff that she was a mere benamidar. The tenants did not know that the premises were purchased by the four brothers jointly by their joint income. They, therefore, held that property as tenants-in-common. The tenants did not also know that it is the requirement of these four families whose interest in the property was not disclosed at all and no claim on their behalf was made, that they are sought to

be evicted. The same applies to the other allegations. In spite of this absence of pleadings and absence of any such case, the Court below allowed the plaintiff to lead evidence on matters which were not pleaded. It is elementary in civil cases that no party should be taken by surprise and whatever case he has, has to be made out in the pleadings so that the defendant or the adversary has an adequate and reasonable opportunity to meet that case. In the absence of any such pleading the adversary would not be in a position to meet such a case. No case, which is not pleaded in civil cases, is or can be allowed to be made out by any amount of evidence. Such evidence has really to be ignored.

15. In view of this position it is really not possible to uphold the decrees passed in this case. Shri Solshe for the respondent contended that even if the plaintiff had not made out a case that the property was purchased by all the four brothers, at least so far as her family was concerned, viz., her husband and her two children, who are college going, were in need and their requirement ought to be considered. It is true that such a limited need of the plaintiff would have been required to be considered if the plaintiff would have come out honestly with a case of this kind. The essence of S. 13, sub-section (1) (g) is that the requirement must be bona fide. A bona fide requirement or need is an honest requirement. It can hardly be said that the plaintiff was honest in making these allegations and trying to support them by evidence about which there was not a whisper in the plaint. If the plaintiff had not been honest in making a disclosure of all the circumstances, details and particulars which were relevant and vital, then the plaintiff can hardly claim and request that the case should be considered as bona fide for her own personal occupation. Shri Solshe clearly conceded that the plaintiff's allegations cannot be stretched to bring the suit under S. 13 (1) (hh). He, however, submitted that the plaintiff's case for possession on the ground that the premises were required for immediate demolition as ordered by the local authority will survive.

16. I am unable to think that there is any substance in this contention also. When the affidavits at the commencement of the hearing of these petitions were filed, Shri Solshe did not ask for any time and was prepared to go on with the petitions. The affidavits clearly show that the wall has been demolished. In the absence of any controversy of those statements, in the affidavit,

the southern wall must be held to have been demolished. It is true that the affidavits do not say as to who demolished the wall. The requirement of the Municipal Corporation to demolish the southern wall has been fulfilled and, therefore, immediate cause of requirement of the terms for the purpose of demolition of southern wall no more exist. In the circumstances the ground under Section 13 (1) (hh) is also no more relevant.

17. Lastly Shri Solshe referred to a decision reported in *Mrs. M. Davidson v. Asma Khatun*, (1966) 70 Cal WN 967, which is entirely inapplicable. The facts in that case and the instant case differ. There the entire family including mother and brothers (children of the mother) were staying together. Such a large family since was living together, it was held that the plaintiff was entitled to ask for possession on the ground that she required the premises reasonably and bona fide. I do not understand how that case is applicable to the facts of the present case.

18. The result is that the petitions have to be allowed. The decrees passed by the Courts below set aside and the suits filed by the plaintiff-respondent dismissed. There will be no order as to costs of the suit. Rule absolute. No order as to costs.

Petitions allowed.

AIR 1982 BOMBAY 589

KANIA, J.

M/s. Nevandram Javermal, Plaintiff v. Devikabai Haridas Gandhi and others, Defendants.

And

R. Sunderdas and another, Respondents.

Chamber Summons No. 135 of 1982 in Suit No. 699 of 1981, D/- 25/29-3-1982.

(A) Civil P. C. (5 of 1908), O. 1, R. 10 — Applicability — Suit against more than one defendant — One of the defendants dead at time of institution of suit — Held, death of defendant did not render suit a nullity and O. 1, R. 10 could be invoked for bringing heirs on record. AIR 1947 Nag 73, AIR 1953 Bom 356 and AIR 1964 Mys 293, Rel. on; AIR 1977 Punj & Har 180, Ref. (Para 7)

(B) Civil P. C. (5 of 1908), O. 1, R. 10 — Application under — Limitation — Suit against several defendants of whom one was already dead — Application under O. 1, R. 10 for bringing heirs on record filed be-

JZ/JZ/E660/82/HR/RSK

latedly due to failure of defendant's counsel to furnish earlier, addresses of heirs to plaintiff — Held, in circumstances, delay could not defeat application of plaintiff.

(Para 7)

Cases Referred:	Chronological	Paras
AIR 1977 Punj & Har 180		6
AIR 1964 Mys 293		5
AIR 1953 Bom 356		5
AIR 1947 Nag 73		5
AIR 1937 Bom 401		5

T. N. Subramaniam, for Plaintiff; N. V. Adhia, for Defendant No. 2.

ORDER :— This is a chamber summons mainly to bring on record the respondents as defendants Nos. 1 (a) and 1 (b), as the executrices of the last Will and testament of the 1st defendant, in the place and stead of the 1st defendant who, it appears, was dead even at the time of the institution of the suit.

2. A few facts are necessary for the appreciation of the controversy raised before me. The defendant No. 1 was the owner of a unit in an industrial estate, called A-Z Industrial Estate at Ferguson Road, Lower Parel in Bombay. Defendant No. 2, a firm, carried on business in the said unit on the basis of a leave and licence agreement. In Sept., 1976, by a written agreement, defendant No. 2 agreed to sell to the plaintiff its running business and the benefit of the tenancy rights which, according to defendant No. 2, it had in the said unit and further agreed that if it acquired the ownership of the said unit from defendant No. 1, the same would also be transferred to the plaintiff. Thereafter, in Suit No. 1744 of 1974, filed in this Court by defendant No. 1 herein against defendant No. 2 herein, certain consent terms were arrived at whereby defendant No. 1 agreed to sell the said unit to defendant No. 2 on the payment of a certain amount. It is the case of the plaintiff that sometime shortly prior to March, 1979, defendant No. 1, through defendant No. 2, agreed to sell to the plaintiff the said unit along with 5 shares in the co-operative society and put the plaintiff in possession of the said unit pursuant to that agreement. It is further contended that on 28th March, 1979, a draft agreement regarding the said purchase was finalised but the same could not be signed for reasons which are not relevant here. The present suit, namely Suit No. 699 of 1981, was filed in March or April, 1981 by the plaintiff for specific performance of the said agreement and it is prayed therein that the defendants be order-

ed and decreed to specifically perform the said sale agreement which has been set out in para 5 of the plaint. The plaint was lodged on 30th March, 1981. It appears that, at that time, the defendant No. 1 was already dead, she having died on 14th July, 1979. It was on 16th Nov., 1979 that the plaintiff came to know that defendant No. 1 had died prior to the institution of the suit and left a registered Will wherein the respondents were appointed as the executrices. It was only in Jan., 1982 that the plaintiff was able to find out the address of the respondents, on the same being furnished to the plaintiff by the learned advocate of defendant No. 2. The present summons has been taken out by the plaintiff on 25th Feb., 1982.

3. Practically the only contention raised by Mr. Adhia, the learned counsel for defendant No. 2, to show cause against the chamber summons, is that, as the defendant No. 1 was dead at the time of the institution of the suit, the suit against her is a nullity and no application can be made to bring her heirs on record or to bring her legal representatives on record in her place and stead.

4. The only question is, whether the respondents could be brought on record under the provisions of O. 1, R. 10 of Civil P. C., 1908. The relevant clause of the said Rule is clause 2, which runs as follows :—

“(2). The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.” It appears to me that it is well settled proposition in law that where the suit is a complete nullity the provisions of this clause will not come into play and no application can be entertained to join any party as a plaintiff or defendant. The main question will be whether the suit can be considered to be a nullity in the present case.

5. In considering this question, I might refer to some of the cases cited by the learned counsel. In Rangrao Vyankatesh v. Kashinath Dhondur, AIR 1947 Nag 73, which decision was relied upon by Mr.

Subramaniam, it has been held that O. 1, R. 10 (1) presupposes that the institution of the suit, that is, the presentation of the plaint, is proper. When the presentation of the plaint is proper the suit cannot be treated as void. In that case, the suit was for rectification of an instrument executed in favour of one Kashinath and one Sadashiv and it was instituted in the name of Kashinath and Sadashiv as plaintiffs, but it was subsequently discovered that Sadashiv had died only 3 days prior to the institution of the suit. The sons and widow of Sadashiv thereafter applied for being substituted as his legal representatives. This was allowed by the trial Court. It was held, in a civil revision application, by Niyogi, J., that the suit was properly presented so far as Kashinath was concerned and he could prosecute the suit on his own account as if he was the sole plaintiff in the case. The suit vis-a-vis Sadashiv was certainly void and his legal representatives could not be brought on record under O. 22, R. 3, Civil P. C., 1908. But O. 1, R. 10 (2) was applicable to the case and hence the order of substitution was not illegal. The fact that Kashinath wrongly included the name of a dead person in his plaint did not make any difference. In *Bai Pani v. Madhabhai*, AIR 1953 Bom 356, Chagla, C. J. held that an effective order under O. 1, R. 10 can only be made provided there is an appeal before the Court, but if the appeal is a nullity, such as when it is presented by the pleader of a person who is already dead, then any order made in that appeal is equally a nullity. The appeal thus being a nullity, an order for substitution of a legal representative in place of the deceased appellant cannot be made. It is true that, in that case, it was held that no substitution could be made, but the discussion in that judgment makes it clear that, the said view was taken only because the sole appellant was dead at the time when the appeal was filed. In fact, in distinguishing the case of *Alabhai Vajsurbhay v. Bhura Bhaya*, AIR 1937 Bom 401, Chagla, C. J. has observed (in para 6 of the said report) as follows:—

“Now, the Bombay case is clearly distinguishable because that was not a case of an appeal being preferred against a sole respondent who was dead at the date when the appeal was preferred. That was a case where the appeal was preferred against several respondents and the appeal was properly instituted against some of the respondents who were alive at the date when the appeal was instituted. Therefore, it could not be

said that the appeal was a nullity. There was a proper and effective appeal before the Court and really the question of bringing the legal representatives of the respondents who had died before the appeal was preferred was not so much a question of substitution as a question of adding is the respondents who were already before the Court, and there can be no doubt that if a suit or an appeal is effectively before the Court, the question of addition of parties is regulated by O. 1, R. 10.”

Similar observations are also found in the decision of a Division Bench of the Mysore High Court in *C. Muttu v. Bharath Match Works*, AIR 1964 Mys 293 at page 295. It has been observed there as follows:

“A careful review of the decisions of the several High Courts relating to substitution of a defendant in a suit in place of the original defendant makes it clear (1) that no such substitution can be permitted in a case where there was a sole defendant, (2) where there are more defendants than one and one of them was dead when the suit was filed, the Courts have held that the legal representatives of the deceased defendant can be brought on record subject to any question of limitation that may be raised by the legal representatives of the deceased person who were brought on record as the suit had been validly presented in so far as the living defendants are concerned.”

With respect, I am in full agreement with these observations.

6. As against these decisions, reliance was sought to be placed by Mr. Adhia on the decision of Narula, C. J. of the Punjab and Haryana High Court, sitting as a single Judge, in *Joginder Singh v. Krishan Lal*, AIR 1977 Punj & Har 180, where it was held that the question of substituting the legal representatives of only such a person under O. 22, R. 4 of Civil P. C. can arise who was alive at the time when the suit was instituted and has died during the pendency of the suit. The case of a person who had died before the institution of the suit or the appeal, and who was erroneously impleaded as a party, does not fall within the purview of O. 22, R. 4 of the Code. In my view this decision is of no assistance to Mr. Adhia at all. In fact, a perusal of the judgment makes it quite clear that the decision, setting aside the order of the lower Court directing the legal representative of some of the defendants, who were dead prior to the institution of the suit, to be brought on record, was set aside on the footing that

the only real defendant in the suit was dead at the time when the suit was instituted and the learned Chief Justice has nowhere said that, this rule would be applicable to a case where there were several defendants and it could not be said that only one of them was the real defendant and that defendant was dead at the time of the institution of the suit.

7. In the present case it is the admitted position that some of the defendants are alive and it is not as if defendant No. 1 was the only real defendant in the suit and in such a case, in my view, it is the settled position as shown by the decisions referred to earlier, that the mere fact that one of the defendants was dead at the time of the institution of the suit does not render the suit a total nullity so that the heirs of the deceased defendant cannot be brought on record at all. It is nobody's case that the application for bringing the heirs of the deceased defendant No. 1 on record is not

made bona fide. It is true that there has been some delay in making the application but, as the facts set out earlier clearly show, it was only in January 1982 that the addresses of the respondents were furnished to the plaintiff by the learned advocate for defendant No. 2 and the chamber summons has been taken out as early as 24th Feb., 1982, hence, there is no such delay as would defeat the application of the plaintiff.

8. In the result the chamber summons is made absolute in terms of prayers (a) and (b), it being ordered that the respondents be brought on record in the suit as defendants Nos. 1 (a) and 1 (b) respectively as the executrices of the last will and testament of the deceased 1st defendant and in her place and stead. Cost of the chamber summons to be costs in the cause.

Ordered accordingly.

END

THE
All India Reporter

1982

[Vol. 69]

CALCUTTA SECTION

CITATION : A. I. R. 1982 CALCUTTA



Published by

D. W. CHITALEY for All India Reporter, Ltd.,

Head Office : Meadows House, Nagindas Master Road, Fort Bombay (India).

Branch Office : Congress Nagar, Nagpur (India).

All correspondence to be addressed to : —

All India Reporter Ltd., (Post Box No. 209), NAGPUR 440012.

Printed by D. W. CHITALEY at the A. I. R. Rotary Printing Press and by Laxmanrao Mahale, Secretary, Press Workers Anudhyogic Sahkari Sanstha Ltd. at the All India Reporter Press, and published by D. W. CHITALEY on behalf of and in the name of the All India Reporter Ltd., at Congress Nagar, Nagpur.

(All Rights Reserved.)

CALCUTTA HIGH COURT

1982

CHIEF JUSTICE

The Hon'ble Mr. Justice Shambhu Chandra Ghose, M.A., Bar-at-law.

PUISNE JUDGES

The Hon'ble Mr. Justice

- „ Ramendra Mohan Datta, M.A., LL.B.,
(Cal.) Bar-at-law.
- „ Samarendra Chandra Deb, Bar-at-law.
- „ Sabyasachi Mukharji, Bar-at-law.
- „ Tarun Kumar Basu, M.A. (Cal), M.Sc.,
(Econ) London, Bar-at-law.
- „ Pradyot Kumar Banerjee, M.A., LL.B.
- „ Anil Kumar Sen, M.A., LL.B.
- „ Chittatosh Mookerjee, M.A., LL.B.
- „ Murari Mohan Dutt, B.Sc., LL.B.
- „ Purna Chandra Borooah, B.Sc., LL.B.
- „ Salil Kumar Roy Chowdhury, M.Sc.,
LL.B., Bar-at-law. (Retired).
- „ Arun Kumar Janah, B.A., LL.B.
- „ Nirmal Chandra Mukherji, M.A., LL.B.
- „ Ajit Kumar Sarkar, B.A., LL.B., Bar-
at-law.
- „ Dipak Kumar Sen, Bar-at-law.
- „ Rabindra Nath Pyne, Bar-at-law.
- „ Bankim Chandra Ray, M.A., LL.B.

The Hon'ble Mr. Justice

- „ Manash Nath Roy, B.A., LL.B.
- „ Bimal Chandra Basak, Bar-at-law.
- „ Ram Krishna Sharma, B.A. (Hons) B.L.
- „ Ganendra Narayan Ray, M.A., LL.B.
- „ Chaudan Kumar Banerji, M.A., LL.B.,
Bar-at-law.
- „ Monoj Kumar Mukherjee, B.Sc., LL.B.
- „ Mrs. Padma Khastgir, B.A., LL.B.
(Hons.) London Bar-at-law.
- „ Mrs. Monjula Bose, B.A. Bar-at-law.
- „ Bimlendra Nath Maitra, B.A., B.L.
- „ Bhabes Chandra Chakrabarti, M.A.,
LL.B.
- „ Mrs. Jyotirmoyee Nag, M.A., LL.B.
- „ Mrs. Pratibha Bonnerjee, B.A., LL.B.
- „ Sudhindra Mohan Guha, M.A., LL.B.
- „ Nanigopal Chaudhuri, M.A., LL.B. (Cal.)
LL.W. (Stratford) (Addl.)
- „ Amitabha Dutta, M.A., LL.B. (Addl.)
- „ Sachindranath Sanyal, M.A., LL.B.
(Addl.)
- „ Subashchandra, Sen, Bar-at-law (Addl.)

ADVOCATES-GENERAL :

- Shri S. K. Acharya.
- „ Sadhan Kumar Gupta, (Addl.)

STANDING-COUNSEL :

Shri Arun Prakash Chatterjee (Senior.)

GOVERNMENT PLEADER

Shri Naranarayan Gupta.

REPORTERS:

- Shri Subodh Chandra Basak, M.Sc., LL.B., Advocate.
- „ Amiya Lal Chatterjee, Advocate.
- „ Gauri Prasad Mukherjee, Advocate.
- „ Jarendra Coomar Dutta, Advocate, Supreme Court of India.

CHIEF EDITOR :

Shri V. R. Mauchar, Advocate (Nagpur),

NOMINAL TABLE

Abdul Latif Sk. v. Commissioner of Wakfs	(Jun) 288	Gopalan Vikraman Nair v. Taranath Dey Sarkar	(Apr) 162
Alliance Mills (Lessees) Pvt. Ltd. v. M/s. Madan Gopal & Sons	(Jun) 282	Haridas Chatterjee v. Debendra Nath Basu	(Apr) 134
Alok Kumar Aich v. Asoke Kumar Aich	(Dec) 599	Hindusthan Steel Works Construction Ltd v. G. Sreenivasulu Reddy & Co.	(Jun) 301
Anadi Nath Chakraborty v. Dukhiram Ghose	(Mar) 113	Hironmoyee Debi v. Somendra Chandra Nandy	(Aug) 391
Anath Nath Das v. Bijali Bala Mondal	(May) 236	I. T. C. Ltd. v. George Joseph Fernandez	(Sep) 440
Anderson Wright and Co. v. State	(Nov) 522	Ina Kar v. Amitava Ghosh	(Apr) 149
Anehakana Sur v. Abani Bhusan Sur	(Aug) 378	Indian Dairy Corporation v. M/s. Lasco	(Mar) 96
Ashis Ranjan Das, Dr. v. Rajendra Nath Mullick	(Nov) 529	Ismail, Sk. v. Fosiuddin Mondal	(Apr) 146
Asit Kumar Dey v. Bishudhananda Chaudhury	(Jan) 55	Jaganath Mondal v. Tarak Ch. Mondal	(May) 224
Avery India Ltd. v. Controller, Weights and Measures, Govt. of West Bengal	(Nov) 520	Jaynal Haldar v. Khorsed Sheikh	(Mar) 118
Bank of India v. Andhra Steel Corporation Ltd.	(Jan) 57	Jugal Kshihore Kundu (deceased by L. R.'s) v. Narayan Chandra Kundu	(Jul) 342
Barun K. Sinha v. District Magistrate Mursheedabad	(Jan) 19	Jyotsna Ranjan Chakrabarti v. N. K. Mitra	(Nov) 518
Bayer Aktiengesellschaft of Leverkusen Federal Republic of Germany v. Controller of Patents, Government of India	(Jan) 30	Kalipada Das v. M/s. North Bihar Sugar Mills Ltd.	(Jan) 48
Bhakta Prosad Paul v. State	(Jun) 254	Kalipada Sadhukhan, In re	(Aug) 376
Bhup Nath Mondal v. Kalipada Mondal	(Nov) 534	Kali Sadhan Banerjee v. K. K. Banerji	(Apr) 158
Bibhuti Bhusan Mayur v. Bhabesh Bhusan Mayur	(Aug) 374	Kaumudi Mohan Guha Raja v. Paresch Nath Mitra	(Mar) 120
Bihar State Agro-Industries Development Corporation Ltd. v. Ram Chand Khosla	(Nov) 537	Krishna Kamalini Debeya v. Junior Land Reforms Officer, Khandagosh	(Mar) 83
Bihar State Electricity Board v. Patna Electric Supply Co. Ltd.	(Feb) 74	Krishna Kishore Kar v. United Commercial Bank	(Jan) 62
Biswanath Charit v. Damodar Patra	(May) 199	Krishna Narayan Das v. Additional District Magistrate	(Aug) 380
Brojendra Kumar Ghosh v. Mrs. Arpana Ghosh	(Aug) 360 (SB)	Kumar Veda Kantha Sinha Roy v. State	(Jul) 307
Calcutta Landing and Shipping Co. Ltd. v. Collector of Calcutta	(May) 209	Kusum Rari Biswas v. Sanyasi Biswas	(Jun) 243
Chandidas Ghosh, In re	(Jul) 305	Lalit Mohan Mondal v. Profulla Kumar Mondal (Deceased through his L. Rs.)	(Jan) 52
Chandra Sekhar Sarkar v. Baidyanath Ghosh	(Jan) 6	Laxmi Moni Basak v. Kedar Nath Basak	(Nov) 559
Commissioner of Payments (Coking Coal) v. Sourindra Nath Basu	(Dec) 605	M. L. Bose & Co. Pvt. Ltd. In re:	(Feb) 71
Corporation of Calcutta v. East India Commercial Company Pvt. Ltd.	(Oct) 479	Mahabir Saha v. Haripada Saha	(Aug) 353
Debi Prasad Bagaria v. State	(Dec) 587	Maharani Kamsundari v. Durganand Jha	(Apr) 151
Delhi Cloth & General Mills Co. Ltd. v. Ramjidas Shriram	(Jan) 34	Mahommed Zazmul Ahasen v. State	(Nov) 546
Director of Enforcement, Enforcement Directorate v. Bird & Co. Pvt. Ltd.	(Sep) 439	Martin Harris (Pvt.) Ltd. v. M/s. Elgin Properties	(Sep) 433
Dukhiram Dey v. Mrityunjoy Prosad Daw	(Jun) 294	Mirta Lina Pr. Ltd. v. Finlay Mills Ltd.	(Jan) 41
Dunia Lal Datta v. Nagendra Nath Datta	(Apr) 163	Nag Book House v. State	(Jun) 245
Dutta and Associates v. State	(May) 225	Nakul Chandra Dutta v. Ajit Kumar Chakrabarty	(Dec) 564
Ganges River Transport v. Reliance Jute and Industries Ltd.	(Jun) 290	Nanalal Madhavji Varma v. State	(Apr) 167
Gillapukri Tea & Seed Co. Ltd. v. Additional Director of Land Requisition & Acquisition & Reforms, Assam	(May) 220	Narendra Nath Pal Choudhury v. G. L. Malhotra	(Aug) 358
Gita Mitra v. Hemanta Kumar Mitra	(Jul) 336	Nilkamal Bez Boruah, Dr. v. State of West Bengal	(Oct) 509
		Nilima Ghosh v. Prakriti Bhusan Mitter	(Jan) 14
		Nil Kamal Bejbaruah v. State	(Apr) 180
		Official Trustee, W. B. v. Lal Chand Mullick	(May) 210

Omprakash Patwarika v. Union of India	(Jul) 340	Shib Nath Paul v. Jaharlal Paul	(Apr) 143
Paras Nath Dubey v. Kedar Nath Kejriwal	(Dec) 578	Shila Banerjee v. State	(Jan) 9
Paresh Nath Mondal v. Bijan Behari Mondal	(Jun) 285	Shima Sundari Lekri v. Paltu Hemram	(Jan) 5
Parimal Mitra v. Paresh Chandra Hazra	(Aug) 361	Shree Choudhary Cold Storage v. Ruby General Insurance Co. Ltd.	(Mar) 124
Parmeshwar Choudhury v. State	(Jul) 346	Shyam Sundar Kajaria v. Eastern Commercial Corporation	(Sep) 437
Parshava Properties Ltd. v. State	(May) 202	Sikha Singh v. Dina Chakrabarty	(Aug) 370
Patel Roadways Pvt. Ltd. v. Bata India Ltd.	(Dec) 575	Smritikana Bag v. Dilip Kumar Bag	(Nov) 547
Patrick Herbert Van-Hek v. More Ilma Van-Hek	(Aug) 356 (SB)	Soumitra Kumar De In re:	(Jan) 32
Periwal Packing Industries Pvt. Ltd. v. Fertilizer and Chemicals, Travancore Ltd.	(Jul) 350	Sree Jain Swetamber Terapanthi Vidyalaya v. State of W. B.	(Mar) 101
Phanindra Nath Dey v. Bholanath Banerjee	(Aug) 397	Sri Iswar Gopal Jew Sri v. Bhagwandas Shaw	(Jan) 12
Piyush Kanti Guha v. West Bengal Pharmaceutical & Phytochemical Development Corporation Ltd.	(Mar) 94	State v. Subimal Kumar Mondal	(Jun) 251
Prahladrai Agarwalla v. Renuka Pal	(Jun) 259	State Bank of India v. Netai Ch. Porel	(Mar) 92
Prasant Chandra Sen v. United Commercial Bank	(Nov) 555	Steel Authority of India Ltd. v. Transworld Marine Ltd.	(Apr) 161
Probodh Kumar Das v. Prafulla Kumar Das	(Sep) 428	Subrata Mukherjee v. State	(Sep) 430
Prosad Kumar Dhara v. Kamala Kanta Dikshit	(Nov) 532	Sudha Mukherjee v. Sankar Chatterjee	(Sep) 407
Protiva Debi v. Zilla Parishad	(Apr) 152	Sudhir Chandra Ghosh v. Sachindra Nath Ghosh	(Jun) 267 (FB)
Purshottamdas Bhiwaniwala, In the matter of	(Oct) 505	Sukhlal Mondal v. Bimal Krishna Biswas	(May) 207
Radheshyam Agarwalla v. Maharaj Bahadur Singh	(Dec) 571	Sukumar Banerjee v. Dilip Kumar Sarkar	(Jan) 17
Ram Awatar Agarwal, In re	(Apr) 191	Sumani Ferro Alloys Ltd. v. Super Forging Steel Sales Pvt. Ltd.	(Apr) 136
Ram Awatar Agarwal v. Corporation of Calcutta	(Jul) 314	Suresh Kumar Rungta v. Mahadeo Prasad Agarwala	(Aug) 394
Ram Narayan Keshori v. University of Calcutta	(Jan) 1	Surjya Kumar Das v. Maya Dutta	(May) 222
Ranjit Kumar Jain v. Kamal Kumar Chowdhury	(Oct) 493	Sushil Chandra Sur v. Sadhana Bakobi	(Sep) 417
Ranu Sengupta, Sm. In Re	(Sep) 420	Tanvar Eqbal v. Union of India	(Nov) 542
Rasomay Mitra v. Smt. Lachmi Todi	(Apr) 178	Thakuruddin Ramjash, a firm v. Sourendra Nath Mukherjee	(Apr) 133
Rita Roy v. Sitesh Chandra Bhadra Roy	(Apr) 138	Tide Water Oil Company (India) Ltd. v. K. D. Banerjee	(Mar) 127
Ritu Sachdev v. Anita Jindal	(Jul) 329	Trambaklal Dayalal Kothari v. L. K. Dey	(May) 217
Ritu Sachdev v. Anita Jindal	(Jul) 333	Union of India v. Chinoy Chablani and Co.	(Aug) 365
Roy A. K., Dr. v. J. C. Roy Choudhury	(Jan) 8	Union of India v. M/s. Manton Company Ltd.	(Sep) 461
Ruby Sett, Miss. Dr. v. University of Calcutta	(Jul) 351	United Investment Corp'n. v. Corporation of India	(Aug) 388
Sankar Prosad Paul Chowdhury v. Madhab Paul Chowdhury	(Oct) 474	Usha Das (Roy) v. Arati Kar (Maiti)	(Apr) 174
Sanyal A. K. v. Chitta Ranjan Basistha	(Sep) 412	Vikam Chand Kothari v. Upendra Nath Sarkar	(May) 205
Sarda Debi v. Pacific Garments	(Jun) 241	West Bengal Board of Secondary Education v. Basana Rani Ghosh	(Oct) 467
Serajuddin & Co. v. Union of India	(Aug) 400	West Bengal Decorating Co. v. M/s. Damodar Das Daga	(Aug) 386
Shethia Mining & Manufacturing Corporation Ltd. v. Khas Dharmaband Colliery Company Pvt. Ltd.	(Sep) 413	Yunus, Md. v. Nabi Hossain	(Oct) 488

SUBJECT INDEX

Andhra Pradesh Electricity Department Manual

—Vol. 2, Appendix, P. 22, Item 46 — See Constitution of India, Art. 299 (1) (Apr) 167 A

Andhra Pradesh Financial Code

—Vol. 1, Art. 51 (b), P. 20 — See Constitution of India, Art. 299 (1) (Apr) 167 A

Arbitration Act (10 of 1940)

—S. 2 (9) — See Ibid, S. 33 (Jun) 282 B
—Ss. 4, 5, 11, 12 and 39, Sch. 2 — Appeal against order passed in application filed under Ss. 4, 5, 11 and 12 for removal of umpire — Maintainability (Jun) 301 A
—S. 5 — See Ibid, S. 4 (Jun) 301 A
—S. 8 (1) (b) — Power of court to appoint arbitrator — Arbitrator appointed by persona designata declining to act as arbitrator — Agreement not showing intention of parties for not filling up vacancy — Court alone can appoint new arbitrator (Jan) 9
—S. 11 — See also Ibid, S. 4 (Jun) 301 A
—S. 11 — Application for removal of umpire — Court while dismissing application directing umpire to give hearing to parties — Direction is without jurisdiction as it related to conduct of proceedings by umpire (Jun) 301 B
—S. 12 — See Ibid, S. 4 (Jun) 301 A
—S. 20 — Application for filing of arbitration agreement — Maintainability — Applicant also seeking change of named arbitrator in the agreement — Court would not exercise its discretion in favour of applicant and order filing of agreement (Jan) 48
—S. 20 — Application to file in court arbitration agreement — Court should not pass order for filing of the agreement, in case of strained relationship between the parties and when arbitrator cannot be impartial (Mar) 96

—Ss. 33, 2 (9) — Application to set aside award — Plea that contract containing arbitration clause is void — Can be raised even after party has acquiesced to arbitration after proceedings and award was passed (Jun) 282 B

—S. 33 — "The Court shall decide the question on affidavits" — Powers of Court (Dec) 578 A

—S. 34 — See also Ibid, S. 35 (1) (Dec) 578 B

—S. 34 — Stay of suit — Application for — S. 14 of Limitation Act — Applicability of, to arbitration proceedings (Sep) 440

—Ss. 35 (1), 34 — Relative scope of — Mere commencement of legal proceeding — Arbitration proceeding not rendered invalid (Dec) 578 B

—S. 39 — See also Ibid, S. 4 (Jun) 301 A

—Sch. 2 — See Ibid, S. 4 (Jun) 301 A

Assam Fixation of Ceiling on Land Holdings Act (1 of 1957)

See under Tenancy Laws.

Benami

—A person who is not a party to a document is not debarred from challenging it as a benami and fictitious document (Jun) 294 G

Benami (contd.)

—Benamidar — Suit against — See T. P. Act (1882), S. 41 (Dec) 571 B

—Benami transaction — See T. P. Act (1882), S. 41 (Dec) 571 A

—Transaction whether sham — Determination of (Jun) 294 H

Bengal Agra and Assam Civil Courts Act (12 of 1887)

—S. 22 — See Tenancy Laws — West Bengal Land Reforms Act (1956), S. 9 (6) (Jun) 285 A, B

Bengal Municipal Act (15 of 1932)

See under Municipalities.

Bengal Wakf Act (13 of 1934)

—S. 27 (1) (a) and (b) — Power given to Commissioner of Wakfs under — It must be exercised in quasi-judicial manner (Jun) 288

Bills of Lading Act (9 of 1856)

—S. 1 — See Sale of Goods Act (1930), S. 2 (4) (Dec) 575 B

Calcutta Hackney Carriage Act (1 of 1919)

—Ss. 2 (b) and 70, Second Proviso — Rickshaw pullers granted licences by Municipality under S. 173 of Bengal Municipal Act — Inclusion of area of Municipality within limits of Calcutta by notification under S. 2 (b) — Rickshaw pullers do not acquire right to ply rickshaw in Calcutta City (Jul) 346 A

—Ss. 70 and 71 (1) — By-Laws framed under S. 71 (1), By-law 13-A — Registering Authority limiting number of rickshaws to be registered for plying in Calcutta to 6000 — Action not open to challenge (Jul) 346 B
—S. 70, Second Proviso — See Ibid, Section 2 (b) (Jul) 346 A

—S. 71 (1) — See Ibid, S. 70 (Jul) 346 B

Calcutta High Court Original Side Rules

See under High Court Rules and Orders.

Calcutta High Court Rules

See under High Court Rules and Orders.

Calcutta Municipal Act (33 of 1951)

See under Municipalities.

Calcutta University Act (2 of 1966)

See under Education.

Civil Procedure Code (5 of 1908)

—S. 2 (2) — See Ibid, S. 47 (Jan) 34 A
—S. 10 — Applicability — Held on facts, while first suit was patently a title suit, in second suit a claim for money was made, and, therefore, the matters in issue were not substantially the same as to attract S. 10 (Jan) 41 A

—S. 10 — Expression "having jurisdiction to grant the relief claimed" — Contemplates the competency of the first court to grant the reliefs claimed in the second suit — Held, second suit valued at Rs. 78,000 was beyond pecuniary jurisdiction of City Civil Court in which first suit was filed, and, City Civil Court was, therefore, incompetent to grant either decree for possession and/or decree for mesne profits claimed in second suit (Jan) 41 B

—Ss. 10, 11 — 'Matter in issue' — Means disputed material questions in the latter suit, which are directly and substantially in issue

Civil P. C. (contd.)

in the former suit — Matters not in issue cannot be regarded as heard or finally decided so as to operate as *res judicata* in the latter suit (Jan) 41 C

—Ss. 10, 151 and O. 39, R. 1 — Power of Court to restrain party from proceeding with suit in another court — Suit sought to be stayed under O. 39 not found to be vexatious or an abuse of process of Court — Neither O. 39 nor Court's inherent powers under S. 151 can be invoked to stay suit (Jan) 41 E

—S. 10 — Companies Act (1956), Ss. 397, 398 — Stay of proceedings — Civil suit filed before company petition — Company petition sought to be stayed — Court finding relief sought for in both cases distinctly different — Stay of company petition cannot be granted (Mar) 94

—S. 10 — Forum — Choice of forum — Effect (Jul) 350

—S. 11 — See also

(1) *Ibid*, S. 10 (Jan) 41 C

(2) *Ibid*, S. 47 (Jan) 34 F

(3) Companies Act (1956), S. 433 (e) (Feb) 71

(4) Houses and Rents — West Bengal Premises Tenancy Act (1956), S. 13 (Mar) 120

(5) Registration Act (1908), S. 17 (2) (vi) (May) 222 B

(6) T. P. Act (1882), S. 41 (Dec) 571 B

—S. 11, O. 23, R. 1 — Grant of permission to withdraw a suit with liberty to sue a fresh — Findings arrived therein would not operate as *res judicata* in a subsequent suit (Jan) 17 C

—S. 11, O. 23, R. 1 — *Res judicata* — Withdrawal of suit alleging determination of lease — Determination of lease by efflux of time — Subsequent suit for khas possession — Not barred by S. 11 (Apr) 133 A

—Ss. 16 (d), 20 (c) — Plaintiff-tenant occupying building situate at Puri in Orissa State — Landlords taking tenant to Calcutta and compelling him to sign agreement collusively surrendering his tenancy right in respect of disputed building — Legality of agreement challenged in City Civil Court, Calcutta — Maintainability (Aug) 361

—S. 20 — Suit based on hundies filed in Delhi High Court — Hundies drawn at Delhi and accepted at Calcutta — Part of cause of action arising in Delhi — Held, Delhi High Court did have jurisdiction to entertain such suit (Jan) 34 C

—S. 20 — Cause of action — Suit for realisation of claims — Appointment of Receiver by High Court — Is a part of cause of action (Nov) 537 A

—S. 20 — Entrustment of goods at P for carriage to 'O' — Breach of contract — Institution of suit at 'A' having jurisdiction over 'D' — Maintainability (Dec) 575 A

—S. 20 (c) — See *Ibid*, S. 16 (d) (Aug) 361

—S. 24 — See Tenancy Laws — West Bengal Land Reforms Act (1956), S. 9 (6) (Jun) 285 A, B

—S. 47 — See also Succession Act (1925), S. 214 (1) (b) (Aug) 378

Civil P. C. (contd.)

—Ss. 47, 2 (2) — Decree — Executability of — Decree passed by Court having jurisdiction to entertain it — All defendants submitting to jurisdiction of court — Decree, not a nullity (Jan) 34 A

—S. 47 — Question as to validity of decree — Execution — Challenge to validity of decree — Mere plea that it is contrary to law — Not open (Jan) 34 D

—Ss. 47, 11 — Question as to nullity of decree — Incorrectness of decision of court passing decree — Pleas as to — Barred by principle of *res judicata* (Jan) 34 E

—S. 47 — Question of liability of certain property to attachment and sale — Properties must be within jurisdiction of Executing Court (Jan) 34 F

—S. 47 — Suit for specific performance of contract decreed on compromise — Defendant required to pay amount due within specified time — Court could not extend time for deposit on application by defendant without consent of plaintiff (Mar) 118

—S. 47 — Objections under, are applications and are governed by Limitation Act — Limitation prescribed under Art. 137 would govern such applications (Apr) 178

—S. 47 — W. B. Premises Tenancy Act (12 of 1956), S. 13 (1) — Suit to evict tenant on ground of default in payment of rent and requirement of premises for rebuilding — Compromise decree — No indication that Court while passing decree applied its mind as to existence of statutory ground of eviction — Decree is nullity and cannot be executed — Executing Court cannot go behind decree (Sep) 417

—S. 60 (1), Cl. (h) read with Cl. (i) — Applicability of Cl. (h) — Applies only to such labourers and domestic servants whose wages do not exceed amount mentioned in cl. (i) — "Wages" is used in same sense as "salary" and as such implies total monthly emoluments (Jul) 336

—S. 80 — See Tenancy Laws — West Bengal Land Reforms Act (10 of 1956), Section 53-A (Jan) 5

—S. 90 — See Trusts Act (1882), S. 34 (Jan) 14

—S. 100 — Second appeal — Finding of fact based on mere inadequacy or insufficiency or improper assessment of evidence — Cannot be interfered by reappraisal of evidence (Aug) 397 C

—Ss. 100, 101 — Second appeal — Suit for declaration of title over suit land — Decision of the final Court of fact cannot be reopened in second appeal, however, erroneous that decision may be (Mar) 113 A

—Ss. 100-101 — Second appeal — Finding of fact when not binding in second appeal (Jun) 251 A

—S. 107 — Appreciation of evidence — Duty of lower appellate Court (Jun) 251 C

—S. 115 — See also *Ibid*, O. 39, R. 1 (May) 207

—S. 115, O. 39, Rr. 1 and 2 — Permanent lease — Lessee raising permanent structures on leasehold land — Injunction against — Grant of — Balance of convenience and inconvenience of parties not duly considered

Civil P. C. (contd.)

while granting injunction — Order can be interfered with under Sec. 115 of Civil P. C. (Apr) 152 B

—S. 115, O. 21, R. 106, O. 43, R. 1 (ja) — Order rejecting application under O. 21, R. 106 not on merits but only on preliminary point — Even then order is appealable and hence not revisable (Apr) 162

—S. 146; O. 22, R. 10 — Applicability — Suit for permanent injunction against 'C' by 'A' licensee holding 'profits a prendre' in land of 'B' for a term of one year (Mar) 113 B

—S. 148 — See Limitation Act (1963), Article 122 (Sep) 413

—S. 149 — See Ibid, S. 151 (Jun) 290

—S. 151 — See also

(1) Ibid, S. 10 (Jan) 41 E

(2) Evidence Act (1872), S. 35 (Jun) 294 C

—S. 151; O. 23, R. 3 and Rule 3-A (as amended by Act 104 of 1976) and Order 47, Rule 1 — Consent decree on basis of oral agreement — Not valid — Suit for setting aside consent decree would be barred under Order 23, Rule 3-A — Application under Sec. 151 or for review would be proper remedy (Jan) 12 A

—S. 151 — Application under Section 151 by managing shebait having power to manage estate of deity — Managing shebait is also party to suit — Application is maintainable (Jan) 12 B

—S. 151 — Application under — It is governed by residuary Article 113 of Limitation Act as there is no express provision for the same (Jan) 12 C

—Ss. 151, 149 and O. 7, R. 11 — Order rejecting plaint for failure to put in deficit court-fee within extended time — Plaintiff's application under S. 151 for recalling that order and restoration of plaint — Matters to be considered (Jun) 290

—O. 1, Rr. 3, 10 (2) — Special Marriage Act (1954), S. 27. — Suit for divorce against husband on ground of adultery — Alleged adulteress made a co-respondent — Damages also claimed against her — Alleged adulteress held, was a proper and necessary party — Her name could not be struck off under O. 1, R. 10 (2) (Aug) 370 A

—O. 1, R. 10 — See also

(1) Ibid, O. 6, R. 17 (Sep) 437

(2) Contract Act (1872), S. 230 (Apr) 161

(3) Letters Patent (Cal.), Cl. 12 (Jul) 329 B

—O. 1, R. 10 — Suit for eviction — Application by wife of real tenant in his absence, for her impleadment — She could be impleaded as party to suit for ends of justice (Jan) 8

—O. 1, R. 10 (2) — See Ibid, O. 1, R. 3 (Aug) 370 A

—O. 6, R. 2 — Ejectment suit on ground of subletting without consent — Defendant cannot be allowed to adduce evidence to show that he only occasionally visited the tenant in absence of such a case in the written statement (Apr) 149

—O. 6, R. 2 — Pleading — New case — Court cannot make a new case, not made out in the pleadings (Jul) 342 A

Civil P. C. (contd.)

—O. 6, R. 2 — Pleadings and evidence — Evidence cannot be allowed to be led by a point not made out in the point (Oct) 488 B

—O. 6, R. 17 — See also

(1) Hindu Marriage Act (1955), S. 21 (Oct) 474 C

(2) Letters Patent (Cal), Cl. 12 (Jul) 329 B

—O. 6, R. 17 — Application for amendment of plaint seeking to introduce cause of action arising subsequent to filing of suit — Court, held, can take note of subsequent facts — Amendment allowed (Aug) 358

—O. 6, R. 17 — W. B. Premises Tenancy Act (10 of 1956), S. 13 (3A) — Amendment of plaint — Order as to — Legality. AIR 1979 Cal 221, **Overruled** (Sep) 407

—O. 6, R. 17 and O. 1, R. 10 — Application for amendment of plaint for impleading a person as defendant — Amendment when can be allowed — Considerations (Sep) 437

—O. 6, R. 17 — Amendment of written statement — Inconsistent pleading — Inconsistent claim can be made in written statement by amendment (Nov) 555 B

—O. 7, R. 11 — See

(1) Ibid, S. 151 (Jun) 290

(2) Letters Patent (Cal), Cl. 15 (Jun) 259

—O. 9, R. 13 — Suit to set aside an ex parte decree on ground of fraud — Factors to be proved (Oct) 488 A

—O. 14, R. 5 — See Houses and Rents — West Bengal Premises Tenancy Act (1956), S. 13 (Mar) 120

—O. 21, R. 58 — Application under for modification of decree — Dismissal of, on ground of want of sufficient particulars — Validity (Dec) 605 B

—O. 21, R. 58 (1) Proviso (b); (3) (d), (4) and (5) — Application for modification of decree — Order giving opportunity to make further application on proper materials — Order is one under sub-rule (3) (d) and as such a decree under sub-rule (4) — It is appealable (Dec) 605 A

—O. 21, R. 90 — Setting aside of sale — Limitation for (Dec) 564

—O. 21, R. 106 — See Ibid, S. 115 (Apr) 162

—O. 22, R. 10 — See Ibid, S. 146 (Mar) 113

—O. 23, R. 1 — See

(1) Ibid, S. 11 (Jan) 17 C;

(Apr) 133 A

(2) Hindu Marriage Act (1955), S. 13 (Oct) 474 D

(3) Tenancy Laws — West Bengal Land Reforms Act (1956), S. 53-A (Jan) 5

—O. 23, R. 1 (2) — Plaintiff permitted to withdraw suit — No order regarding liberty to file fresh suit — Effect (Jan) 17 A

—O. 23, R. 1 (4) — Previous suit for ejectment by five brothers — Subsequent application by defendant under Section 17 (2) of W. B. Premises Tenancy Act (12 of 1956) — Bar enjoined by O. 23, R. 1 (4) not to bring another suit on the same cause of action has

Civil P. C. (contd.)

no application as the claim and subject-matter are different (Jan) 17 B

—O. 23, R. 3 — See also *Ibid*, S. 151

(Jan) 12 A

—O. 23, R. 3 — *Locus standi* — Shareholders of company have no *locus standi* to intervene in suit of parties representing company (Jan) 57

—O. 23, R. 3-A — See *Ibid*, S. 151

(Jan) 12 A

—O. 31, R. 22 (1) — Respondent can challenge adverse finding without filing appeal or cross-objection (Mar) 127 A

—O. 37, R. 1 — Applicability — Suit for recovery of price of goods sold and delivered — It does not come within meaning of O. 37 (Aug) 386 B

—O. 37, R. 2 — Suit for recovery of sale proceeds of goods of plaintiff (holder of hundies) — Suit based on hundies accepted by defendant — Held, maintainable — Fact that hundies not endorsed in favour of plaintiff — Not material (Jan) 34 B

—O. 37, R. 2 — Plaintiff drawing Hundies on bank defendant No. 2 — Acceptance by defendant No. 1 — Bank presenting Hundies to defendant No. 1 for payment — Dishonour of Hundies — Bank endorsing those Hundies in favour of plaintiff for value received — Suit by plaintiff under O. 37 — Defendant No. 1 would be entitled to defend suit (Apr) 136

—O. 37 — Suit for recovery of price of goods sold and delivered — Application for leave to defend filed beyond time — Condonation of delay (Aug) 386 A

—O. 39, R. 10 — See also

(1) *Ibid*, S. 10 (Jan) 41 E

(2) *Ibid*, S. 115 (Apr) 152 B

—O. 39, R. 1 — Transfer of Property Act (1882), S. 44 — Transfer of premises by one co-sharer to outsider — Right of transferee to joint possession — Grant of injunction to co-sharer (Apr) 143

—O. 39, R. 1 — Transfer of Property Act (1882), Section 108 (1) (p) — Permanent lease — Lessee raising permanent structures on leasehold land — Temporary injunction against — Grant of — Factors to be considered (Apr) 152 A

—O. 39, Rr. 1 and 2 and S. 115 — Suit for declaration that order of suspension of plaintiff was illegal and for permanent injunction — Dismissal of suit — *Prima facie* good case of plaintiff — High Court to interfere (May) 207

—O. 39, R. 1 — Application for ad interim injunction — Suppression of material facts — Application would be liable to be dismissed (Sep) 412

—O. 39, R. 1 — Agreement to execute lease of plot of land — Suit for specific performance of — Right of defendant to ask for interlocutory relief restraining plaintiff to make any construction — Plaintiff in possession of plot — Defendant, held, was entitled to interlocutory injunction against plaintiff (Nov) 529

—O. 39, R. 2 — See also

(1) *Ibid*, S. 115 (Apr) 152 B

(2) *Ibid*, O. 39, R. 1 (May) 207

Civil P. C. (contd.)

—O. 39, R. 2 — Suit by P (officiating Headmistress of School) against D (duly approved Headmistress) for declaration — Application for injunction — Effect of granting injunction (Apr) 174 B

—O. 39, R. 2A — Injunction order — Violation without understanding implication of order — Unqualified apology was accepted (Apr) 151

—O. 43, R. 1 — See Letters Patent (Cal), Cl. 15 (Jun) 259

—O. 43, R. 1 (ja) — See *Ibid*, S. 115 (Apr) 162

—O. 45, R. 5 (1) — Preliminary decree for partition — High Court staying further proceedings of preliminary decree — Opposite party filing execution and purchasing property in auction before communication of stay to executing Court — Held, sale is not invalid as stay of further proceedings of preliminary decree would not include a stay of execution proceedings also (May) 224

Companies Act (1 of 1956)

—S. 397 — See Civil P. C. (1908), S. 10

(Mar) 94

—S. 398 — See Civil P. C. (1908), S. 10

(Mar) 94

—Ss. 433 (e), 434 — Winding up petition — Inability to pay debts — Company disputing its liability on ground of fraud — Not filing separate suit as earlier directed by Court — Principle of estoppel and *res iudicata* attracted — Winding up petition maintainable (Feb) 71

—S. 434 — See *Ibid*, S. 433 (e) (Feb) 71

Constitution of India

—Art. 14 — See also

(1) *Ibid*, Art. 299 (Jul) 340

(2) West Bengal Taxation Laws 2nd Amendment Act (1977), Pre. (May) 202 A

—Arts. 14, 226 and 298 — Public contracts — Writ petition challenging acceptance of tender of contractor at rate higher than offered by petitioner — Petition is maintainable (Jan) 19 A

—Arts. 14 and 298 — Public contracts — Authority cannot pick and choose tender — Selection of higher tender without assigning reason is violative of Art. 14 (Jan) 19 B

—Arts. 14, 15, 226 — Admission to M. D. course by competitive examination — Assessment of marks — Interference by High Court (Jul) 351 A

—Arts. 14, 15 — Admission to M. D. Course by competitive examination — Duty of University (Jul) 351 B

—Art. 15 — See also *Ibid*, Art. 14

(Jul) 351 A, B,

—Art. 19 — See West Bengal Taxation Laws 2nd Amendment Act (1977), Pre. (May) 202 B

—Art. 19 (1) (f) — See Electricity Act (1910), S. 6 (Feb) 74

—Art. 19 (1) (g) — See

(1) Education — West Bengal Board of Secondary Education Act (1963), Section 19 A (3) (h) (Jun) 245 A

(2) Municipalities — Calcutta Municipal Act (1951), S. 414 (Jul) 314 F

Constitution of India (contd.)

- Art. 21 — See
 (1) Hindu Marriage Act (1955), S. 13 (1) (iii) (Apr) 138 C
 (2) Municipalities — Calcutta Municipal Act (1951), S. 414 (Jul) 314 F
- Arts. 26, 29, 30 — Religious minority — Jain Svetamber Terapanthi Sect constitutes religious minority — Institution established and run by such sect is entitled to benefits under Art. 30 (Mar) 101 A
- Art. 29 — See Ibid, Art. 26 (Mar) 101 A
- Art. 30 — See Ibid, Art. 26 (Mar) 101 A
- Art. 31 (2) — See Electricity Act (1910), S. 6 (Feb) 74
- Arts. 226 — See also
 (1) Ibid, Art. 14 (Jan) 19 A; (Jul) 351 A
 (2) Ibid, Art. 299 (Jul) 340
 (3) Defence of India Rules (1962), R. 133 V (1) (Nov) 542 A
 (4) Education — Rules relating to Constitution of Managing Committee of Aided Primary Schools in Calcutta, R. 7 (Dec) 587 C
 (5) Education — West Bengal Board of Secondary Education Act (1963), Section 19-A (3) (h) (Jun) 245 A
 (6) Essential Commodities Act (1955), Section 3 (Nov) 546
 (7) Municipalities — Calcutta Municipal Act (1951), S. 414 (Jul) 314 C
 (8) Municipalities — Calcutta Municipal Act (1957), S. 414 (3) (Apr) 191 A
 (9) Tenancy Laws — West Bengal Land Reforms Act (1954), S. 54 (Jun) 254 A
 (10) W. B. Land (Requisition and Acquisition) Act (1948), S. 3 (1) (Apr) 180 D
- Art. 226 — Students charged with adopting unfair means — Charge levelled, held proved in view of report of examiner and evidence tendered by him before Committee — Students not allowed to adduce rebuttal evidence or to cross-examine witness — There is denial of natural justice (Jan) 1
- Art. 226 — Writ against Universities — Student of Law College — Less attendance at classes — Student detained from appearing at final Law examination — Petition by student — Maintainability (Jan) 32
- Art. 226 — Locus standi — Aggrieved person — It need not be shown that his individual or personal rights are affected (May) 225 A
- Art. 226 — Writ petition — Locus standi (Jun) 245 C
- Art. 226 — High Court's power under Art. 226 to interfere with a perverse order (Jun) 254 B
- Art. 226 — Delay — Question whether delay is fatal to maintainability of petition — Principles stated (Jul) 307
- Art. 226 — Relief under — Grant of relief under Art. 226 is discretionary — Nobody can claim as a matter of right that he must be given the relief he asks for in his writ petition (Jul) 314 E

Constitution of India (contd.)

- Art. 226 — Bengal Municipal Act (15 of 1932), Section 56A — Prayer for writ of quo warranto — Assumption of office by members of committee challenged — Statutory authority for assumption of office under S. 56A established — Prayer for writ must fail (Sep) 420 B
- Art. 226 — Bengal Municipal Act (15 of 1932), Section 56A — Appointment of committee by Govt. under S. 56A to administer affairs of municipality — Selection of members from political party by which Govt. was formed — Validity (Sep) 420 C
- Art. 226 — Bengal Municipal Act (15 of 1932), Section 56A — Committee appointed under S. 56A — Transfer of Midwives from one ward to other by Committee — Validity (Sep) 420 D
- Art. 226 — Writ petition — Laches — Notice of requisition under S. 3 served on petitioner in 1974 — Petition challenging it filed in 1981 — Petition liable to fail on ground of delay (Sep) 430 A
- Art. 226 — Writ petition — Necessary parties — Writ challenging notice of requisition of land by one of its co-owners alone — Notice of requisition served by State on petitioner alone and on no other cosharer — Petition cannot fail for non-joinder of other co-sharers (Sep) 430 B
- Art. 226 — Education — Locus standi — Revision of syllabus for History prescribed for VIIIth Class — Guardians of students can challenge it (Oct) 467 A
- Art. 226 — Locus standi — Revision of syllabus of History for VIIIth class — Headmasters' Association sending its representatives on the Syllabus Committee revising syllabus — Writ Petition by Association challenging revised syllabus as violative of fundamental right under Art. 19 (1) (a) and some provisions of W. B. Secondary Education Act — Competent (Oct) 467 B
- Art. 245 — See Municipalities — Bengal Municipal Act (1932), S. 56 (Sep) 420 A
- Art. 285 — See West Bengal Taxation Laws 2nd Amendment Act (1977), Pre. (May) 202 A
- Art. 298 — See Ibid, Art. 14 (Jan) 19 A, B
- Arts. 299, 226, 14 — Public contract — Acceptance of tender of contractor at rate higher than offered by petitioner — Selection of higher tender after consideration of analysis — Arbitrariness not established (Jul) 340
- Art. 299 (1) — See also Contract Act (1872), S. 70 (Apr) 167 B
- Art. 299 (1) — Additional Chief Engineer, Electricity for State of A. P. has no power to enter into contract on behalf of State (Apr) 167
- Art. 300-A — See Municipalities — Calcutta Municipal Act (1951), S. 414 (Jul) 314 F
- Contract Act (9 of 1872)**
 —S. 16 — See
 (1) Ibid, S. 17 (Aug) 353 A
 (2) Succession Act (1925), S. 61 (Dec) 599 G

Contract Act (contd.)

—Ss. 17 and 16 — Evidence Act (1872), Ss. 101-104 — No allegation in plaint that Karta of family got lease deed executed by mother of minor plaintiff by practising fraud or collusion — Certificate that document was read over and explained to her — Necessity (Aug) 353 A

—S. 28 — See Civil P. C. (1903), S. 20 (Dec) 575 A

—S. 70 — Contract in contravention of Art. 299 (1) of Constitution — Claim for compensation under S. 70 (Apr) 167 B

—S. 171 — Banker's lien — Lien cannot be exercised where there is express contract to contrary (Jan) 62 A

—S. 171 — Separate accounts in Bank — Adjustment — Banker's lien (Jan) 62 B

—S. 230 — X a ship-owner of Taiwan and having Y as his agent at Calcutta — A entering into a contract of carriage with X for carrying steel plates to Calcutta — Ship sunk and goods lost — Suit for damages by A against X and Y — Suit is not sustainable against Y — His name must be struck out from the plaint (Apr) 161

—S. 230 — Contract to contrary — Presumption — Maxim expressio unius exclusio alterius does not apply to clauses 1 to 3 of Section 230 (Aug) 365 B

—S. 230, clause (3) — Contract as to contrary — Presumption under (Aug) 365 A

—S. 230, clause (3) — Expression "Principal" — Cannot be sued — Meaning of — Territorial extension of it (Aug) 365 C

Copyright Act (14 of 1957)

—S. 13 — See Education — West Bengal Board of Secondary Education Act (1963), S. 19-A (3) (g) (Jun) 245 B

Court-fees Act (7 of 1870)

See under Court-fees & Suits Valuation

COURT-FEES AND SUITS VALUATIONS**—Court-fees Act (7 of 1870)**

—S. 7 (iv) (b) and Sch. II, Art. 17 (va) (W. B.) — Suit for partition of house against co-sharer when moiety shares of parties were declared in previous suit for declaration — Because co-sharer's possession will be plaintiff's possession, suit filed with court-fee of Rs. 15 maintainable (May) 222 C

—S. 19-H (3) — Collector must give notice and hear petitioner for probate on due opportunities being given before making proper valuation of property — Held Collector having not taken such steps acted without jurisdiction (May) 217

—Sch. II, Art. 17 (va) — See Ibid, S. 7 (iv) (b) (May) 222 C

—Suits Valuation Act (7 of 1887)

—S. 8 — See

(1) Court-fees and Suits Valuation — W. B. Court-fees Act (1970), S. 7 (iv) (Nov) 559

(2) Court-fees & Suits Valuation — West Bengal Court-fees Act (1970), S. 7 (vi) (b) (i) (Jan) 41 D

Court-fees & Suits Valuations (contd.)**—West Bengal Court-fees Act (10 of 1970)**

—S. 7 (iv), Sch. II, Art. 15 (VI) — Court fees — Valuation of suit for jurisdiction — Failure of plaintiffs to value reliefs — Value as determinable for the computation of court-fee and value for purposes of jurisdiction would be same (Nov) 559

—S. 7 (vi) (b) (i) — Applicability — Suit for ejectment of licensee — Valuation of suit for purpose of court-fees shall be made u/s. 7 (vi) (b) (i) and value for jurisdictional purposes shall be same as for court-fees in view of S. 8, Suits Valuation Act (Jan) 41 D

—Sch. II, Art. 15 (Vi) — See Ibid, Section 7 (iv) (Nov) 559

Deed

—Construction — See T. P. Act (1882), S. 11 (Apr) 158

Defence of India Act (51 of 1962)

—S. 2 (c) (ii) — Defence of India Rules (1962), Rr. 133 A (f), 133 V (1) — Govt. Notification No. 12/2/65 E. Pty. dated 10-9-1965 — Immovable property belonging to Pakistani National not staying in India — Transfer of, by owner in 1969 — By Govt. Notification dated 10-9-1965 that property automatically vested in Custodian of Enemy Property for India — Transfer by original owner after such vesting was illegal. (1975) 79 Cal WN 153 and (1977) 2 Cal LJ 96, Dissented from (Nov) 542 B

Defence of India Rules (1962)

—R. 133-A (f) — See Defence of India Act (1962), S. 2 (c) (ii) (Nov) 542 B

—R. 133 V (1) — See also Defence of India Act (1962), S. 2 (c) (ii) (Nov) 542 B

—R. 133 V (1) — Govt. Notification No. 12/2/65 E. Pty. dated 10-9-1965 — Constitution of India, Article 226 — Questions of fact — Cannot be gone into by Court exercising powers under Writ Jurisdiction (Nov) 542 A

Divorce Act (4 of 1869)

—Ss. 10, 17 — Reference for acceptance of decree of dissolution passed on ground of desertion and adultery — Evidence in support of adultery — Sufficiency — Charge of adultery failing — Decree cannot be sustained on ground of desertion alone (Aug) 356 (SB)

—S. 10 — Decree of divorce — Grant of (Aug) 360 (SB)

—S. 17 — See Ibid, S. 10 (Aug) 356 (SB)

East India Jute and Hessian Exchange Ltd. Calcutta (Working Manual Vol. III)

—Chap. V Bye-laws 15, Appendix II — See Forward Contracts (Regulation) Act (1952), S. 15 (3A) (Jun) 282 A

—Chap. V — Bye-laws 17, Appendix II — See Forward Contracts (Regulation) Act (1952), S. 15 (3A) (Jun) 282 A

EDUCATION

—School committee — Supersession — See Education — Rule relating to Constitution of Managing Committee of Aided Primary Schools in Calcutta, R. 6 (Dec) 587 B

Education (contd.)

—School committee — Supersession — See Education — Rules relating to Constitution of Managing Committee of Aided Primary Schools in Calcutta, R. 7

(Dec) 587 D

—School Managing Committee — See Education — Rules relating to Constitution of Managing Committee of Aided Primary Schools in Calcutta, R. 6

(Dec) 587

—Secondary Board — Publication of text books — Powers as to — See Education — West Bengal Board of Secondary Education Act (1963), S. 19-A (3) (h)

(Jun) 245 A

—Syllabi prepared by Board — Does not subsist copyright — See Education — West Bengal Board of Secondary Education Act (1963), S. 19-A (3) (g)

(Jun) 245 B

—Calcutta University Act (2 of 1966)

—S. 53 (c) — See Constitution of India, Art. 226

(Jan) 32

—Management of Recognized Non-Govt. Institutions (Aided & Unaided) Rules (1969)

—R. 8 — See

(1) Constitution of India, Art. 26

(Mar) 101 A

(2) Education — West Bengal of Secondary Education Act (1963), S. 19

(Mar) 101 B

—Rules relating to constitution of Managing Committee of Aided Primary Schools in Calcutta

—R. 6 — Constitution of Committee — Formal order approving or disapproving Committee is a must

(Dec) 587 A

—Rr. 6 and 7 — Improper constitution of committee — Not a ground for supersession

(Dec) 587 B

—R. 7 — See also Ibid, R. 6

(Dec) 587 B

—R. 7 — Order of supersession of Committee passed without giving opportunity to persons concerned of being heard — Order is bad in law

(Dec) 587 C

—R. 7 — Power of supersession — Rule requires objective satisfaction and not subjective one

(Dec) 587 D

—West Bengal Board of Secondary Education Act (5 of 1963)

—S. 19 — Management of Recognised Non-Government Institutions (Aided and Unaided) Rules 1969, R. 8 — Special Constitution of Committee of institution — Approval by Board — Matter cannot be referred to Recognition Committee — Refusal to approve on basis of Report of Recognition Committee is illegal

(Mar) 101 B

—Ss. 19-A and 27 — Revised syllabus of History for VIIIth class framed after amendment of Act — Procedure prescribed under Ss. 19A and 27 not followed — Syllabus is illegal — Cannot be enforced

(Oct) 467 C

—S. 19-A (3) (g) — Copyright Act (1957), S. 13 — Syllabi prepared by Board merely prescribed guidelines to be followed by text book writers — It does not subsist any copyright

(Jun) 245 B

—S. 19-A (3) (h) — See Constitution of India, Art. 226

(Jun) 245 C

—Ss. 19-A (3) (h), 27 (2) — Powers of Board

(Jun) 245 A

Education — W. B. Board of Secondary Education Act (contd.)

—S. 22 (3) — Order of Administrator affecting service of officiating Headmistress of School — Her remedy is to prefer appeal to Appeal Committee

(Apr) 174 C

—S. 24 — See Ibid, S. 28 (2)

(Jul) 305

—S. 27 — See Ibid, S. 19-A

(Oct) 467 C

—S. 27 (2) — See

(1) Ibid, S. 19-A (3) (h)

(Jun) 245 A

(2) Constitution of India, Art. 226

(Jun) 245 C

—Ss. 28 (2), 24 — Rules for Management of Non-Government Institutions (aided and unaided) (1969), R. 28 (8) — President according approval of disciplinary proceedings against teacher of school — Matter ordered to be placed before Committee of Education Board instead of Board itself — Order is invalid

(Jul) 305

—S. 45 — See Constitution of India, Article 26

(Mar) 101 A

Electricity Act (9 of 1910)

—Ss. 6, 7-A — Right of licensee to get price of undertaking — When accrues

(Feb) 74

—S. 7-A — See Ibid, S. 6

(Feb) 74

Electricity (Bihar Amendment) Act (7 of 1976)

—S. 2 (ii) — See Electricity Act (1910), S. 6

(Feb) 74

—S. 3 — See Electricity Act (1910), Section 6

(Feb) 74

Essential Commodities Act (10 of 1955)

—Ss. 3, 7 — West Bengal Food Grains Control Order (1951), Cl. 13 (2) — Cancellation of dealership of ration — Order not containing any reasons why charges against dealer were held proved and explanation given by him was not acceptable — Order not a speaking one and liable to be set aside

(Nov) 546

—S. 7 — See Ibid, S. 3

(Nov) 546

Evidence Act (1 of 1872)

—Ss. 3, 114 — Adverse inference — Suit for declaration of title — When could be drawn

(Jun) 294 D

—S. 3 — Evidence — Appreciation — Damaging statements cannot be got rid of merely by stating that they were slips of tongue

(Oct) 488 C

—S. 3 — Chance witness — Person attending chamber of Advocate who had advised the testator in the matter of preparation of Will — Cannot be called as mere chance witness

(Dec) 599 B

—S. 3 — Witnesses — Credibility of — Witnesses attesting to will deposing in Court four years after attestation — Minor discrepancies in their evidence do not affect credibility of the witnesses

(Dec) 599 C

—S. 13 (a) — Certified copies of decrees recognizing interest of a person in the disputed property are admissible in evidence under S. 13 (a)

(Jun) 294 F

Evidence Act (contd.)

—S. 21 — Admission — Value of — It is substantive evidence — When there is admission, it is not necessary to confront the person concerned with his previous statement (Aug) 353 C

—Ss. 31, 33 — Admission in prior suit — Can be taken as his admission in a subsequent suit against same property after confronting him with such statement (Jun) 294 I

—S. 32 — Hearsay evidence — Admissibility (Jul) 342 B

—S. 33 — See also Ibid, S. 31

—S. 33 — Admission made by a party is decisive on the point (Jul) 342 D

—Ss. 35, 74, 114 — Entries in revenue record — Conflict between entry in C. S. Khatian and R. S. Khatian — Latter entries recorded in record of rights are presumed to be correct (Jun) 294 B

—Ss. 35, 74 — Entries in revenue record — Correction of — Revenue Officer not being a Court cannot exercise jurisdiction under S. 151, C. P. C. for correction of any previous entry (Jun) 294 C

—Ss. 35, 74 — Certified copies of Assessment Register of Municipality and tax receipts are relevant (Jun) 294 E

—S. 50 — Relationship — Opinion as to — Competent witness (Jun) 294 A

—S. 65 (a) and (c) — Secondary evidence — Certified copy of registered document — When could be relied on (Oct) 493 B

—S. 73 — Service by post — Signature of postal peon on envelope and on his deposition in Court compared — Comparison when justified (Aug) 397 B

—S. 74 — See Ibid, S. 35 (Jun) 294 B, C, E

—Ss. 101-103 — Suit for declaration of title — Burden is on plaintiff to prove his title (Jun) 251 B

—Ss. 101-104 — See also

(1) Limitation Act (1908), Art. 142

(2) Succession Act (1925), S. 61 (Jun) 294 J

(3) Succession Act (1925), S. 63 (Dec) 599 E

(4) T. P. Act (1882), S. 41 (Dec) 599 A

—Ss. 101-104 — Will — Burden of proof — Presence of suspicious circumstances makes initial onus heavy — Judicial conscience must be satisfied (Sep) 428

—S. 103 — See Houses and Rents — W.B. Premises Tenancy Act (1956), S. 13 (1) (ff) (Mar) 127 D

—S. 114 — See

(1) Ibid, S. 3 (Jun) 294 D

(2) Ibid, S. 35 (Jun) 294 B

(3) Hindu Marriage Act (1955), S. 13 (1) (iii) (Apr) 138 C, D

—S. 114 (g) — See Houses and Rents — West Bengal Premises Tenancy Act (1956), S. 13 (1) (ff) (Mar) 127 D

—S. 114 Illus. (g) — See Hindu Marriage Act (1955), S. 13 (Oct) 474 A

Evidence Act (contd.)

—S. 115 — See

(1) Civil P. C. (5 of 1908), S. 47

(Jan) 34 A

(2) Companies Act (1956), S. 433 (e)

(Feb) 71

(3) Constitution of India, Art. 226

(Oct) 467 B

(4) Registration Act (1908), S. 17 (2) (vi)

(May) 222 B

—S. 154 — Hostile witness — Cross-examination — Inconsistent and contradictory statements are not the only ground for permitting such examination (Aug) 397 A

Expenditure General Principles and Rules

—Appendix 4. Item 27 — See Constitution of India, Art. 299 (1) (Apr) 167 A

Foreign Exchange Regulation Act (7 of 1947)

—S. 19 (2) — Notice under S. 19 (2) — Authority issuing it had not applied its mind before issuing it — Notice invalid

(Sep) 439 A

—S. 19 (2) — Notice under — Authority issuing it, not empowered to issue the same under Section 19 (2) — Notice invalid — Appropriate Authority given opportunity to issue valid notices (Sep) 439 B

Forward Contracts (Regulation) Act (74 of 1952)

—S. 15 (3A) — Contract relating to jute and Hessian not made in prescribed form and in accordance with Prescribed Bye laws read with S. 15 (3A) of Forward Contracts (Regulation) Act, would be void

(Jun) 282 A

General Clauses Act (10 of 1897)

—S. 13 (1) — See Special Marriage Act (1954), S. 41 (2) (a) (Aug) 370 C

—S. 13 (2) — See Hindu Succession Act (1956), S. 23 (May) 222 A

—S. 27 — See Tenancy Laws — West Bengal Premises Tenancy Act (1956), S. 13 (1) (ff) (Mar) 127 D

General Insurance Business (Nationalisation) Act (57 of 1972)

—S. 16 (1) — National Insurance Company Limited (Merger) Scheme (1973) Ser. 8 — Cause title of suit filed in Sept. 1975 describing defendant as named General Insurance Company — Management of Company vesting in Govt. Company before by aforesaid date, by virtue of S. 8 — Suit being one against dissolved Company is liable to be dismissed (Mar) 124

HIGH COURT RULES AND ORDERS**—Calcutta High Court Original Sides Rules**

—Chap. 13A, R. 4 — Service of summons — Seven clear days' notice not given — Defendant appearing on returnable date but not raising objection about short notice — Objection raised only at time of hearing plaintiff's application for final judgment against defendant in suit — Objection is not sustainable (Jun) 241

—Calcutta High Court Rules

—R. 10 — See Special Marriage Act (1954) S. 27 (Aug) 370 B

Hindu Adoptions and Maintenance Act (78 of 1956)

—S. 20 — See Tenancy Laws — West Bengal Land Reforms Act (1956), S. 14-K (c) (Mar) 83

Hindu Law

—Adoption — Ceremonies — Jains — Ceremony of giving and taking is essential even amongst Jains — Proof — Onus (Oct) 493 A

—Dayabhaga — No nucleus to presume that brothers owning any joint property to provide sufficient source to acquire property — Property standing in the name of wife of one of them alleged to be acquired by father in the name of his daughter-in-law during lifetime — Daughter-in-law cannot be said to be benamidar regarding such property and house constructed thereon by her (Jul) 342 C

—Religious endowments — See Civil P. C. (1908), S. 151 (Jan) 12 B

—Shēbaitship — Right of succession — Nature of (Nov) 534

Hindu Marriage Act (25 of 1955)

—S. 12 (1) (b) — Petition for annulment of marriage on ground that wife was insane — No cogent evidence produced to establish that at time of marriage wife was of unsound mind or was suffering from some mental disorder — Held, petition was liable to be dismissed (Nov) 547 B

—S. 13 — Petition by husband for divorce on ground of wife's cruelty — Husband not examining members of his family — Adverse presumption can be drawn against petitioner (Oct) 474 A

—S. 13 — Civil P. C. (5 of 1908), O. 23, R. 1 — Petition for divorce by husband — Allegation that there was persistent refusal by wife for sexual intercourse — Court finding against him — Application for withdrawal of petition and filing fresh petition on grounds of physical deformity in wife — Held, withdrawal cannot be granted as he cannot be allowed to get rid of adverse findings upon issues made by Court below (Oct) 474 D

—S. 13 (1) — See Ibid, S. 21 (Oct) 474 C

—S. 13 (1) (i) (a) — Expression 'cruelty' — Failure or inability on part of spouse to effectuate sexual intercourse amounts to cruelty (Oct) 474 B

—Ss. 13 (1) (iii) and 14 — Divorce petition by husband under Section 13 (1) (iii) presented within one year of marriage — No application filed under proviso to Section 14 (1) nor any case of exceptional hardship pleaded — Held, petition was barred under S. 14 and case for divorce was not made out under Section 13 (1) (iii) (Nov) 547 A

—S. 13 (1) (iii) — Suit for divorce under — Maintainability (Apr) 138 A

—S. 13 (1) (iii) — Divorce — Grounds — Allegation that wife suffered from incurable schizophrenia — Maintainability of (Apr) 138 B

—S. 13 (1) (iii) — Divorce — Ground that wife suffered from schizophrenia — No

Hindu Marriage Act (contd.)

provision under Act to compel wife for medical examination — Effect (Apr) 138 C

—S. 13 (1) (iii) — Divorce — Ground that wife suffered from incurable schizophrenia — Proof as to (Apr) 138 D

—S. 14 — See Ibid, S. 13 (1) (iii) (Nov) 547 A

—Ss. 21 and 13 (1) — Civil P. C. (1908), O. 6, R. 17 — Petition by husband for divorce on grounds of cruelty — Allegation that there was persistent refusal by wife to have sexual intercourse with him — Amendment of petition sought to incorporate plea of physical deformity or defect in wife — Amendment cannot be allowed (Oct) 474 C

Hindu Minority and Guardianship Act (32 of 1956)

—S. 8 — See Letters Patent (Cal) Cl. 15 (May) 199 B

—S. 8 — Contract to sell suit property to "A" by mother of minors for legal necessity — No previous permission of Court sought — Contract is in contravention of S. 8 (2) and so not enforceable, ILR (1972) 2 Cal 347, Reversed on principle (May) 199 A

Hindu Succession Act (30 of 1956)

—S. 14 (1) — See Succession Act (1925), S. 84 (Jan) 52

—S. 23 — Applicability — Applies even if Hindu dies intestate leaving one male heir and one female heir (May) 222 A

HOUSES AND RENTS

—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950)

—S. 12 (1) (c) — See Houses and Rents — W. B. Premises Tenancy Act (1956), Section 40 (Aug) 391 B

—S. 13 (2) — See Houses and Rents — W. B. Premises Tenancy Act (1956), Section 40 (Aug) 391 B

—West Bengal Premises Requisition and Control (Temporary Provisions) Act (5 of 1947)

—S. 3 (1) read with 1st proviso — Section does not by necessary implication provide for notice and hearing before an order of requisition is passed (Nov) 522 A

—S. 4 (1) — Notice under — Notice to vacate is to be served only on person in occupation — Notice not giving minimum period of time to vacate requisitioned premises must be held to be insufficient (Nov) 522 B

—West Bengal Premises Tenancy Act (12 of 1956)

—S. 8 (1) (c) — Rent Controller — Status of — Rent Controller is a Court (Apr) 134

—S. 8 (1) (d) — See Municipalities — Calcutta Municipal Act (1951), S. 168 (Oct) 479

—S. 13 — Suit for eviction against tenant and his assignee — Assignee putting in appearance only after landlord filed application under S. 17 (3) — Effect (Mar) 120

—S. 13 — Eviction — Tenant surrendering leased premises — Possession of two rooms

Houses and Rents — W. B. Premises Tenancy Act (contd.)

in such premises not handed over — Claim that he became statutory tenant of such rooms — Not sustainable (Sep) 433

—S. 13 (1) — See Civil P. C. (1908), S. 47 (Sep) 417

—S. 13 (1) (ff) — Reasonable requirement for personal use and occupation — Determination (Mar) 127 C

—Ss. 13 (1) (k), 13 (6) — Protection of tenant against eviction — No written undertaking given by tenant to vacate premises — Landlord cannot avail of provisions of S. 13 (1) (k) (Mar) 127 B

—Ss. 13 (2), 16 (2) — Protection to sub-tenants against eviction — Availability (Aug) 391 A

—S. 13 (3A) — See Civil P. C. (1908), O. 6, R. 17 (Sep) 407

—S. 13 (6) — See Ibid, S. 13 (1) (k) (Mar) 127 B

—S. 16 (2) — See Ibid, S. 13 (2) (Aug) 391 A

—S. 17 (1) & (2) — Striking out defence — Protection against — Tenant must deposit even time-barred rent. (1961) 65 Cal WN 1093 and AIR 1981 Cal 352 (Pt C), **Overruled** (Jun) 267 (FB)

—S. 17 (1), (2), (3) and (4) — Suit for ejectment on ground of default in payment of rent — Application for permission to deposit arrears of rent earlier deposited with Rent Controller — Application cannot be refused by Court on technical ground of non-mention of section therein (Jan) 55

—S. 17 (2) — See also Civil P. C. (1908), O. 23, R. 1 (4) (Jan) 17 B

—S. 17 (2) — Suit for eviction on ground of default filed on 11-12-1975 — Application by tenant filed on 9-2-1976 — Duty of Court, while dealing with it (May) 205

—S. 17 (3) — Deposit by tenant — Arrears of rent must be paid at rate at which rent was last paid and not according to fair rent fixed by Rent Controller during pendency of suit for ejectment (Apr) 134 B

—S. 22 (2) — Expression "tenant wilfully or negligently makes any false statement" — Tenant depositing in name of M/s. B. and others, a Firm" — Firm not existing — Deposit held invalid — Counsel's mistake held not good defence (Oct) 505

—S. 29-B — Summary trial for eviction — Expression "a landlord who is a retired member etc." — Meaning (Nov) 518

—S. 31 (1) (ff) — Eviction of tenant — Notice to quit — Meaning of service by post (Mar) 127 D

—S. 34 — Essential services — Contractual tenant relegated to position of statutory tenant by notice to quit — Does not lose right to enjoyment of electricity and water supply (Aug) 394

—S. 40 — W. B. Premises Rent Control (Temporary Provisions) Act (17 of 1950), Ss. 13 (2), 12 (1) (c) — Saving clause — Effect of — 'Right of sub-tenant under Section 13 (2) to be deemed to be tenant directly under the landlord is not saved by S. 40

Houses and Rents — W. B. Premises Tenancy Act (contd.)

of Act 12 of 1956, AIR 1980 Cal 131, **Not followed** in view of AIR 1957 Cal 257 (SB) (Aug) 391 B

Imports and Exports (Control) Act (18 of 1947)

—S. 5 — See Arbitration Act (1940), S. 34 (Sep) 440

Interpretation of Statutes

—See Municipalities — Calcutta Municipal Act (1951), S. 414 (3), Proviso (Apr) 191 B

Land Acquisition Act (1 of 1894)

—S. 4 — See
(1) W. B. Land (Requisition and Acquisition) Act (1948), Pre. (Oct) 509 C
(2) West Bengal Land (Requisition and Acquisition) Act (1948), S. 3 (1) (Aug) 380 C
—S. 6 — See West Bengal Land (Requisition and Acquisition) Act (1948), S. 3 (1) (Aug) 380 B, C

Letters Patent

—Cl. 12 — Amendment of plaint — Permissibility. Decision of single Judge, D/- 19-2-1980, **Reversed** (Jul) 329 B

—Cl. 12 — Leave to file suit — Revocation of, on ground of absence of territorial jurisdiction — Principles regarding (Jul) 333

—Cl. 12 — Leave to file suit under — Revocation of — Factors to be considered — Decision of single Judge in Suit No. 906 of 1978, D/- 27-8-1979 (Cal), **Reversed** (Nov) 537 B

—Cl. 15 — Hindu Minority and Guardianship Act (1956), S. 8 — Mother of minors, natural guardian agreeing to sell property to "A" for legal necessity without prior permission of Court — Subsequent compromise to transfer the property in favour of "B" to defeat the agreement with "A" — "B" obtaining decree on basis of that compromise — Compromise found to be collusive — "B" has no locus standi to challenge decree in favour of "A" though it was voidable at the instance of minors (May) 199 B

—Cl. 15 — Civil P. C. (1908), O. 7, R. 11; O. 43, R. 1 — Order under O. 7, R. 11 refusing to reject plaint is not a judgment — Appeal against it is not maintainable (Jun) 259

—Cl. 15 — Appeal — Plaintiff besides seeking amendment of plaint praying for joinder of new party and grant of fresh leave under Cl. 12 — Order appealable (Jul) 329 A

—Cl. 15 — 'Judgment' — Order refusing amendment of written statement seeking to plead defence that defendant stood discharged from liability under guarantee because of alleged conduct of plaintiff — Order amounts to judgment (Nov) 555 A

Limitation Act (9 of 1908)

—Art 137 — See Civil P. C. (1908), S. 47 (Apr) 178

—Art. 142 — Limitation Act (1963), Section 31 (a), Art. 64 — Applicability of Article 142 (Jun) 294 J

Limitation Act (36 of 1963)

- Pre. — See Civil P. C. (1908), S. 47 (Apr) 178
- S. 5 — See also
(1) Civil P. C. (1908), O. 37, R. 3 (Aug) 388 A
- (2) Tenancy Laws — W. B. Land Reforms Act (1956), S. 8 (Jan) 6
- S. 5 — Application for condonation of delay in filing appeal by Official Trustee — Official Trustee not guilty of negligence nor responsible for acts of his employees — Held, delay should be condoned in special circumstances of the case (May) 210
- S. 14 — See Arbitration Act (1940), Section 34 (Sep) 440
- S. 17 — See Civil P. C. (1908), O. 21, R. 90 (Dec) 564
- S. 31 (a) — See Limitation Act (1908), Art. 142 (Jun) 294 J
- Art. 64 — See Limitation Act (1908), Art. 142 (Jun) 294 J
- Art. 113 — See Civil P. C. (1908), S. 151 (Jan) 12 C
- Art. 122 — Conditional order to file affirmed affidavit within stipulated time, on failure of which suit would stand dismissed — Delay in filing affirmed affidavit — Condonation (Sep) 413
- Art. 137 — See Patents Act (1970), S. 71 (Jan) 30 A

Management of Recognised Non-Government Institutions (Aided & Unaided) Rules (1969)
See under Education.

Maxim

- Expression unius exclusio alterius — See Contract Act (1872), S. 230 (Aug) 365 B

Mines and Minerals (Regulation and Development) Act (67 of 1957)

- Ss. 8, 30 — Mineral Concession Rules (1960), R. 22 — Application for renewal of lease — Deemed rejection thereof as not considered within stipulated period — Effect (Aug) 400
- S. 30 — See Ibid, S. 8 (Aug) 400

Mineral Concession Rules (1960)

- R. 22 — See Mines and Minerals (Regulation and Development) Act (1957), S. 8 (Aug) 400

MUNICIPALITIES**—Bengal Municipal Act (15 of 1932)**

- S. 56-A — See also Constitution of India, Art. 226 (Sep) 420 B, C, D
- S. 56A — Constitution of India, Art. 245 — S. 56A providing for appointment of committee to administer affairs of municipality — S. 56A is not illegal or unconstitutional as conferring uncontrolled power or as colourable piece of legislation or for not providing tenure of committee (Sep) 420 A
- S. 173 — See Calcutta Hackney Carriage Act (1919), S. 2 (b) (Jul) 346 A

—Calcutta Municipal Act (33 of 1951)

- S. 5 (51) — See Ibid, S. 414 (3) Proviso (Apr) 191 B
- S. 5 (53) — Building constructed by lessee and let out for first time by him to

Municipalities — Calcutta Municipal Act (contd.)

- tenants — Held, lessee realising rents from its sub-lessees was 'Owner' of building (Aug) 388
- S. 168 — Assessment of annual value of building let out to tenant — Fair rent not fixed by Controller under West Bengal Premises Tenancy Act, 1956 — Assessment of annual value can be made on basis of contractual rent paid by tenant (Oct) 479
- S. 187 — See Ibid, S. 414 (3), Proviso (Apr) 191 B
- S. 392 — See Ibid, S. 414 (Jul) 314 F
- S. 414 — See also Ibid, S. 568 (Jul) 314 G
- S. 414 — Construction of building up to 6th storey adjudicated as unauthorised construction — Order confirmed up to Supreme Court — Demolition order — Proceedings before Building Tribunal in respect of subsequent unauthorised construction and stay order, held, became infructuous and inoperative (Jul) 314 A
- Ss. 414, 414-A — Demolition of unauthorised construction — Written notice under Sec. 414 (1) to person responsible to demolish or alteration etc. — "Person responsible", connotation of — Occupier if can challenge order of demolition — Occupier whether entitled for opportunity of being heard (Jul) 314 C
- Ss. 414; 392 and Sch. 16, Rr. 59, 60 — Demolition of unauthorised construction — Occupiers of unauthorised structure if can claim infringement of fundamental rights to carry on business, their personal liberty or their right to property (Jul) 314 F
- S. 414 (1) (c) — Demolition of unauthorised construction — Fresh demolition proceeding not necessary for each addition to an unauthorised construction (Jul) 314 B
- Ss. 414 (3), 560, 561 — Order of demolition of unauthorised structure can be straightway enforced — Giving of another notice to owner and occupier of premises before enforcement not necessary (Apr) 191 A
- S. 414 (3) — Demolition order — Service on owner and occupier — Corporation not required to serve copy of demolition order on every occupier found in unauthorised building at the time of execution of order (Jul) 314 D
- Ss. 414 (3) Proviso, 5 (51), 187 — Word 'Occupier' — Connotation of — It only means an occupier at the time when demolition order is passed (Apr) 191 B
- S. 414-A — See Ibid, S. 414 (Jul) 314 C
- S. 560 — See Ibid, S. 414 (3) (Apr) 191 A
- S. 561 — See Ibid, S. 414 (3) (Apr) 191 A
- Ss. 568 and 414 — Demolition of unauthorised construction — Occupiers of unauthorised building cannot claim compensation under S. 568 (Jul) 314 G
- Sch. 16, R. 59 — See Ibid, S. 414 (Jul) 314 F
- Sch. 16, R. 60 — See Ibid, S. 414 (Jul) 314 F

**National Insurance Company Limited
(Merger) Scheme (1973)**

—S. 8 — See General Insurance Business
(Nationalisation) Act (1972), S. 16 (1)
(Mar) 124

Natural Justice

—See Education — Rules relating to Con-
stitution of Managing Committee of Aided
Primary Schools in Calcutta, R. 7

—See W. B. Land (Requisition and Acqui-
sition) Act (1948), S. 3 (1) (Apr) 180 D

Negotiable Instruments Act (26 of 1881)

—S. 9 — See Civil P. C. (1908), O. 37, R. 2
(Apr) 136

Partition Act (4 of 1893)

—S. 4 — Preliminary decree in suit for
partition of dwelling house — Sale of un-
divided interest in suit property in favour
of petitioner — Effect (Aug) 376

Patents Act (39 of 1970)

—S. 2 (1) (i) (iv) — Word 'weedicides' in
S. 2 (1) (i) (iv) includes "herbicides" —
Patentee claiming "Chlorothio-N-Phthali-
mide" as an intermediate product suitable
for producing herbicidal compound — Classi-
fication of the intermediate product as medi-
cine or drug is proper (Jan) 30 B

—S. 71 — Application under, for rectifica-
tion of entry relating to a patent — Filing
of — No limitation prescribed under the Act
— Limitation would be governed by Art. 137
of Limitation Act (Jan) 30 A

**Public Premises (Eviction of Unauthorised
Occupants) Act (40 of 1971)**

—S. 2 (2) (g) — Unauthorised occupation
of public premises — Termination of occu-
pant's tenancy by notice to quit — He be-
comes person in unauthorised occupation of
premises (Sep) 461 A

—Ss. 2 (2) (g) and 4 (1) — Eviction pro-
ceedings under S. 4 (1) — Challenge to pro-
ceedings (Sep) 461 B

—S. 4 (1) — See also Ibid, S. 2 (2) (g)
(Sep) 461 B

—S. 4 (1) — Show cause notice under —
Inadvertent error therein as to date of deter-
mination of tenancy — Determination of ten-
ancy is not vitiated (Sep) 461 C

Registration Act (16 of 1908)

—S. 17 (1) (c) and (2) (xi) — Mortgage
for Rupees 1000 — Endorsement that dues
under mortgage were paid — Admissible in
evidence and no registration thereof is nec-
essary in view of S. 17 (2) (xi) — As mort-
gage dues were not extinguished by that en-
dorsement, S. 17 (1) (c) does not apply
(Aug) 353 B

—S. 17 (2) (vi) — Compromise decree in
suit for declaration of plaintiff's title to
house — Such decree does not require regis-
tration — It operates as estoppel and not as
res judicata (May) 222 B

**Requisitioning and Acquisition of Immovable
Property Act (30 of 1952)**

—S. 8. — See Constitution of India, Arti-
cle 226 (Jul) 307

**Rules relating to Constitution of Managing
Committee of Aided Primary Schools in
Calcutta**

See under Education.

Sale of Goods Act (3 of 1930)

—S. 2 (4) — Bills of Lading Act (1856),
S. 1 — Consignment — It is not bill of lad-
ing — S. 1 would not be applicable in case
of endorsement (Dec) 575 B

—S. 55 — See Civil P. C. (1908), O. 37, R. 1
(Aug) 386 B

Special Marriage Act (43 of 1954)

—S. 41 — See Ibid, S. 27 (Aug) 370 B

—S. 41 (2) (a) — Rules framed under, by
Calcutta H. C. R. 10 suit for divorce on
ground of adultery — Impleading "adul-
terer" as co-respondent — Rule is not refer-
able only to a male adulterer — Masculine
gender includes feminine as well

(Aug) 370 C

Specific Relief Act (47 of 1963)

—Ss. 14, 34 — Contract of personal ser-
vice — Not enforceable — Employee of pri-
vate school — Removal of — Remedy of
employee is in damages and not by way of
declaration (Apr) 174 A

—S. 27 — See also Civil P. C. (1908), O. 1,
R. 3 (Aug) 370 A

—Ss. 27 and 41. — Calcutta H. C. Rules,
R. 10 — R. 10 is not ultra vires the rule-
making power — Wife's suit for divorce on
ground of adultery — Woman with whom
husband is alleged to have committed acts
of adultery can be impleaded as co-respon-
dent in terms of R. 10 (Aug) 370 B

—Ss. 31, 34 and 35 — Suit under — Main-
tainability — Conditions to be satisfied for a
suit under S. 31 — Jurisdiction of Court
under S. 34 when can be invoked (Apr) 163

—S. 34 — See

(1) Ibid, S. 14 (Apr) 174 A

(2) Ibid, S. 31 (Apr) 163

—S. 35 — See Ibid, S. 31 (Apr) 163

Stamp Act (2 of 1899)

See under Stamp Duty.

STAMP DUTY

—Stamp Act (2 of 1899)

—Ss. 12 (1) (a) and 63 — Stamp Rules,
1925, R. 17 — Government of West Bengal
Notification No. 6714 AST dated 18-7-1941 —
Share transfer deed — Company refusing to
register transfer inter alia for non-cancellat-
ion of adhesive stamps — Company cannot
be said to have violated R. 17 of the Rules
for attracting penalty under S. 63 (May) 209

—S. 63 — See Ibid, S. 12 (1) (a) (May) 209

—Stamp Rules (1925)

—R. 17 — See Stamp Duty — Stamp Act
(1899), S. 12 (1) (a) (May) 209

Succession Act (39 of 1925)**TENANCY LAWS**

- S. 59 — Testamentary capacity — Burden of proof (May) 236
- Ss. 61, 63 — Evidence Act (1 of 1872), Ss. 101-104 — Will — Undue influence — Burden of proof is on the party who alleges it (Dec) 599 E
- S. 61 — Will — Undue influence — What constitutes — Elements of (Dec) 599 G
- S. 63 — See also Ibid, S. 61 (Dec) 599 E
- (2) Ibid, S. 74 (Dec) 599 D
- S. 63 — Proof of execution — Suspicious circumstances surrounding execution of will must be removed by cogent and satisfactory evidence (May) 236 A
- S. 63 — Evidence Act (1 of 1872), Sections 101-104 — Will — Proof — Mode of — Onus of proof (Dec) 599 A
- Ss. 74, 63 — Will — Construction — Due execution of Will and testamentary capacity of testator proved — Court is not entitled to consider the terms of Will and to decide justifiableness of Will (Dec) 599 D
- S. 84 — Construction of Will — Testator stating in his Will that his wife would get the property absolutely with full right of alienation by way of gift, sale etc. — Effect of (Jan) 52
- S. 131 — See T. P. Act (1882), S. 11 (Apr) 158
- S. 135 — See T. P. Act (1882), S. 11 (Apr) 158
- S. 138 — See T. P. Act (1882), S. 11 (Apr) 158
- S. 214 (1) (b) — Civil P. C. (1908), S. 47 — Suit for recovery of profits misappropriated by Receiver decreed ex parte — Death of decree-holder and judgment-debtor — Execution filed by successors-in-interest of decree-holder — Amount claimed is not debt — Succession certificate is not necessary in execution proceeding (Aug) 378
- S. 218 — See Ibid, S. 227 (Oct) 493 C
- Ss. 227, 218 — Grant of probate — Probate granted in respect of a will — Deed of settlement was also executed by the executant of will — Effect of probate (Oct) 493 C
- S. 263 — Grant of probate — Revocation of — Genuineness of will (Aug) 374
- S. 264 — See Evidence Act (1872), Sections 101-104 (Sep) 428
- S. 284 — See Ibid, S. 299 (Dec) 599 F
- Ss. 299, 284 — Appeal against rejection of caveat — Plea of undue influence against propounder of will — Plea cannot be allowed to be raised in appeal for the first time (Dec) 599 F
- S. 370 — Debt — Ornaments kept in safe deposit locker in the Bank — Not being a debt or a security within meaning of S. 370, succession certificate cannot be granted (Mar) 92

Suits Valuation Act (7 of 1887)

See under Court-fees and Suits Valuations.

1982 Cal. Indexes/2(1)

—Assam Fixation of Ceiling on Land Holdings Act (1 of 1957)

—Ss. 7 (3) and 7 (2) — Appeal lies against order under Section 7 (2) — Hence it must be communicated to objector — Final order and final statement in S. 7 (2) have different meanings. Ori. Order No. 71 of 1980 (Cal), Reversed (May) 220

—West Bengal Land Reforms Act (10 of 1956)

- S. 8 — Application under, for pre-emption — Section 5 of Limitation Act (1963), is applicable (Jan) 6
- Ss. 8 and 14-M — Order as to pre-emption — Determination of ceiling area is not condition precedent. (1981) 2 Cal LJ 22 and (1978) 2 Cal LJ 155, Overruled (Apr) 146
- S. 8 — Application for pre-emption under — Exercise of jurisdiction by Court — Legality (Jun) 243 A
- S. 8 — Application for pre-emption under — Plea that purported transfer giving rise to application under S. 8 was benami — Court not considering it although specifically raised — Held, it amounted to failure to exercise its jurisdiction (Jun) 243 B
- S. 9 (6) — Appeal under — District Judge in entertaining appeal does not act as a persona designata (Jun) 285 A
- S. 9 (6) — Appeal under S. 9 (6) before District Judge — Appeal cannot be transferred to Subordinate Court (Jun) 285 B
- S. 14J — See Ibid, S. 14-K (c) (Mar) 83
- Ss 14-K (c) and 14-J — Right of maintenance of parents of Raiyat cannot be equated with right of separate ceiling (Mar) 83
- S. 14-M — See Ibid, S. 8 (Apr) 146
- S. 53A — Title suit against party belonging to Scheduled Caste — Failure to make Revenue Officer as party — Permission for withdrawal from suit, for serving notice under Sec. 80, C. P. C. on Revenue Officer — Can be granted (Jan) 5
- S. 54 — See also Constitution of India, Art. 226 (Jun) 254 B
- S. 54 — Tribunal could correct accidental error in its order — Party not being prejudiced could not challenge the correction as being opposed to rules of natural justice (Jun) 254 A

Transfer of Property Act (4 of 1882)

- Ss. 11, 28, 32 — Deed of settlement — Construction — Defeasance clause — What amounts to (Apr) 158
- S. 16 — See Hindu law — Shebaitship (Nov) 534
- S. 25 — See Hindu Law — Shebaitship (Nov) 534 A

Transfer of Property Act (contd.)

- S. 28 — See Ibid, S. 11 (Apr) 158
 —S. 32 — See Ibid, S. 11 (Apr) 158
 —S. 41 — Question whether transaction was benami — Evidence — Discharge of onus (Jun) 251 D
 —S. 41 — Benami transaction — Proof — Matters to be taken into consideration — Burden of proof (Dec) 571 A
 —S. 41 — Civil P. C. (1908), S. 11 — Suit against benamidar — Decision therein would bind real owner unless it is shown that benamidar could not and did not in fact represent interest of real owner in that suit (Dec) 571 B
 —S. 44 — See Civil P. C. (1908), O. 39, R. 1 (Apr) 143
 —S. 53A — See also Hindu Minority and Guardianship Act (1956), S. 8 (May) 199 A
 —S. 106 — See Houses and Rents — West Bengal Premises Tenancy Act (1956), S. 13 (1) (ff) (Mar) 127 D
 —S. 106 — Service of notice on tenant — Effect (May) 225 C
 —Ss. 106 and 111 (h) — Agricultural lease commencing on 1-4-1948 — Notice dated 7-10-1980 terminating tenancy on expiry of 14-4-1981 — Notice being not 6 months' notice expiring with end of year of tenancy is invalid (May) 225 D
 —S. 107 — See also Houses and Rents — W. B. Premises Tenancy Act (1956), S. 13 (Sep) 433
 —S. 108 (1) (p) — See Civil P. C. (1908), O. 39, R. 1 (Apr) 152 A
 —S. 111 — See Houses and Rents — W. B. Premises Tenancy Act (1956), S. 13 (Sep) 433
 —S. 111 (a) — See Civil P. C. (1908), S. 11 (Apr) 133 A
 —S. 111 (h) — See Ibid, S. 106 (May) 225 D
 —S. 116 — Lease for 15 years expiring in 1965 — Tenant holding over — No intention to create new lease — Landlord not assenting to his continuing in possession — Held there was no new tenancy in his favour (Apr) 133 B
 —S. 116 — Lease of 30 years with renewal clause — Tenant continuing in possession even after expiry of 30 years — Effect (May) 225 B

Trusts Act (2 of 1882)

- S. 34 — Trust property — Trustee entering into an agreement to sell — No express provision in trust deed authorising trustee to sell such property — Dispute as to whether trustee could sell property referred to court under Section 90, Civil P. C. — Court would be justified in refusing to answer as matter should have been referred to court specified in Section 34 of Trusts Act (Jan) 14

Urban Land (Ceiling and Regulation) Act (33 of 1976)

- Sch. I, Entry 15 — See W. B. Taxation Laws 2nd Amendment (1977), Pre. (May) 202 A

Wakf Act (29 of 1954)

- S. 15 — See Bengal Wakf Act (1934), S. 27 (1) (a) & (b) (Jun) 288

West Bengal Board of Secondary Education Act (5 of 1963)

See under Education.

West Bengal Court-fees Act (10 of 1970)

See under Court-fees & Suits Valuations

West Bengal Food Grains Control Order (1951)

- Cl. 13 (2) — See Essential Commodities Act (1955), S. 3 (Nov) 546

West Bengal Land Reforms Act (10 of 1956)

See under Tenancy Laws.

West Bengal Land (Requisition & Acquisition) Act (2 of 1948)

- Pre. — See also Ibid, S. 3 (1) (Aug) 380 C
 —Pre., S. 3 — Requisition under the Act — Urgency or immediacy of requisition is not condition precedent (Oct) 509 B
 —Pre., S. 3 (1) — Acquisition under the Act — Not mala fide or does not amount to malice in law on ground that provisions of Land Acquisition Act are not resorted to (Oct) 509 C
 —S. 3 — See also
 (1) Ibid, Pre. (Oct) 509 B
 (2) Constitution of India, Art. 226 (Sep) 430 A, B
 —S. 3 — Order under S. 3 — Giving of prior notice and hearing to person affected, not contemplated — Remedy of aggrieved party is to complain to authority concerned after service of order under S. 3 (2) (Aug) 380 A
 —S. 3 — Land requisitioned for one public purpose used for another — Legality (Sep) 430 C
 —S. 3 — Acquisition under — Not invalid on ground of not giving a hearing to owner (Oct) 509 F
 —S. 3 (1) — See also Ibid, Pre. (Oct) 509 C
 —S. 3 (1) — W. B. Land (Requisition and Acquisition) Rules (1948), R. 3 (a) and (d) — Requisition of premises — Order for — Service of (Apr) 180 A
 —S. 3 (1) — Requisition of premises for establishment of a power distribution centre — Urgent necessity of solving acute problems of insufficient supply of electricity to buildings in area concerned — Requisition is for public purpose (Apr) 180 B
 —S. 3 (1) — Requisition of land for establishment of a power distribution centre — Extent of land (Apr) 180 C
 —S. 3 (1) — Requisition of premises for public purpose — Order for — Section itself does not provide for giving any opportunity of hearing (Apr) 180 D
 —S. 3 (1) — Public purpose — What constitutes public purpose (Aug) 380 B

West Bengal Land (Requisition and Acquisition) Act (contd.)

—S. 3 (1) and Preamble — Requisition of land which was a tank used for pisciculture — Validity (Aug) 380 C

—S. 3 (1) — Acquisition under, for company — Validity (Oct) 509 E

—S. 3 (1A) — Acquisition of premises by Land Acquisition Collector on receipt of proposal from State Government — Officer inspecting premises and satisfying himself as to suitability of premises for purpose in question — Requisite formation of opinion on part of officer is to be presumed (Oct) 509 D

—S. 3 (3) — Service of order of requisition — Validity (Oct) 509 A

West Bengal Land (Requisition and Acquisition) Rules (1948)

—R. 3 (a) — See W. B. Land (Requisition & Acquisition) Act (1948), S. 3 (3) (Oct) 509 A

—R. 3 (a) & (d) — See West Bengal Land (Requisition & Acquisition) Act (1948), Section 3 (1) (Apr) 180 A

West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950)

See under Houses & Rents.

West Bengal Premises Requisition and Control (Temporary Provisions) Act (5 of 1947)

See under Houses and Rents.

West Bengal Premises Tenancy Act (12 of 1956)

See under Houses & Rents.

West Bengal Restoration of Alienated Land Act (23 of 1973)

—Ss. 2 (2) and 4 — 'Land' means primarily agricultural land (Nov) 532 A

—S. 4 — See also Ibid, S. 2 (2) (Nov) 532 A

—S. 4 — Requisites for claiming relief under S. 4 (Nov) 532 B

(West Bengal) Rules for Management of Non-Government Institutions (Aided and Unaided) (1969)

—R. 28 (8) — See Education — West Bengal Board of Secondary Education Act (1963), S. 28 (2) (Jul) 305

West Bengal Standards of Weights and Measures (Enforcement) Rules (1959)

—R. 24 — Memo No. 2035 (60) dated Oct. 28, 1960 — Manufacture of complete set of component parts of weighing machine — Disclosure thereof in fortnightly return essential (Nov) 520

West Bengal Taxation Laws (2nd Amendment) Act (20 of 1977)

—Pre. — West Bengal Urban Land Taxation Act (8 of 1976), S. 4 — Buildings within any category of urban agglomeration of W. B. — Imposition of uniform tax — Amendment Act of 1977 is unconstitutional (May) 202 A

—Pre. — Constitutionality of Act — Act not imposing unreasonable restriction to hold building within urban agglomeration — It cannot, therefore, be said to be violative of Art. 19 of the Constitution (May) 202 B

West Bengal Urban Land Taxation Act (8 of 1976)

—S. 4 — See W. B. Taxation Laws 2nd Amendment Act (1977), Pre. (May) 202 A

Words and Phrases

—Banker's lien — See Contract Act (1872), S. 171 (Jan) 62 A, B

—'Drugs' — See Patents Act (1970), S. 2 (1) (I) (iv) (Jan) 30 B

—'Herbicides' — See Patents Act (1970), S. 2 (1) (I) (iv) (Jan) 30 B

—'Medicines' — See Patents Act (1970), S. 2 (1) (I) (iv) (Jan) 30 B

—'Weedicides' — See Patents Act (1970), S. 2 (1) (I) (iv) (Jan) 30 B

**LIST OF CALCUTTA CASES OVERRULED, REVERSED AND DISSENTED
FROM IN A. I. R. 1982**

Diss.: Dissented from in; Over.: Overruled in; Revers.: Reversed in

(1911) ILR 39 Cal 232 (PC) — Held no longer good law in view of AIR 1948 PC 95 : AIR 1951 Orissa 351 held per incuriam. AIR 1982 Orissa 158 B (Jul).

AIR 1929 Cal 532 (Pt. B) (2) — Diss. AIR 1982 Delhi 14 A (Jan).

AIR 1942 Cal 571 — Diss. AIR 1982 Pat 208 (Oct).

AIR 1943 Cal 484 — Over. AIR 1982 SC 1302 A (Oct).

AIR 1948 Cal 230 — Diss. AIR 1982 Ker 181 C (Jul).

(1955) 59 Cal WN 304 — Diss. AIR 1982 Delhi 62 (Feb).

AIR 1956 Cal 470 (Pt. 'e') — Diss. AIR 1982 Orissa 283 B (Dec).

AIR 1959 Cal 455 (Pt. B) — Diss. (1) AIR 1982 Andh Pra 100 C (Mar).

(2) AIR 1982 J & K 98 (FB) (Sep).

(1961) 65 Cal WN 1093 — Over. AIR 1982 Cal 267 (FB) (Jun).

AIR 1966 Cal 315 — Over. AIR 1982 SC 1302 A (Oct).

- AIR 1968 Cal 314 — **Diss.** AIR 1982 Him Pra 42 A (Apr).
- ILR (1972) 2 Cal 347 — **Revers.** on Principle. AIR 1982 Cal 199 A (May).
- (1973) 77 Cal WN 830 — **Diss.** AIR 1982 Delhi 362 B (Aug).
- AIR 1975 Cal 243 (Pt. B) — **Diss.** AIR 1982 Pat 213 B (**SB**) (Nov).
- (1975) 79 Cal WN 153 — **Diss.** AIR 1982 Cal 542 B (Nov).
- 1976 Lab IC 1398 (Pt. B) (Cal) — **Revers.** AIR 1982 SC 1062 (**Jun**).
- AIR 1977 Cal 241 — **Diss.** AIR 1982 Andh Pra 278 (Jul).
- (1977) 2 Cal LJ 96 — **Diss.** AIR 1982 Cal 542 B (Nov).
- (1978) 2 Cal LJ 155 — **Over.** AIR 1982 Cal 146 (Apr).
- AIR 1979 Cal 221 — **Over.** AIR 1982 Cal 407 (Sep).
- (1979) Decision of single Judge in Suit No. 906 of 1978, D/- 27-8-1979 (Cal) — **Revers.** AIR 1982 Cal 537 B (Nov).
- AIR 1980 Cal 131 — **Not followed** in view of AIR 1957 Cal 257 (B) (SB). AIR 1982 Cal 391 B (Aug).
- AIR 1980 Cal 148 — **Not followed** in view of AIR 1970 All 257 (FB) and AIR 1977 Madh Pra 222 (FB). AIR 1982 Orissa 212 C (Sep).
- (1980) Ori. Order No. 71 of 1980 (Cal) — **Revers.** AIR 1982 Cal 220 (May).
- AIR 1981 Cal 352 (Pt. C) — **Over.** AIR 1982 Cal 267 (**FB**) (Jun).
- (1981) 2 Cal LJ 22 — **Over.** AIR 1982 Cal 146 (Apr).
- (1981) 85 Cal WN 532 — **Revers.** AIR 1982 SC 983 (**May**).

COMPARATIVE TABLE

AIR 1982 Calcutta

AIR = Other Journals

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1	(1982) 86 Cal WN 148	118con	(1981) 85 Cal WN 984	202con	(1981) 86 Cal WN 420	283con	(1982) 2 Ren CR 82
5	(1981) 85 Cal WN 1189	120	(1981) 85 Cal WN 875		(1982) 1 Cal LJ 504	288	(1982) 86 Cal WN 434
6	(1981) 2 Cal LJ 310 86 Cal WN 111 (1982) 1 Cal HN 52	124	(1982) 86 Cal WN 59	205	(1982) (1) Cal HN 177 86 Cal W N 595 (1982) 1 Cal LJ 508	290	(1982) 86 Cal WN 443 1982 (2) Cal WN 129
8	(1981) 2 Cal LJ 263 86 Cal W N 151	127	(1982) 1 Cal HN 54 86 Cal W N 456		(1982) 1 Rent LR 690 (1982) 2 Ren CJ 280	294	1982 (1) Cal LJ 256 1982 (1) Cal HN 206
9	---		(1982) 1 Rent LR 469 1982 (1) Civ LJ 428	207	1982 (2) Civ LJ 113	301	---
12	---	134	---	209	---	305	86 Cal WN 893 (1982) 2 Cal LJ
14	1981 (2) Cal HN 103 (1981) 85 Cal WN 898	136	---	210	---	307	---
17	(1981) 85 Cal WN 1019 1981 (2) Cal HN 182	138	(1982) 2 Cal LJ 462 (1982) 86 Cal WN 187 1982 (1) Civ LJ 455	217	1981 (1) Cal HN 547 1981 (1) Cal LJ 551	314	1982 (1) Cal HN 338 (1982) 1 Cal LJ 409 86 Cal WN 793
19	---	143	---	220	(1982) 86 Cal WN 210	329	---
30	---	146	(1982) 86 Cal WN 279 (1982) (1) Cal HN 68 (1982) 1 Cal LJ 174	222	(1982) 86 Cal WN 559 1982 (1) Cal LJ 179 1982 (1) Cal HN 155	333	---
32	(1981) 2 Cal LJ 1	149	---	224	(1981) 85 Cal WN 862 1981 (2) Cal HN 95	336	1981 (2) Cal HN 431 (1982) 86 Cal WN 174
34	---	151	(1982) 1 Cal LJ 502	225	---	340	---
41	---	152	1982 (1) Cal HN 73 86 Cal W N 329	238	(1981) 2 Cal LJ 428	342	(1982) 1 Cal LJ 279 86 Cal WN 516 (1982) 1 Cal LJ 310 86 Cal WN 628
48	---	158	(1982) 1 Cal HN 184 86 Cal WN 583	241	---	350	---
52	(1982) 1 Cal LJ 73 (1982) 1 Cal HN 119 86 Cal WN 398 86 Cal WN 289 (1982) 1 Ren CJ 732	161	---	243	86 Cal WN 556	351	---
57	---	162	(1982) 86 Cal WN 225	245	---	353	---
62	---	163	---	251	---	356SB	(1982) 2 DMC 266 1982 Mat LR 209
71	---	167	---	254	(1981) 2 Cal LJ 9 (1981) 85 Cal WN 959	358	---
74	(1981) 2 Cal HN 286	174	86 Cal WN 337	259	---	360SB	(1982) 2 Cal LJ 132 (1982) 2 DMC 257 1982 Hindu LR 464
83	(1981) 1 Cal LJ 372 (1981) 85 Cal WN 825	178	---	267	(1982) 1 Cal HN 287 86 Cal WN 554 (1982) 1 Cal LJ 436 (1982) 2 Ren CJ 402 (1982) 2 Ren OR 19 (1982) 2 Ren LR 252	361	(1982) 1 Cal HN 389 1982 (1) Cal LJ 468 (1982) 86 Cal WN 758 (1982) 2 Ren OR 260
92	1981 (1) Cal HN 494	180	86 Cal WN 502	282	86 Cal WN 623	365	---
94	---	191	---	283	(1982) 86 Cal WN 491 1982 (1) Cal HN 215 (1982) 2 Cal LJ 33	370	86 Cal WN 901 1982 (2) Cal HN 250 (1982) 2 DMC 241 (1982) 1 Cal LJ 460
98	---	199	1982 (1) Cal LJ 134 1982 (1) Cal HN 189 (1982) 86 Cal WN 423 1982 Hindu LR 298 (1982) 2 Civ LJ 85			374	---
101	(1982) 86 Cal WN 84 (1982) 1 Cal HN 247	202	1982 (1) Cal HN 146			376	(1982) 86 Cal WN 346
118	(1981) 85 Cal WN 1083 (1981) 2 Cal LJ 255						
118	1981 (2) Cal HN 81						

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
378	1982 (1) Cal LJ 244	407	(1982) 86 Cal WN 841	440	...	532	con(1982) 2 Cal
	1982 (1) Cal HN 278		1982 East LR 82	461	(1982) 86 Cal WN 832		LJ 164
	(1982) 86 Cal WN 523		(1982) 2 Ren OR 275	467	86 Cal WN 908	534	1982 East LR 151
380	(1982) 86 Cal WN 864		1982 (2) Civ LJ 408		(1982) 2 Cal LJ 148	537	...
386	1982 (1) Cal LJ 305	412	...	474	...	542	(1982) 2 Cal HN 68
	(1982) 86 Cal WN 618	413	1982 (2) Cal HN 49 86 Cal WN 919	479	1982 (1) Cal HN 360	546	(1982) 1 Cal LJ 541
388	...	417	(1982) 86 Cal WN 739		(1982) 86 Cal WN 926	547	(1982) 1 DMO 146
391	1982 (1) Cal LJ 229		(1982) (1) Cal HN 410	488	(1982) 86 Cal WN 673		(1982) 86 Cal WN 213
	1982 (1) Cal HN 234		(1982) 2 Ren CR 150		1982 (1) Cal LJ 493	555	...
	(1982) 86 Cal WN 559	420	(1982) 86 Cal WN 598	493	...	559	...
	(1982) 2 Ren CJ 151		(1982) 1 Cal LJ 528	505	...	564	1982 (2) Cal HN 54
394	(1982) 2 Ren CR 256	428	...	509	86 Cal WN 1046		(1982) 86 Cal WN 866
397	(1982) 2 Cal HN 166	430	...	518	1982 East LR 144	571	...
	1982 East LR 170	433	(1982) 86 Cal WN 588		(1982) 86 Cal WN 1031	575	1982 East LR 24
400	(1982) 86 Cal WN 772		(1982) 1 Rent LR 684		(1982) 2 Rent OR 476		(1982) 86 Cal WN 992
			(1982) 2 Rent OR 432	520	...	578	...
		437	...	522	...	587	1981 (2) Cal HN 126
		439	(1982) 2 Comp LJ 843	529	...	998	...
				532	(1982) 2 Cal HN 1 (1982) 86 Cal WN 848	805	...

Other Journals = All India Reporter

1981 (1) Cal H N	1982 (2) Cal H N	(1982) 2 Cal L J Cal LJ AIR	(1982) 86 Cal W N	(1982) 2 Com L J
Cal HN AIR	Cal HN AIR	38 1982 Cal 285	Cal WN AIR	Com LJ AIR
494 1982 Cal 92	166 1982 Cal 397	82 " " 805	398 1982 Cal 52	848 1982 Cal 489
516 " NOC 41	250 " " 370	110 " NOC 279	420 " " 202	—
547 " Cal 217	—	132FB " Cal 360	423 " " 199	—
—	1980 (1) Cal L J	148 " " 467	434 " " 288	—
1981 (2) Cal H N	Cal LJ AIR	164 " " 532	443 " " 290	(1982) 1 DMC
Cal HN AIR	262 1982 NOC 6	—	456 " " 127	DMC AIR
81 1982 Cal 118	—	(1980) 84 Cal	491 " " 285	146 1982 Cal 547
95 " " 224	(1981) 1 Cal L J	W N	502 " " 180	—
108 " " 14	Cal LJ AIR	Cal WN AIR	516 " " 342	(1982) 2 DMC
128 " " 587	372 1982 Cal 88	837 1982 NOC 6	523 " " 378	DMC AIR
182 " " 17	520 " NOC 41	—	556 " " 243	241 1982 Cal 370
204 " NOC 39	541 " Cal 217	(1981) 85 Cal	559 " " 391	257FB " " 360
266 " Cal 74	—	W N	583 " " 158	268FB " " 356
329 " NOC 5	(1981) 2 Cal L J	Cal WN AIR	588 " " 423	—
481 " Cal 336	Cal LJ AIR	675 1982 Cal 120	595 " " 205	1982 East L R
—	1 1982 Cal 32	825 " " 85	598 " " 420	East LR AIR
1982 (1) Cal H N	9 " " 254	862 " " 224	618 " " 386	24 1982 Cal 575
Cal HN AIR	153 " NOC 5	919 " NOC 68	628 " " 282	82 " " 407
52 1982 Cal 6	226 " " 88	959 " Cal 254	628 " " 346	144 " " 518
54 " " 127	255 " Cal 113	984 " " 118	634 " " 267	151 " " 534
68 " " 146	268 " " 8	998 " " 14	655 " NOC 215	170 " " 397
73 " " 152	310 " " 6	1019 " " 17	673 " Cal 488	—
118 " " 52	396 " NOC 37	1025 " NOC 5	717 " NOC 189	1982 Hindu L R
146 " " 202	426 " Cal 236	1033 " Cal 113	735 " " 276	Hindu LR AIR
155 " " 222	462 " " 138	1101 " NOC 39	739 " Cal 417	298 1982 Cal 199
177 " " 205	—	1139 " Cal 5	753 " " 381	464FB " " 360
184 " " 159	(1982) 1 Cal L J	—	772 " " 400	—
189 " " 199	Cal LJ AIR	(1982) 86 Cal	793 " " 314	1982 Mat L R
206 " " 294	61 1982 NOC 182	W N	819 " NOC 232	Mat LR AIR
215 " " 285	73 " Cal 52	Cal WN AIR	832 " Cal 461	209FB 1982 Cal 356
234 " " 391	184 " " 199	59 1982 Cal 124	841 " " 407	—
240 " NOC 215	174 " " 146	72 " NOC 37	848 " " 532	1982 (1) Civ L J
247 " Cal 101	179 " " 222	84 " Cal 101	866 " " 564	Civ LJ AIR
278 " " 378	229 " " 391	111 " " 6	893 " " 305	428 1982 Cal 153
287FB " " 267	244 " " 378	139 " NOC 162	901 " " 370	455 " " 138
311 " NOC 189	256 " " 294	146 " Cal 1	908 " " 467	—
338 " Cal 314	279 " " 342	151 " " 8	919 " " 413	1982 (1) Ren C J
360 " " 479	305 " " 386	167 " " 138	926 " " 479	Ren CJ AIR
389 " " 381	310 " " 346	174 " " 336	961 " NOC 199	586 1982 NOC 37
410 " " 417	388 " NOC 281	210 " " 220	992 " Cal 575	697 " " 68
—	409 " Cal 311	213 " " 547	1031 " " 518	732 " Cal 55
1982 (2) Cal H N	436FB " " 267	225 " " 162	1046 " " 509	—
Cal HN AIR	460 " " 374	230 " " 133	—	1982 (2) Civ LJ
1 1982 Cal 532	465 " NOC 198	239 " " 55	592 " " 518	Civ LJ AIR
37 " NOC 275	468 " Cal 361	279 " " 146	—	85 1982 Cal 189
49 " Cal 413	493 " " 489	294 " NOC 41	592 " " 518	113 " " 207
54 " " 564	502 " " 151	329 " Cal 152	—	408 " " 407
66 " " 542	504 " " 202	337 " " 174	1982 (1) Civ L J	—
129 " " 290	508 " " 205	346 " " 376	592 " " 518	—
—	528 " " 420	359 " " 222	—	—
—	541 " " 546	384 " " 880	—	—

Other Journals = All India Reporter (concluded)

1982 (2) Ren				(1982) 2 Ren				(1981) 1 Rent			
C J				C R				L R			
Ren	CJ	AIR		Ren	CR	AIR		Ren	LR	AIR	
151	1982	Cal	381	19FB	1982	Cal	267	489	1982	Cal	133
280	"	"	205	85	"	"	285	678	"	NOC	87
402FB	"	"	267	118	"	NOC	232	684	"	Cal	433
				150	"	Cal	417	890	"	"	305
				256	"	"	394				
				260	"	"	381				
				275	"	"	407				
				432	"	"	433				
				476	"	"	518				
(1982) 1 Ren								(1982) 2 Rent			
C R								L R			
Ren	CR	AIR						Ren	LR	AIR	
30	1982	NOC	37					100	1982	NOC	232
								252FB	"	Cal	267

THE
All India Reporter
1982

Calcutta High Court

AIR 1982 CALCUTTA 1

B. C. RAY, J.

Ram Narayan Keshori and others,
Petitioners v. University of Calcutta
and others, Respondents.

C. R. No. 7103 (W) of 1979. D/- 9-9-1981.

Constitution of India, Art. 226 — Education — Unfair means — Natural justice — Students charged with adopting unfair means — Charge levelled, held proved in view of report of examiner and evidence tendered by him before Committee — Students not allowed to adduce rebuttal evidence or to cross-examine witness — There is denial of natural justice.

It is well settled that a public authority while exercising disciplinary powers having civil consequences is under an obligation to observe the principles of natural justice. What do the principles of natural justice mean or in other words what does the term *audi alteram partem* mean. Is that mere formality to be observed by giving a copy of the charge sheet to the party proceeded against and asking him to explain and that will be a sufficient compliance of the principles of natural justice. When a report is relied upon or some witness is examined at the back of the party charged against and decision is made in the disciplinary proceeding solely on the basis of that evidence or on the basis of the report it is not necessary to conform to the principles of

natural justice to give the party a reasonable opportunity by asking him to be present at the time when the witness is examined and also allowing him to cross examine the witnesses and/or to adduce any evidence to controvert the statements or evidence of the particular witness and to confront him with report relied upon. If that position is accepted then the whole foundation and the basic principles of natural justice will be a formality and will be illusory and futile. (Para 6)

Where the examiner on whose report disciplinary proceedings were initiated against certain students was not examined by the sub-committee appointed by the Board of Discipline of the University to investigate into the charge in presence of the students concerned nor the students were ever intimated to be present in the meeting of the sub-committee when that particular witness would be examined nor any opportunity was given to the students to adduce evidence to controvert the evidence adduced by this witness and/or to cross examine this witness, the order of the University Council cancelling the examination of the students on basis of the resolution of the Board of Discipline that the students were guilty of breach of discipline, was liable to be set aside on ground of denial of natural justice. (Paras 6, 7)

Cases Referred: Chronological Paras
AIR 1979 SC 1628: (1979) 3 SCC 489 6
AIR 1978 SC 597: (1978) 2 SCJ 312 6

Noni Coomar Chakraborty and Ambica Bhattacharya, for Petitioners; N. K. Roy

JY/JY/E594/81/SNV

1982 Cal./1 I G-20

and Sarda Parmar, for University of Calcutta.

ORDER:— This Rule is directed against the order passed by the Calcutta University approving the resolution of the Board of Discipline dated 10-5-79 cancelling the examination of the petitioners who appeared at the B. Lib. Science Examination held in 1978 and the letter issued by the Board of Discipline intimating the same to the Head of the Department of Library Science of Calcutta University which are annexed to the writ petition as annexures C and D respectively.

2. The salient facts in short as appear from the averments in the petition are as follows. The petitioners appeared in the B. Lib. Sc. Examination in 1978. The said examination was held at Pischall Hall, Darbhanga Building College Street Campus, on and from Aug. 29; 1978 to Sept. 19, 1978 and Classification practice (paper II) examination was held on Sept. 15, 1978. On or about May 24, 1978, the result of the said examination was published but as regards the result of the petitioners they were not published and were withheld with the remark "result withheld" against the name of each of the petitioners. Thereafter on Mar. 28, 1978 copies of charge-sheets were issued by the Secretary, Board of Discipline, to the petitioners intimating them of the charges brought against them and directing them to appear at the meeting of the sub-committee of the Board of Discipline which was entrusted to investigate into the cases of Breach of discipline at the said Lib. Sc. Examination held in 1978 to be held on 6-4-1979 at 3 p. m. It has also been stated in the said notice if the petitioners defaulted in appearing before the sub-committee on the date of the meeting as mentioned hereinbefore the matter would be decided ex parte without any further reference to them. One of the copies of the charge-sheets as well as one of the copies of the notices have been annexed as annexure A to the writ petition. It has been stated that the said notices are vague and the same did not contain relevant particulars in regard to the said charge-sheet. It has also been submitted that no copy of the report alleged to have been submitted by the examiner Shri P. C. Banerjee was served on any of the petitioners though investigation was sought to be made by the sub-committee on

the basis of the above report. The petitioners it is stated, appeared before the sub-committee as directed by the said notice and denied the allegations levelled against them in the aforesaid charge sheet. It has also been stated that while they appeared before the sub-committee the answer scripts which were alleged to be vitiated by copying were not produced nor were the same shown to them in order to give them a reasonable opportunity of knowing in particular the nature of the charges and in controverting them properly. It has been further stated that no evidence either oral or documentary was recorded by the sub-committee in their presence nor they were allowed to cross examine the witnesses examined and/or to controvert the evidence so recorded by adducing evidence in support of their case. The sub-committee adopted certain resolutions at its meeting which were considered by the Board of Discipline at its meeting on May 10, 1979 and the particular matter in question appeared as item no. 9 of the proceeding. A resolution was adopted by the Board of Discipline to the effect that the petitioners' examination be cancelled and the said resolution was recommended to be submitted before the Calcutta University Council for their approval. Accordingly on May 18, 1979 the Calcutta University Council at its meeting under agenda No. 31 considered and resolved that the resolution of the Board of Discipline dated 10-5-1979 with regard to the candidates bearing roll Nos. mentioned therein be approved. This resolution of the Calcutta University Council was intimated by the Secretary, Board of Discipline, to the Head of the Department of Library Science, Calcutta University under communication No. BD/255/RA/B-Lib. Sc./78 dated 2-7-1979 which has been annexed as annexure D to the petition.

3. It has been submitted on behalf of the petitioners that the impugned resolution adopted by the Calcutta University Council is vitiated by non-observance of the principles of natural justice inasmuch as the sub-committee appointed by the Board of Discipline in accordance with the provisions of Ordinance 62 framed under the Calcutta University Act, 1966 did not allow the petitioners any opportunity to be present at the time when it examined Shri P. C. Banerjee on whose report the dis-

disciplinary proceeding was initiated and on whose statements as recorded by the sub-committee the charges were held to have been brought home. It has also been contended that the sub-committee which under proviso to Cl. (5) of Ordinance 62 of the Calcutta University First Ordinances, 1966 requires to be consisted of three members and the quorum in the meeting shall be two did not adopt the impugned resolution at the meeting wherein Shri P. C. Banerjee was examined inasmuch as in that meeting quorum was not there as according to the petitioners only one member of the committee, i. e., respondent No. 6 was present. The other member, respondent No. 7, Dr. A. K. Ohdedar, Chief Librarian, was absent and the third member Shri P. C. Banerjee of the said sub-committee was not permitted to participate in the proceeding of the meeting as a member by an order of the Vice-Chancellor on the ground that it was at his instance this prosecution and/or disciplinary proceeding was started and respondent no. 5 was asked to be present as an observer in his place. It has therefore been submitted that the meeting of this sub-committee wherein Shri P. C. Banerjee was examined is also bad and the proceeding adopted in the said meeting is illegal and of no effect as it is in contravention of the mandatory provisions of Ordinance 62 Cl. (5) of the Calcutta University First Ordinances, 1966. The instant Rule was issued but the prayer for interim order was not allowed.

4. Mr. Chakraborty, learned Advocate appearing on behalf of the petitioners, has submitted in the first place that the impugned resolution adopted by the sub-committee wherein Shri P. C. Banerjee was examined is bad on the ground of non-observance of the principles of natural justice as the said witness was examined without intimating the petitioners to be present or in other words, not in the presence of the petitioners and without giving the petitioner any opportunity of cross examining the witnesses and also of adducing evidence to controvert the statements and/or evidence given by Shri P. C. Banerjee. It has been next submitted by Mr. Chakraborty that at the meeting when Shri P. C. Banerjee was examined by the sub-committee there was no quorum and only one member i. e., respondent no. 6 Dr. Barua alone was pre-

sent and respondent no. 5 as an observer was present and Vice-Chancellor was present. Therefore this meeting is bad as there was no quorum and resolution adopted at the meeting is also illegal and unenforceable being contrary to the mandatory provisions of Ordinance 62 Cl. (5) of the above Ordinances. It has therefore been submitted by Mr. Chakraborty that the impugned resolution adopted by the Calcutta University Council approving of the resolution of the Board of Discipline taken at its meeting dated 10-5-1979 should be cancelled, quashed and set aside.

5. Mr. Roy, learned Advocate appearing on behalf of the Calcutta University, has on the other hand produced before this Court the answer scripts of most of the petitioners and referring to them submitted that the answer scripts will show the allegations that have been made in the report of Shri P. C. Banerjee which has been annexed as annexure A to the affidavit-in-opposition sworn by Shri Pratip Kumar Mukherjee Registrar of the University of Calcutta. It has been further submitted by Mr. Roy that in the meeting of the sub-committee appointed by the Board of Discipline in accordance with the provisions of Ordinance 62 of the said Ordinance two members were present. This has been stated in para. 19 of the affidavit-in-opposition where it has been stated that the respondent no. 7, an expert on the subject was present as a member of the sub-committee and he along with respondents nos. 5 and 6 investigated into the charges and thus denied the statements made in paras 23 and 24 of the petition that only one member of the sub-committee was present in the said meeting and not Dr. Ohdedar (respondent no. 7) who is an expert on the subject was present. It has also been stated in para 15 of the affidavit-in-opposition that the petitioners were confronted with the report as also the answer scripts but no satisfactory explanations about the similarity of answers as well similar mistakes committed were furnished by any of the petitioners who appeared before the committee. This statement in p. 15 of the affidavit-in-opposition has been affirmed as true to information from the respondents nos. 5 and 6 and records of the University. However the proceed-

ings of the sub-committee have not been produced before this Court to show if this report was produced and/or placed before the petitioners when they appeared before the sub-committee. Mr. Roy also submitted that principles of natural justice require that definite charges are to be levelled and the copies of the charge-sheets are to be given to the persons charged against and they will be asked to show cause. It is not necessary that the persons charged against have to be given an opportunity of cross examining witnesses or that the witnesses are to be examined in his presence. In support of this submission of Mr. Roy some decisions have been cited at the Bar. Mr. Roy therefore has submitted that since the charge-sheet has been served on the petitioners and they were allowed to appear before the sub-committee appointed by the Board of Discipline to show cause against the charges it cannot be said that there has been violation of the principles of natural justice. The resolution adopted at the meeting of the sub-committee and thereafter on its basis the resolution adopted at the meeting of the Board of Discipline on 10-5-1979 and approved by the Calcutta University Council cannot be questioned as bad being violative of the principles of natural justice.

6. Undoubtedly it is well settled that a public authority while exercising disciplinary powers having civil consequences is under an obligation to observe the principles of natural justice. What do the principles of natural justice mean or in other words what does the term *audi alteram partem* mean. Is that mere formality to be observed by giving a copy of the charge-sheet and asking him to explain and that will be a sufficient compliance of the principles of natural justice. Even a report is relied upon or some witness is examined at the back of the petitioner charged against and decision is made in the said disciplinary proceeding solely on the basis of that evidence or on the basis of the report it is not necessary to conform to the principles of natural justice to give the petitioner a reasonable opportunity by asking him to be present at the time when the witness is examined and also allowing him to cross-examine the witnesses and/or to adduce any evidence to controvert the statements or evidence

of the particular witness and to confront him with report relied upon. If that be the position then the whole foundation and the basic principles of natural justice will be an empty formality and will be illusory and futile which in this late hour of the day this Court is not prepared to accept. The scope of the principles of natural justice has been very succinctly and elaborately elucidated in the judgment rendered in *Maneka Gandhi's case* (AIR 1978 SC 597) wherein the law prescribing the forfeiting of a passport of a citizen did not provide for giving an opportunity of hearing. Still then the Supreme Court pronounced that the right guaranteed under Art. 21 of the Constitution of India demands that principles of natural justice have to be observed in the democratic form of our Government and the citizen whose passport is being cancelled has to be provided with reasonable opportunity of being heard. The same view was also reiterated in *R. D. Shetty v. International Air Port Authority of India*, reported in AIR 1979 SC 1628 where it has been said in no uncertain terms that in the matter of distribution of privileges, contracts, largess by public authorities it is incumbent on them to observe the principles of natural justice. Therefore there is no iota of doubt that the sub-committee which is examining Shri P. C. Banerjee on whose report disciplinary proceeding was initiated and on whose evidence the sub-committee came to a decision and the Board of Discipline after considering the resolution of the sub-committee adopted a resolution to the effect that the petitioners are guilty of breach of discipline in the examination of B. Lib. Sc. held in 1978 it is imperative and it is an impelling necessity in order to observe the principles of natural justice that the witness on whose evidence the resolution is going to be made is to be examined in the presence of the petitioners and the petitioners have to be given opportunity of cross-examining the witness and also if necessary to allow him opportunity to adduce evidence in support of the petitioners' case and to controvert the evidence adduced by this particular witness. This is the immediate and essential requirement of the principles of natural justice. In this case undoubtedly as has been candidly admitted by Mr. Roy, learned Advocate appearing on behalf of the Calcutta University, that

Shri P. C. Banerjee was not examined in presence of the petitioners nor the petitioners were ever intimated to be present in the meeting of the sub-committee when this particular witness would be examined nor any opportunity was given to the petitioners to adduce evidence to controvert the evidence adduced by this witness and/or to cross examine this witness. Therefore in these circumstances in my view the principles of natural justice have been violated and have not been observed. For this infirmity alone the impugned order as embodied in annexure C i. e. the resolution of the Calcutta University Council dated 15-5-1979 is liable to be quashed and set aside. It is not necessary for me to go into and/or deal with the other points raised in the petition. Therefore, for the reasons aforesaid the arguments advanced on behalf of the petitioners succeed and the Rule succeeds.

7. The Rule is made absolute. The impugned order of the Calcutta University Council annexed as annexure C to the petition and also the communication made thereon by the Secretary of the Board of Discipline annexed as annexure D to the petition are illegal and bad.

8. Let a writ of mandamus be issued commanding the respondents to forbear from giving effect to the said resolution of the Calcutta University contained in annexure C and also the communication of the same contained in annexure D to the petition.

9. Let a writ of Certiorari be issued quashing and setting aside the said resolution and also the communication.

10. The University of Calcutta may proceed in this matter in accordance with law.

11. This order is made only with regard to the petitioners who are before this Court.

12. L/Advocates for the parties may take plain copies of the ordering portion of this order, as prayed for.

Rule made absolute.

AIR 1982 CALCUTTA 5

SUDHINDRA MOHAN GUHA, J.

Smt. Shima Sundari Lekri, Petitioner
v. Paltu Hemram and others, Opposite Parties.

C. R. No. 1747 of 1980, D/- 30-7-1981.

HY/HY/D697/81/VNP

West Bengal Land Reforms Act (10 of 1956), Sec. 53A — Title suit against party belonging to Scheduled Caste — Failure to make Revenue Officer as party — Permission for withdrawal from suit, for serving notice under S. 80, C. P. C. on Revenue Officer — Can be granted. (Civil P. C. (5 of 1908), Sec. 80; O. 23, R. 1).

Where in the suit for declaration of title and injunction filed by the plaintiff, one of the opposite party was belonging to the Scheduled Caste and the plaintiff failed to make the Revenue Officer as a party to the suit as required by Sec. 53A, the plaintiff could be permitted to withdraw from suit, for serving the notice under Sec. 80, C. P. C. on the Revenue Officer, to implead him as a party.

(Para 8)

Himadri Sankar Mazumder, for Petitioner.

ORDER :— This application for revision is directed against the order dated 5th of March, 1980 passed by the learned Munsif, Garbeta, District Midnapore, in Title Suit No. 135 of 1979 refusing to permit the plaintiff-petitioner to withdraw from the suit.

2. The Title Suit No. 135 of 1979 was instituted by the petitioner as plaintiff against the opposite parties for declaration of title and injunction.

3. At the time of settlement operation prepared under the W. B. Land Reforms Act the name of the petitioner was duly recorded and at that time the lands were in her own cultivation. The defendants at the instigation of others claimed the right of bargadar and in fact, while opposing the application under O. 39, R. 1, C. P. C. they claimed to be the bargadars. It was also pointed out that Opposite Party No. 1 belonged to a Scheduled Tribe.

4. Section 53A of the W. B. Land Reforms Act provides that the Revenue Officer will be a necessary party in a suit in which one of the parties is a member of any Scheduled Tribe. In this view of the matter, on the date of hearing of the application for injunction the petitioner filed an application for withdrawing the suit with liberty to sue afresh, on the ground that no notice under Section 80 of the Civil P. C. had been served upon the Junior Land Reforms Officer in compliance with the provision of Sec. 53A of the W. B. Land Reforms Act, before instituting the suit.

5. The learned Munsif on interpretation of provision of Section 80, C. P. Code

read with Sec. 53A of the W. B. Land Reforms Act rejected the said application for withdrawing from the suit.

6. Mr. H. S. Mazumder, the learned Advocate for the petitioner contends that the learned Munsif acted illegally and without jurisdiction in not allowing the application for withdrawal of the suit.

7. There is no doubt that in the suit against a member of the Scheduled Tribe it was incumbent on the plaintiff to make the Revenue Officer as a party under Section 53A of the W. B. Land Reforms Act.

8. Section 53A of the W. B. Land Reforms Act is of course, conspicuously silent as to necessity or otherwise of any notice under Section 80, C. P. Code on the Revenue Officer concerned. This section does not lay down merely that such a proceeding is only to be decided in the presence of the Revenue Officer. On the contrary it lays down that the Revenue Officer shall be a necessary party to all suits of a civil nature in which one of the parties is any member of any Scheduled Tribe. Section 80, C. P. C. relates firstly to suits against Government and secondly to suits against Public Officers. The words "acts purporting to be done" qualify the public Officers. A notice under Section 80, C. P. Code is mandatory against Public Officers, when the suit is in respect of an act purporting to be done by him in official capacity. A Revenue Officer if impleaded in such a proceeding must be done so in his official capacity. If that be the position a notice under Section 80, C. P. Code seems to be mandatory. The petitioner as plaintiff had every reason to think that non-service of notice under Section 80, C. P. C. would be rather fatal. In this view of the matter, the petitioner wanted to withdraw from the suit on the ground of formal defect. On construing Sec. 53A of the W. B. Land Reforms Act it is observed by the learned Munsif that the provision in Sec. 53A, C. P. Code (or W. B. Land Reforms Act?) has been made to safeguard the interest of the Scheduled Tribe, so that due to their ignorance their interest may not be affected and that is why the Revenue Officer has been made a necessary party. Then he opined that as the Revenue Officer is a necessary party he cannot be taken to be a party requiring a notice under Section 80, C. P. Code. I cannot be in agreement with the learned Munsif on this point. It has already been pointed out that the Revenue Officer is to be impleaded as a party not in his private

capacity but as a Public Officer. If that be so, it will be incumbent upon the petitioner to serve a notice under Sec. 80, C. P. Code before impleading such a Public Officer in a suit of this nature. Non-joinder of the Revenue Officer as a party to the suit can be taken to be a formal defect. In this view of the matter, the learned Munsif should have allowed the application for withdrawal of the suit.

9. In the result, this application succeeds. The Rule is made absolute. The impugned order is set aside. There will be no order as to costs. The learned Munsif is directed to permit the plaintiff petitioner to withdraw from the suit with liberty to sue afresh on the same cause of action if not otherwise barred, subject to payment of such costs as he thinks proper and just.

10. Let the records be sent down at once.

Application allowed.

AIR 1982 CALCUTTA 6

SUDHINDRA MOHAN GUHA, J.

Chandra Sekhar Sarkar, Petitioner v. Baidyanath Ghosh and others, Opposite Parties.

C. R. No. 2099 of 1980, D/- 9-9-1981.

W. B. Land Reforms Act (10 of 1956), Section 8 — Application under, for pre-emption — Section 5 of Limitation Act (1963), is applicable, (Lim. Act (1963), S. 5).

Where an application under Section 8 is filed after the coming into force of the Lim. Act 1963, Section 5 thereof will be applicable to the applicant and if he can show that he had sufficient cause for not filing the application within four months, the delay may be condoned. AIR 1976 SC 105. Rel. on; (1975) 1 Cal LJ 494 Disting. . (Para 6)

Cases Referred : Chronological Paras
AIR 1976 SC 105 : 1976 Cri LJ 179 3
(1975) 1 Cal LJ 494 5

Abhijit Banerjee, for Petitioner; P. N. Palit, for Opposite Parties.

ORDER :— The petitioner herein is the applicant for pre-emption under Section 8 of the Land Reforms Act in respect of the land purchased by the opposite parties on the ground of vicinage. As the application could not be

filed within four months of the date of transfer as required by the Section, he filed an application under Section 5 of the Limitation Act for condonation of delay.

2. The learned Munsif, 2nd Court at Arambagh by an order dated 22-3-1980 held that Section 5 of the Limitation Act had no application in a case under Section 8 of the West Bengal Land Reforms Act, particularly when the application is made on the ground of vicinage. So the application under Section 5 of the Limitation Act was rejected.

3. Mr. Abhijit Kumar Banerjee, the learned Advocate for the petitioner argues that in view of Section 29 (2) of the Limitation Act, Section 5 of the Limitation Act is applicable in the instant case. He further contends that there is nothing in the West Bengal Land Reforms Act excluding the provision of Limitation Act. Reference is made to the decision of the Supreme Court in the case of (1) Mangu Ram (2) M/s. Ram Parshad Gondamal v. Municipal Corporation of Delhi, reported in AIR 1976 SC 105. At page 108 of the report Their Lordships observe as follows :—

"There is an important departure made by the Limitation Act, 1963 in so far as the provision contained in Section 29, sub-section (2) is concerned. Whereas under the Indian Limitation Act, 1908, Section 29, sub-section (2), Cl. (b) provided that for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law the provisions of the Indian Limitation Act, 1908, other than those contained in Sections 4, 9 to 18, and 22 shall not apply and therefore, the applicability of Section 5 was in clear and specific terms excluded. Section 29, sub-section (2) of the Limitation Act 1963 enacts in so many terms that for the purpose of determining the period of limitation prescribed for any suit appeal or application by any special or local law the provisions contained in Sections 4 to 24, which would include Section 5, shall apply in so far as and to the extent to which they are not expressly excluded by such special or local law. Section 29 sub-section (2) Cl. (b) of the Indian Limitation Act 1908 specifically excluded the applicability of Section 5, while Section 29 sub-section (2) of the Limitation Act 1963 in

clear and unambiguous terms provides for the applicability of Section 5....."

4. Sub-section (2) does not stand in the way of the legislature in making of a provision in the Special Act as to applicability of the Limitation Act, where such a provision is made in the local or special Act, Section 29 (2) would have no application. Thus where a special or local law provides for any suit, appeal or application a period different from the period therefor by the provisions, and there is also a provision in such Act prohibiting the applicability of the general law of limitation, the provisions of the Limitation Act will not apply.

5. Mr. Pramatha Nath Palit, the learned Advocate for the opposite parties on the other hand contends that Section 8 of the West Bengal Land Reforms Act clearly specifies that the commencement for the period of limitation for making an application by an adjoining owner would be the date of transfer and the other termini of the said period would be the date of expiry of four months from the date of such transfer. He relies on the Bench decision of this Court in the case of Sm. Ashalata Bairagya v. Gopal Chandra Chakraborty, reported in (1975) 1 Cal LJ 494. In this case the point for decision before Their Lordships was whether there was any scope for application of Art. 137 of the Limitation Act, 1963 to the period of limitation of four months prescribed in Section 8, commencing from the date of transfer. Their Lordships had no occasion to make any observation as to the maintainability of an application under S. 5 after the introduction of S. 29 (2) in the Limitation Act of 1963.

6. In the above premises it must therefore be held where an application under Section 8 of the West Bengal Land Reforms Act is filed after the coming into force of the Limitation Act 1963. S. 5 will be applicable to the applicant and if he can show that he had sufficient cause for not filing the application within four months, the delay may be condoned.

7. In this view of the matter, this application succeeds. The Rule is made absolute. The learned Munsif would dispose of the application under Section 5 of the Limitation Act on merits.

8. Each party to pay and bear its own costs.

Order accordingly.

AIR 1982 CALCUTTA 8

SUDHINDRA MOHAN GUHA, J.

Dr. A. K. Roy, Petitioner v. J. C. Roy Choudhury and another, Opposite Parties.

C. R. No. 2265 of 1980, D/- 26-8-1981.

Civil P. C. (5 of 1908), O. 1, R. 10 — Suit for eviction — Application by wife of real tenant in his absence, for her impleadment — She could be impleaded as party to suit for ends of justice.

Where the application under O. 1, R. 10 was filed by the wife of real tenant to be added as a defendant to the suit for ejectment in absence of her husband and her father-in-law, the ostensible tenant was the benamidar of the real tenant, the wife could be impleaded as a party to the suit for the ends of justice as the rules relating to the joinder of parties are based on the principles of avoiding multiplicity of suits and also preventing possible conflict of decisions. Case law discussed, (Para 12)

Cases Referred: Chronological Paras

AIR 1976 SC 2400	9
AIR 1969 SC 316	9
AIR 1968 Mad 142	7
(1961-62) 65 Cal WN 1175	10
AIR 1958 SC 886	8

S. P. Roy Chowdhury, Anil Kumar Rakshit and Phani Bhusan Das, for Petitioner; Asis Chandra Bagchi, (for No. 1) and M. N. Nag (for No. 2), for Opposite Parties.

ORDER:— The order dated 10-6-1980 passed by Sri D. K. Bhattacharjee, the learned Munsif, 4th Court, Sealdah allowing the application under Order 1, R. 10 C. P. C. filed by the opposite party No. 2 Smt. Kalpana Roy Choudhury to be added as a defendant to the suit for ejectment, being Title Suit No. 412 of 1979 has been challenged by the landlord-petitioner under the present revision.

2. According to the petitioner, Opposite party No. 1 was a tenant under him in respect of the premises in suit at a monthly rental of Rs. 150/- per month and he served a notice dated 25-5-1979 on the opposite party No. 1 to quit the

premises in suit on and from 1-7-1979. But he failed to vacate, hence the suit. He, however, did not appear to contest the suit, and as such the suit was fixed for ex parte hearing.

3. On 20-3-1980, the opposite party No. 2 filed the application under O. 1, Rule 10 C. P. Code for being added as a defendant, contending inter alia, that she is the wife of the eldest son of Opposite party No. 1, and the real tenant of the premises in suit was her husband, Tushar Kanti Roy Choudhury, and the Opposite party No. 1 was simply a benamdar and her husband all along paid rent.

4. A matrimonial suit being Matrimonial Suit No. 800 of 1980 is pending between the husband and the wife Opposite Party No. 2 in the Court of the District Judge, 24-Parganas. So the husband was not taking any step in the suit to safeguard the interest of the wife as well as that of two minor daughters. Overruling the objection raised by the petitioner, the learned Munsif by the impugned order allowed the application.

5. It is contended by Mr. S. P. Roy Chowdhury, the learned Advocate for the petitioner that the Opposite Party No. 2 was an absolute stranger to the suit and she had no locus standi to be added as a party to an ejectment suit, in which the landlord and the tenant are only necessary parties.

6. Mr. Asis Chandra Bagchi, the learned Advocate for the Opposite Party No. 1 supporting the petitioner also questions the propriety of the impugned order.

7. Mr. M. N. Nag, the learned Advocate for the Opposite Party No. 2 contends that the Opposite Party No. 1 is the benamdar of his son Tushar Kanti Choudhury, husband of O. P. No. 2 who pays the rent of the house on drawing House Rent Allowance from his office (Shipping Corporation of India). He refers to the copy of extract from paragraph 5 of the petition dated 3-11-1979 filed by Tushar Kanti Choudhury before the Judicial Magistrate, Barrackpore, in Case No. 155 of 1978 under Section 125 Cr. P. C. and to the copy of extract from paragraph 8 of the petition dated 17-3-1981 under Section 24 of the Hindu Marriage Act filed by Tushar Kanti; wherein the father, Opposite Party No. 1 was described as a dependent of the petitioner, thereby implying that the

father had no income of his own. It is also contended that the allegation of the Opposite party No. 2 that the Opposite Party No. 1 was the benamdar of his son has been substantiated. It is further contended that the Opposite party No. 2 being in actual occupation of the premises in suit is most interested in the litigation, as neither O. P. No. 1 nor his son is in actual occupation. According to him even a stranger to the suit, who has direct interest, legal or equitable in subject matter of dispute can be impleaded as a party. Reference is made to the decision in the case of *G. M. V. Krishnamachari v. M. D. Dhanalakshmi Ammal*, reported in AIR 1968 Mad 142.

8. Reference is also made to the decision of the Supreme Court in *Razia Begum v. Anwar Begum*, reported in AIR 1958 SC 886, in which the scope of Order 1, Rule 10 C. P. C. came up for consideration. At page 891 of the report the Supreme Court observes as follows :

"There cannot be the least doubt that it is firmly established as a result of judicial decisions that in order that a person may be added as a party to a suit he should have a direct interest in the subject-matter of the litigation whether it raises questions relating to movable or immoveable property."

9. Again, Opposite party No. 1 has been characterised as the benamdar of the real tenant, husband of the Opposite party No. 2. In the absence of the real owner, the wife can represent his interest till the marriage is dissolved by a decree of divorce. "The decision in any proceeding brought by or against the benamdar will bind the real owner though he is not joined as a party unless it is shown that the benamdar could not or did not in fact represent the interest of the real owner in that proceeding." *Ragho Prasad Gupta v. Krishna Poddar*, reported in AIR 1969 SC 316. It is also held by the Supreme Court in the case of *Niranjan Kumar v. Dhyan Singh* reported in AIR 1976 SC 2400 that oral evidence in view of proviso (4) to Section 92 of the Evidence Act is admissible to prove that the real tenant was other than the ostensible tenant.

10. There is also a Bench decision in the case of *A. C. Bhattacharya v. Arun Kumar Roy* reported in (1961-62) 65 Cal WN 1175, wherein it is held that a

tenancy may be benami, though it may not have been to the knowledge of the landlord, who accordingly not be bound to recognise the contender as the real tenant. But once benami is found it would dispel the landlord's allegation of transfer of the tenancy which might otherwise have disentitled the tenant to any protection under the Rent Control Legislation.

11. All these decisions are referred to only for the purpose of showing that in the case of alleged benami — the real tenant or one whose interest is affected may be a necessary party to the suit.

12. While disposing the application under Order 1, R. 10 C. P. C. the Court should be guided by certain principles. The narrow view is that "the questions involved in the suit" can only be questions as between the parties to the litigation, and not questions between any of the parties to the suit and a third party even though touching the subject matter of the suit. Much emphasis is laid on this view by Mr. Roy Chowdhury. It is to be seen whether the presence of O. P. No. 2 before the Court would enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. Mr. Nag has emphasised that the rules relating to the joinder of parties are based on the principles of avoiding multiplicity of suits and also preventing possible conflict of decisions. To these principles it may be added that there must be finality to litigation and all the controversy must be set at rest. Having taken into consideration all these principles the learned Munsif passed the order in favour of O. P. No. 2. In my opinion in a proper case for ends of justice the wider interpretation of the scope of Order 1, Rule 10 should be adopted.

13. Thus, in this case there is no scope for interference. The rule is, accordingly, discharged. There will be no order as to costs.

Order accordingly.

AIR 1982 CALCUTTA 9

R. N. PYNE, J.

Smt. Shila Banerjee, Petitioner v. State of West Bengal, Respondent.

Matter No. 1656 of 1980, D/- 22-7-1981

JY/KY/E704/81/PGS

Arbitration Act (10 of 1940), Section 8 (1) (b) — Power of court to appoint arbitrator — Arbitrator appointed by persona designata declining to act as arbitrator — Agreement not showing intention of parties for not filling up vacancy — Court alone can appoint new arbitrator.

Where the arbitrator appointed by the persona designata under the agreement, had declined and/or refused and/or expressed his unwillingness to act as an arbitrator and there was no evidence to show that the parties intended that the power of the appointing authority to appoint a new arbitrator would revise, it would be only the court who could appoint an arbitrator when the arbitration agreement did not show the intention of the parties that the vacancy should not be filled up. Therefore it would be necessary that the vacancy should be filled up by the court by appointing an arbitrator under Section 8 (1) (b). Case law discussed.

(Para 6)

Cases Referred: Chronological Paras

AIR 1980 SC 103:1979 All LJ 1317	6
AIR 1980 Cal 86	6
AIR 1980 Orissa 142	6
AIR 1978 Cal 271	6
AIR 1971 SC 2298	6
AIR 1970 Cal 243	6

ORDER:— By a writing and/or work order dated 9-4-1976/15-4-1976 being Tender No. 34/S/M of 1976-77, the petitioner and the respondent entered into a contract for construction of a road bridge over the 'Madaria Khal' at chain 1237.00 at an estimated cost and/or value of Rs. 2,69,115/-. By another writing and/or work order dated August 9, 1976 being reference No. 1182 and Tender No. 9 (M) of 76-77 the parties entered into another contract for the work of putting, maintaining, removing the cross bundh, construction of diversion channel and refilling the same after construction and construction of the approach road at the site of minor road bridge at chain 1237.00 on 'Madaria Khal' an estimated cost and/or value of Rs. 23,300/-. It is stated that the said two contracts consist of the following documents:—

(i) West Bengal Form No. 2911 (ii) — In the case of First Contract — and 2911 (i). in the case of Second Contract.

(ii) Schedule of rates attached to the respective contracts;

(iii) Specification attached to the respective contracts;

(iv) Additional terms and conditions; and

(v) Drawings.

The said contracts, inter alia, contain an arbitration clause as follows:—

"Except as otherwise provided in the contract all questions and disputes, relating to the meaning of the specification, design, drawing and instruction hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arisen out of or relating to the contract, design, drawing, specification, estimates, instruction, orders or those conditions or otherwise consigning the works of the execution, or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the Chief Engineer of the Department. Should the Chief Engineer be for any reason unwilling unable to act as such arbitrator, such question and dispute shall be referred to an arbitrator to be appointed by the Chief Engineer. The Award of the arbitrator shall be final, conclusive and binding on all parties to this contract."

2. According to the petitioner some payments were made in respect of the works done under the said two contracts. But she has still a claim for a sum of Rs. 5,39,845/- on account of the first contract and a sum of Rupees 1,37,500/- on account of the second contract then her total claim is Rupees 6,77,345/-.

3. The petitioner's case is that in spite of demands the respondent No. 1 failed and neglected to pay the said sum of Rs. 6,77,345/- or any portion thereof to the petitioner. Therefore according to the petitioner disputes and differences and/or questions of claims and/or right had arisen out of or relating to or within the ambit of the said arbitration clause by and between the parties herein.

4. As the petitioner's aforesaid claim was not paid by a letter No. B/J/491/78 dated December 12, 1978 the petitioner duly applied in terms of the aforesaid

arbitration clause to the Chief Engineer of the respondent No. 1 for appointment of an arbitrator to decide and settle the disputes that had arisen between the parties in terms of the said arbitration clause. In spite of such requests the respondent No. 2 failed and/or neglected to act as an arbitrator or to appoint a sole arbitrator in terms of the said arbitration clause. Ultimately by a letter and/or an order dated Dec. 21, 1979 Mr. S. P. Sen, Chief Engineer-1, West Bengal Irrigation and Waterways Directorate of the respondent No. 2 (hereinafter referred to as "the Chief Engineer") appointed, by virtue of the said arbitration clause one Mr. P. K. De, retired Chief Engineer of the Irrigation and Waterways Directorate, Government of West Bengal as the sole arbitrator to settle the aforesaid disputes. By a letter dated January 15, 1980 the appointed arbitrator Shri P. K. De agreed to act as a sole arbitrator in the aforesaid disputes, inter alia, on the terms and conditions that the fees of the arbitrator should be Rs. 200/- for each day of hearing and the same would be shared equally by the two parties. Thereafter, the petitioner received a letter dated June 6, 1980 from the said sole arbitrator wherein he had declined and/or refused and/or evinced his incapability to act as such arbitrator due to his pre-occupation. The petitioner has stated that at all material times she was and still is interested in and/or desirous of settling the aforesaid disputes through the machinery of arbitration the chosen forum of the party and indeed has made all efforts to have the said disputes settled through the machinery of arbitration and to recover her legitimate dues. According to the petitioner all such efforts have been frustrated. In the above circumstances by a letter dated June 21, 1980 the petitioner appointed one Mr. Arabindo Ghosh, Barrister-at-Law to act as the sole arbitrator to decide the aforesaid disputes and duly called upon the respondent to concur in the said appointment within a period of 15 days from the date of the receipt of the said letter. In spite of the receipt of said letter, the respondents neither had concurred in the said appointment nor had objected to the same, nor filled up the vacancy. The petitioner's case is that the Chief Engineer having appointed the said Mr. P. K. Dey in terms of the

aforesaid arbitration clauses and as the said P. K. Dey having declined and/or refused and/or became incapable of acting in terms thereof the power conferred on the said Chief Engineer in terms of the said arbitration clause had exhausted and indeed he had or has no further power and/or authority and/or jurisdiction to make any further appointment. Therefore on or about 14th August, 1980 the petitioner has made the instant application praying that Mr. Arabindo Ghose, Barrister-at-Law would be appointed as the sole arbitrator to fill up the vacancy caused by the resignation of P. K. Dey or alternatively the Court should appoint any person as an arbitrator as it would deem fit and proper.

5. An affidavit affirmed by one Bhaskar Sen, Assistant Engineer of Hooghly Irrigation Division, Irrigation and Waterways Department, Government of West Bengal on the 12th September 1980 has been filed on behalf of the respondent in opposition to the instant application. In paragraph 12 of the said affidavit it is stated that inasmuch as the appointed arbitrator Shri P. K. Dey had declined to act as such arbitrator before entering upon the reference the power of the respondents to appoint another arbitrator has not been exhausted and therefore the respondents should be given opportunity to appoint another arbitrator in the place and stead of the said P. K. Dey.

6. In the instant case the arbitration clause confers two powers and/or authorities upon the Chief Engineer, that is, (i) to act as the sole arbitrator or (ii) to act as a person designated under the agreement to appoint an arbitrator for the parties if he himself is unwilling or unable to act as arbitrator. The Chief Engineer when approached by the parties did not act as the sole arbitrator but as persona designata appointed an arbitrator to whom the disputes and differences were referred. The appointed arbitrator accepted the said appointment. But thereafter by his letter dated 6th June, 1980 declined and/or refused and/or expressed his inability to act as such arbitrator as stated hereinbefore. Therefore, the power or authority conferred upon the Chief Engineer to appoint an arbitrator having been once exercised cannot be exercised again. The arbitration agreement how-

ever does not provide for a situation when the arbitrator appointed by the persona designata under the agreement has declined and/or refused and/or expressed his unwillingness to act as an arbitrator. The arbitration clause in my view does not show any such intention of the parties. There is no evidence to show that the parties intended that, in such a case, the power of the appointing authority to appoint a new arbitrator would revive. That being the position it is only the Court who can appoint an arbitrator in the instant case if otherwise all the conditions as laid down in Section 8 (1) (b) of the Arbitration Act are satisfied. In the instant case the arbitration agreement does not show the intention of the parties that the vacancy should not be filled up. Therefore, in this case it is necessary that the vacancy should be filled up by the Court by appointing an arbitrator under the said section. In this connection reference may be made to the cases of Union of India v. Raghunath Singh and Co., AIR 1980 SC 103; Prabhat General Agencies v. Union of India, AIR 1971 SC 2298; East India Construction Private Limited v. Union of India AIR 1970 Cal 243; V. G. Ghawda Pvt. Ltd v. Union of India, AIR 1978 Cal 271; Excalcer v. State of West Bengal, AIR 1980 Cal 86 and Niranjan Swain v. State of Orissa, AIR 1980 Orissa 142.

7. On the question of the personnel of the arbitrator it has been submitted on behalf of the respondents that as, in the instant case, the disputes involve consideration of technical matters a Departmental Engineer of the respondent No. 1 should be appointed as arbitrator. On the contrary, it has been submitted on behalf of the petitioner that in view of the facts and circumstances of this case a person not connected with the parties should be appointed as arbitrator. Further, in respect of technical matters evidence can be given before the arbitrator.

8. Considering the facts and circumstances of this case, in my view, in the instant case a person not connected with the parties should be appointed as arbitrator. I, therefore, appoint Mr. A. M. Pal, Barrister-at-Law as the sole arbitrator and all disputes and difference between the parties under the two contracts mentioned in the petition are referred to him. The arbitrator

will be entitled to a remuneration of 30 G. Ms. for each effective sitting of not less than two hours and such remuneration will be paid by the parties in equal shares. The arbitrator will make his award within six months from the date of his entering upon the reference. The respondents will pay the cost of this application to the petitioner.

9. All parties and the arbitrator are to act on a signed copy of the minutes of this order upon usual undertaking.

Order accordingly.

AIR 1982 CALCUTTA 12

Mrs. PRATIBHA BONNERJEA, J.

Sri Sri Iswar Gopal Jew and others,
Plaintiffs v. Bhagwandas Shaw, Defendant.

Suits Nos. 1788 of 1967 and 2746 of 1968, D/- 14-7-1981.

(A) Civil P. C. (5 of 1908), Section 151; Order 23, R. 3 and Rule 3-A (as amended by Act 104 of 1976) and Order 47, Rule 1 — Consent decree on basis of oral agreement — Not valid — Suit for setting aside consent decree would be barred under Order 23, Rule 3-A — Application under Sec. 151 review would be proper remedy.

Where the court had passed a consent decree on the basis of an oral agreement between the parties, the decree, would be deemed to be unlawful, as the court has no jurisdiction to pass a consent decree on basis of an oral agreement under Order 23, Rule 3. Therefore a suit for setting aside such decree would be barred by the provisions of Order 23, Rule 3-A. Only an application under Section 151 or a review would be the proper procedure.

(Paras 4, 7)

(B) Civil P. C. (5 of 1908), Sec. 151 — Application under Section 151 by managing shebait having power to manage estate of deity — Managing shebait is also party to suit — Application is maintainable. (Hindu Law — Religious endowments). (Para 5)

(C) Civil P. C. (5 of 1908), Sec. 151 — Application under — It is governed by residuary Article 113 of Limitation Act as there is no express provision for the same. (Limitation Act (1963), Art. 113). (Para 6)

Cases Referred: Chronological Paras

AIR 1929 Cal 470	3
(1909) 13 Cal WN 1197	3

HY/HY/D688/81/PGS

N. C. Roy Chowdhury with Prabir Roy Chowdhury, for Plaintiffs; P. K. Roy with P. P. Mitter, for Defendant.

ORDER :— The above suit was instituted by the plaintiff for eviction of the defendant from the suit property as a trespasser and a decree for Rupees 1,09,600/- by way of mesne profit etc. The plaintiff alleged that pursuant to an agreement for lease by and between the parties, the plaintiff agreed to let out the suit property to the defendant for 86 years on terms and conditions contained in the draft approved lease and the defendant deposited Rupees 1,00,000/- with the plaintiff by way of salami to be forfeited on failure of the defendant to execute the lease. The possession of the suit property was delivered to the defendant pursuant to the said agreement. The defendant failed and neglected to execute the lease. Therefore the said deposit was forfeited by the plaintiff in terms of the agreement and the suit was instituted for recovery of possession. In the written statement the defendant alleged that he was in possession of the suit property as a thika tenant prior to the agreement for lease. It was denied that there was any failure or negligence on the part of the defendant to execute the lease. A cross suit was filed by the defendant against the plaintiff, being Suit No. 2740 of 1968 for specific performance of the said lease. This suit was also ready for hearing. The evidence in the above suit was closed and the matter was adjourned for argument. After several adjournments, the above matter was taken up on 2-2-1981 when I enquired of the counsel for both the parties whether any settlement was possible. Thereafter discussions were held between Mr. R. C. Deb of M/s. G. C. Chunder and Co., the Advocate on record of the plaintiff and Mr. P. K. Roy, senior counsel for the defendant, in open Court. The junior counsel of the plaintiff Mr. Prabir Roy Chowdhury also was present. Certain terms were agreed between the parties and on that basis I dictated the said agreed terms and a consent decree was passed by consolidating the two suits.

2. The present petition has been taken out on behalf of the plaintiff in the above suit for setting aside or amending the said consent decree and

this petition is supported by the supporting affidavit of Mr. R. C. Deb affirmed on 6-3-1981. The case made out in the petition was that Mr. R. C. Deb was under a mistaken apprehension that the dictated terms would be the basis of further negotiation between his client and the defendant. Mr. Deb never consented to a decree being passed. Another point taken by the petitioner in his affidavit-in-reply was that the consent decree was not in writing nor the same was signed by the parties. Therefore it was not binding. In the affidavit-in-opposition, the defendant categorically denied the petitioner's allegations and alleged that a consent decree was passed by agreement between the parties of which Mr. R. C. Deb had full knowledge and in proof thereof, several documents were annexed to the affidavit-in-opposition.

3. According to Mr. P. K. Roy, the counsel for the defendant, a suit is the proper proceeding for setting aside a consent decree and a review under Order 47, Civil P. C. or an application under Section 151 of Civil P. C. would not lie. In support of his contention he relied on (1909) 13 Cal WN 1197 (Mussammat Gulab Koer v. Badshah Bahadur) and AIR 1929 Cal 470. (J. C. Galstaun v. Pramatha Nath Roy). Mr. N. C. Roy Chowdhury, counsel for the petitioner submitted, that law had since been changed due to the amendment of the Civil P. C. in 1976. Under O. 23 R. 3A, of C. P. C. no suit will lie to set aside a consent decree if the same is unlawful. To appreciate his argument it is necessary to look into the amended provisions of O. 23, Rr. 3 and 3A:—

"Rule 3. Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise (in writing and signed by parties), or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith (so far as it relates to the parties to the suit whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit);

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been

arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.

Explanation: An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.

Rule 3A. No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful."

4. According to the petitioner's counsel, the present consent decree was not in writing or signed by the parties as required under Order 23 Rule 3 of the C. P. C. Hence it was against the express provisions of law and was unlawful. The consent decree was passed due to the mistake or misapprehension of the Advocate-on-record of the petitioner. This allegation will bring the case within the scope of the explanation to Rule 3 and would be deemed to be unlawful. If so, a suit for setting aside a consent decree would be barred under the provision of Rule 3-A. I accept this submission on behalf of the petitioner that on the basis of the facts alleged in the petition no suit could be filed for the relief claimed in the petition. An application under Section 151 of the Civil P. C. or a review is the proper procedure.

5. The next point urged by the counsel for the defendant is that this application was not by the deity and should be dismissed on that ground alone. The present application was taken out by the managing shebait, who has the power to manage the state of the deity. He is also a party to the suit. Hence this irregularity if any, is not material and I hold that the application is maintainable.

6. The third point taken on behalf of the defendant is that the application is barred by the law of limitation. According to the counsel for the petitioner, the application is governed by the residuary article of the Limitation Act as there was no express provision for the same. I accept this submission on behalf of the petitioner.

7. The provisions of Order 23, Rule 3 of the Civil P. C. should be considered carefully. It appears that the Court's

jurisdiction to pass the consent decree under Order 23 Rule 3 of the Civil P. C. would depend on the satisfactory proof of the agreement between the parties to the suit and such agreement must be in writing and signed by the parties. This express provision has been incorporated by amendment in 1976 with the object to exclude the oral agreements. What had happened on 2-2-1981 was that an oral agreement was entered into between the counsel for both the parties, in Court, and on the basis of that oral agreement the Court dictated the consent decree. On careful consideration of the provisions of Order 23, Rule 3 it appears, that Court has no jurisdiction to pass a consent decree on the basis of an oral agreement between the parties. In this view of the matter, the consent decree dated 2-2-1981 was bad being unlawful and should be set aside. In the premises aforesaid the question of going into the merit of the case does not arise. The consent decree dated 2-2-1981 is therefore, set aside. There will be no order as to cost.

Order accordingly.

AIR 1982 CALCUTTA 14

ANIL K. SEN AND

B. C. CHAKRABARTI, JJ.

Smt. Nilima Ghosh and another, Petitioners v. Prakriti Bhusan Mitter, Respondent.

C. O. No. 1305 of 1981, D/- 19-6-1981.

Trusts Act (1882), Section 34 — Trust property — Trustee entering into an agreement to sell — No express provision in trust deed authorising trustee to sell such property — Dispute as to whether trustee could sell property referred to court under Section 90, Civil P. C. — Court would be justified in refusing to answer as matter should have been referred to court specified in Section 34 of Trusts Act, (Civil P. C. (5 of 1908), Section 90).

Where the settlor of the trust property who was the sole trustee entered into an agreement for sale of such property and as the trust contained no express provision authorising her settlor, to sell the property on any contingency, she, along with the vendee initiated proceedings under Section 90 of Civil P. C. to refer the dispute to the Court

HY/TY/D633/81/SMA/SNV

as to whether she could lawfully sell the property, the Court could be said to be justified in refusing to answer the question so raised when it was not the court specified in Sec. 34 of the Trusts Act. The question referred to the Judge for his opinion being a question relating to the management and administration of the trust property to be answered on interpretation of the trust deed, could be answered only by the principal civil court of the original jurisdiction of the district in view of the provisions of the Trusts Act and as such the court in question was not the proper forum for obtaining the necessary opinion. AIR 1930 Bom 232, *Rei. on.* (Para 5)

Under the provisions of Section 34 of the Trusts Act a question relating to the management and administration of trust property should be referred to the principal civil court of original jurisdiction for its opinion. Section 34 of the Act may have conferred wider powers on the court specified therein to authorise sale of a trust property by the trustee even if the trustee is not expressly authorised to do so by the deed where such a sale becomes a necessity for preservation or development of the estate, but that makes it all the more incumbent for the parties to approach that court because that Court is not only competent to give the opinion now sought for but also is only competent court to help the parties in solving their real problem viz. to effect sale of the Trust property.

(Para 5)

Cases Referred: Chronological Paras
AIR 1930 Bom 232 5

B. P. Banerjee and S. Bidesaria, for Petitioners; L. K. Gupta and Sukhendu Banerjee, for Respondent.

ANIL K. SEN, J.:— This is a revisional application arising out of a proceeding under Section 90 of the Code of Civil Procedure which was registered as Title Suit No. 146 of 1980 of the Second Court of the learned Subordinate Judge, Alipore and is directed against the order dated February 17, 1981 passed by the learned Subordinate Judge disposing of the said proceeding.

2. Smt. Nilima Ghosh and her daughter-in-law Smt. Ira Ghosh are the petitioners before us in this revisional application. By a deed of trust dated Aug. 31, 1967 Smt. Nilima Ghosh settled pre-

mises No. 6, Panditiya Terrace, Calcutta in trust making herself the sole trustee. Under the said trust the settlor retained unto herself a life interest in the said property with a further provision that on her death the property would vest absolutely in her daughter-in-law, Ira Ghosh or her heirs and legal representatives as the case may be. The trust contained no express provision authorising the trustee to sell the property on any contingency.

3. According to the settlor Smt. Nilima Ghosh, it being inconvenient for her to reside any further in the said premises and it being uneconomic to hold the property any further by letting it out to tenants, she entered into an agreement for sale of the property with the opposite party, Sri Prakriti Bhusan Mitter on December 14, 1979. In order to effect the sale both the beneficiaries, namely the settlor herself and her daughter-in-law by an instrument dated August 19, 1980 agreed to the proposed sale of the property. Since, however, the opposite party raised a dispute as to whether in the absence of any express authority the trustee can effect sale of the property, the two petitioners and the opposite party by an agreement dated Aug. 21, 1980 agreed to refer the dispute to the court for its opinion on the point as to whether in the facts and circumstances the trustee can lawfully sell the property to the opposite party. Thus, the parties initiated the aforesaid proceeding under Section 90 of the Code as a special case which was heard and disposed of as a suit in terms of the rules of Order 36 of the Code. By the order impugned the learned Judge however refused to give his opinion on the disputed question so raised or answer the same though referred to him as a special case under Section 90. According to the learned Judge, the question referred to him for his opinion being a question relating to the management and administration of the trust property to be answered on interpretation of the trust deed, could be answered only by the principal civil court of the original jurisdiction of the district in view of the provisions of the Indian Trusts Act and as such his court is not the proper forum for obtaining the necessary opinion. In challenging the said order of the learned Subordinate Judge in this revisional application the petitioners have challenged the correct-

ness of the view so taken by the learned Subordinate Judge.

4. Mr. Banerjee appearing in support of the revisional application has contended that the parties to the proceeding having entered into a bona fide agreement has referred certain questions to the court for its opinion in terms of Section 90 of the Code of Civil Procedure and a special case having been initiated on such an agreement it was incumbent for the court to give its opinion and that the learned Subordinate Judge went wrong in thinking that his court is not the proper forum. According to Mr. Banerjee, once the terms of Section 90 of the Code of Civil Procedure are complied with, the parties making out a special case are entitled to have the opinion of the court on the questions referred to court according to such terms. The learned Subordinate Judge being the court of competent jurisdiction for the purpose of entertaining the special case under Order 36, could not have held that this court is not the proper forum. The opposite party has entered appearance and the learned Advocate appearing for him also supports the contention of Mr. Banerjee. It has been contended on his behalf that the scope of a proceeding under Section 90 and that under Section 34 of the Indian Trusts Act not being the same it could not have been held that Section 34 constitutes a bar to the adjudication prayed for in the special case.

5. Though none of the parties is supporting the order impugned before us, on a careful consideration of the legal position we are, however, of the opinion that the learned Subordinate Judge is well justified in refusing to answer the question referred to him as a special case under Section 90 of the Code. In our view, the point of relevance is not as to whether such a question could have been competently referred to the learned Subordinate Judge for his opinion or not but whether the learned Subordinate Judge should give his opinion even if the question was competently referred to him. We agree with the learned Subordinate Judge that he should not give his opinion in a case like the present one. It is only in that context that he rightly held that his court is not the proper forum for obtaining the opinion sought for in this special case. Under O. 36, R. 5 of the Code

even if there had been a lawful agreement between the parties having bona fide interest in the question agreed to be referred to the court, the court is not bound to give its opinion unless it is further satisfied that "the same is fit to be decided". In adjudging whether it would be fit for the court to decide the case or not different considerations may come up before the court which are required to be taken note of in adjudging that point. One of such considerations is as to whether in deciding the case the court would be intruding upon a field reserved for some other forum and once it is found that it would be so, then it is certainly open to the court to refuse to decide the case or give its opinion irrespective of the question whether it had the jurisdiction to do so or not. On the facts of the present case we agree with the learned Subordinate Judge that the question referred to him for opinion is one relating to the management and administration of the trust property. Under the provisions of Section 34 of the Indian Trusts Act such a question relating to the management and administration of trust property should be referred to the principal civil court of original jurisdiction for its opinion. Section 34 may have conferred wider powers on the court to authorise sale of a trust property by the trustee even if the trustee is not expressly authorised to do so by the deed where such a sale becomes a necessity for preservation or development of the Estate, but that makes it all the more incumbent for the parties to approach that court because that court is not only competent to give the opinion now sought for but also is only competent court to help the parties in solving their real problem viz., to effect sale of the trust property. Therefore, Section 34 not only covers the field but, in our opinion, provides the better forum for the relief the parties are really intending to have. That court is admittedly a court superior to the court of the learned Subordinate Judge. In view of the fact that the Indian Trusts Act has provided for a special forum for obtaining the opinion on such a question, the learned Judge was right in refusing to give his opinion on such a question and thus intrude upon a field reserved for the other forum. This view is well supported by a Bench decision in the case

of Trustees of the Port of Bombay v. Municipal Corporation of Bombay, AIR 1930 Bom 232.

6. Such being the position, we must uphold the order and dismiss the present revisional application and we direct accordingly.

7. There will be no order as to costs.

B. C. CHAKRABARTI, J.:— I agree.
Revision dismissed.

AIR 1982 CALCUTTA 17

B. N. MAITRA, J.

Sukumar Banerjee, Petitioner v. Dilip Kumar Sarkar and others, Opposite Parties.

C. O. No. 1300 of 1981, D/- 16-6-1981.

(A) Civil P. C. (5 of 1908), O. 23, R. 1 (2) — Plaintiff permitted to withdraw suit — No order regarding liberty to file fresh suit — Effect.

Where the plaintiff files an application to withdraw from the suit with liberty to sue afresh and the Court passes an order giving permission to withdraw the suit but nothing is said in the order regarding plaintiff's liberty to institute a fresh suit on the same cause of action, the order has to be read along with the plaintiff's application on which the order is passed. As the plaintiff's prayer is not refused the order has the effect of granting permission to the plaintiff with liberty to sue afresh on the same cause of action. The effect of withdrawal from the suit is that the parties are left to the position which they occupied before the suit was filed. AIR 1974 SC 1126, Disting. (1908) ILR 35 Cal 990 and (1894) ILR 17 All 53, Rel. on. (Para 5)

(B) Civil P. C. (5 of 1908), Order 23, Rule 1 (4) — Previous suit for ejectment by five brothers — Subsequent application by defendant under Section 17 (2) of W. B. Premises Tenancy Act (12 of 1956) — Bar enjoined by O. 23, R. 1 (4) not to bring another suit on the same cause of action has no application as the claim and subject matter are different. (Para 8)

(C) Civil P. C. (5 of 1908), Sec. 11, O. 23, R. 1 — Grant of permission to

withdraw a suit with liberty to sue afresh — Findings arrived therein would not operate as res judicata in a subsequent suit. (Para 9)

Cases Referred: Chronological Paras

AIR 1974 SC 1126	4, 7
(1957) 99 Cal LJ 72	3
AIR 1945 Cal 317	6
(1938) 42 Cal WN 492	7
(1908) ILR 35 Cal 990: 12 Cal WN 893	5
(1894) ILR 17 All 53	6

R. P. Banerjee and Amitava Goswami, for Petitioner; Sakti Nath Mukherjee and Prabir Kr. Samanta, for Opposite Parties.

ORDER:— The tenant-defendant filed an application under Section 17 (2) of the West Bengal Premises Tenancy Act, 1956. The objection was filed by the plaintiff-landlords. The defendants' plea was that there was no relationship of landlord and tenant between the parties regarding the premises in question. In the earlier Title Suit No. 534 of 1974 instituted in the Court of the third Munsif at Alipore, it was already decided that defendant No. 1 was a tenant regarding that property under plaintiff No. 2. That order remains unchallenged and operates as res judicata. He is not a defaulter. The plaintiff's objection was that the previous title suit was withdrawn with liberty to sue afresh and so there was no question of res judicata.

2. The learned Munsif accepted the plaintiff's contention and stated that the previous decision did not operate as res judicata. He, however, found that the defendant was a defaulter from October, 1973. Hence necessary order was passed in this respect. A direction was given to defendant No. 1 to liquidate the arrears in lump by 30th April, 1981, and also to pay the current rent within the 15th day of each month. Hence this revisional application by the defendant-petitioner No. 1.

3. The learned Advocate appearing on behalf of the petitioner has referred to a decision of Renu Pada Mukherjee, J. in the case of Bishnu Charan v. Basudeb Banerjee in (1957) 99 Cal LJ 72 to show that where in a suit for ejectment brought under the provisions of West Bengal Rent Control Act, 1950, the tenant pleads that he is not the plaintiff's tenant, the decision of the

court on such a question for the purpose of deciding an application under Section 14 (4) of the Act, must be taken to be final and conclusive at all subsequent stages of the suit. Subsequently, the plaintiff prayed for withdrawal of the aforesaid suit with liberty to sue afresh on the same cause of action. That permission was refused and only the plaintiff was permitted to withdraw the suit. Hence the previous finding operates as *res judicata*.

4. The learned Advocate appearing on behalf of the opposite party has stated that the previous suit was filed for ejectment by five brothers. There was an additional observation regarding the contractual relationship between the plaintiff No. 4 and defendant. That observation was unnecessary. The case of *Ganga Bai v. Vijay Kumar* in AIR 1974 SC 1126 at page 1131 has been cited to show that when the matter relating to the alleged partition was met (sic-Not?) directly and substantially in issue in the suit, the finding that the partition was a sham one, cannot operate as *res judicata*. It has been contended that though the plaintiff of that suit made an application for withdrawal with liberty to sue afresh, only permission was given to withdraw the suit. Nevertheless, that permission for withdrawal granted by the court has the effect of giving the plaintiff of that suit permission to sue afresh on the subject-matter of the suit. Moreover, when that suit was withdrawn, the effect in law is that there was no such suit. Consequently the question of *res judicata* is out of the way. Further elaborate submissions have been made on other points, which are unnecessary for the purpose of disposal of this simple revisional application.

5. It appears that Title Suit No. 284 of 1977 was permitted to be withdrawn by the learned Munsif. The plaintiff made a prayer for liberty to bring a fresh suit. No order was given thereon, but that prayer was not refused. In the Bench case of *Gulam Mahomed v. Shibendra* reported in (1908) ILR 35 Cal 990 at p. 995, it has been stated that when the plaintiff files an application to withdraw from the suit with liberty to sue afresh, on which an order was passed on the same date giving permission to withdraw the suit and although nothing was said in that order as to the plaintiff's liberty to institute a fresh

suit on the same cause of action, that order ought to be read along with the application, on which it was passed. It has already been indicated that that prayer was not refused. Hence it is held that that order has the effect of granting permission to the plaintiff with liberty to sue afresh on the same cause of action.

6. The effect of the withdrawal from the suit is that the parties are left to the position which they occupied before the suit was filed. This view was taken in the case of *Behari Lal v. Baran* in (1894) ILR 17 All 53. In the Bench case of *Sashi Bhusan v. Moti* in AIR 1945 Cal 317 at p. 318 Sri Bijan Kumar Mookerjee presiding over the Bench has followed the aforesaid case of *Behari Lal v. Baran* (supra) and stated that when the Court grants leave to file a fresh suit or proceedings on the same cause of action, the withdrawn suit has no existence in the eye of law. It is available for no purpose and the parties are relegated to the position which they occupied before the suit was brought.

7. The case of *Ganga Bai v. Vijay Kumar*, (AIR 1976 SC 1126) (supra) cited for the O. P. is on a different point. In the case reported in (1938) 42 Cal WN 492 it has been stated that a party has a right to file an appeal against an adverse finding, which is sought to be appealed against, on the ground that such finding is one to which the rule of *res judicata* applies. The question whether that view of the Calcutta High Court is correct was left undecided by the Supreme Court.

8. Nevertheless, the bar enjoined by sub-rule (4) of Rule 1 of Order 23 of the Civil P. C. not to bring another suit on the same cause of action, has no application because the claim and the subject matter are different. Moreover, that question is not at all germane in his revisional application.

9. Since the plaintiff of that suit was permitted to withdraw from it with liberty to sue afresh, in the eye of law there was no existence of any such suit. Consequently, the findings arrived at in the earlier suit have no effect on the present suit. It is, therefore, held that there is no question of *res judicata*.

10. The question of default has not been challenged. Hence the contention

put forward on behalf of the petitioner cannot be sustained.

11. The application is, therefore, dismissed.

12. There will be no order as to costs.
Application dismissed.

AIR 1982 CALCUTTA 19

B. C. RAY, J.

Barun K. Sinha and another, Petitioners v. District Magistrate, Murshidabad and others, Respondents.

Decided on 31-8-81.

(A) Constitution of India, Arts. 14, 226 and 298 — Public contracts — Writ petition challenging acceptance of tender of contractor at rate higher than offered by petitioner — Petition is maintainable.

The tenderer who has a genuine grievance against the order of the tender committee accepting the tender of another contractor at rate higher than that offered by him in his tender is an aggrieved person competent to maintain the writ petition. (Para 13)

The meaning of the word "locus standi" for the purpose of maintaining a writ application has been widened very much. In exceptional cases a person who has been prejudicially affected by an act or an omission by an authority can file a writ petition even though he has no proprietary or fiduciary interest in the subject-matter thereof.

(Para 11)

Moreover in view of Art. 298 of the Constn. the State can carry on the executive function of making of contracts subject to Part III of the Constn. and as such Art. 14 of the Constn. is applicable to the exercise of such powers. So in the matter of public contracts equal opportunities are to be given to the citizens who apply and they cannot be discriminated against in the matter of giving their offer for such contracts and of having the same considered.

(Para 13)

Held that the petitioner, who had submitted tender in compliance with the tender notice within the time specified for supply of dietary articles to the State owned hospitals, was entitled to have his tender considered as it was a case of distribution of public contracts. Though the petitioner had got no legal

right to claim that the tender submitted by him must be accepted by the Tender Committee still he had a right to have his tender fairly and properly considered by the public authority before the same was rejected. The arbitrary rejection of his tender without considering the same at all and the acceptance of the tender of another Contractor who quoted rates much higher than the rates quoted by the petitioner undoubtedly affected the petitioner and the petitioner was an aggrieved person. Therefore the writ application at the instance of the petitioner was maintainable. AIR 1966 SC 828; AIR 1976 SC 578 and (1978) 2 Cal LJ 166 Foll; AIR 1972 SC 1816 and AIR 1952 Orissa 344, Disting. (Para 12)

(B) Constitution of India, Arts 14 and 298 — Public contracts — Authority cannot pick and choose tender — Selection of higher tender without assigning reason is violative of Art. 14.

The Public Authority cannot exercise its discretion arbitrarily in the matter of giving contracts to a party at its own sweet will and pleasure. It has to exercise its discretion in the matter of selecting right person for the giving of largess or contract or for selecting persons for giving contract fairly and on a just consideration of all the tenders submitted on a reasonable basis, and, in the case of selecting a tender of a person offering higher rate in preference to another offering a lower rate it has to record valid, relevant and cogent reasons therefor. A selection of higher tender in preference to a lower tender without assigning any reason will be violative of the provisions of Art. 14 of the Constn. (Para 16)

It is a well settled rule of administrative law that executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. AIR 1979 SC 1628 Foll. (Para 16)

Cases Referred: Chronological Paras

1981 Lab IC NOC 179 (Cal)	11
AIR 1980 SC 1992: (1980) 4 SCC 1	17
AIR 1979 SC 1628: (1979) 2 Lab LJ	16
217	16
(1978) 2 Cal LJ 166	13, 16
AIR 1977 SC 1496: 1977 SCJ 481	13, 16
AIR 1976 SC 578: (1976) 1 SCA 671	11
AIR 1975 SC 266: (1975) 1 SCC	13, 16

AIR 1974 SC 651: (1974) 3 SCR 64: 16
 (1974) 2 SCC 169 16
 AIR 1973 SC 205: (1972) 1 SCA 555 16
 AIR 1972 SC 1816: 1972 Tax LR 2298: 12
 1972 SCD 401 12
 AIR 1971 SC 40: 1971 Lab IC 8: (1971) 1 SCJ 655 16
 AIR 1967 SC 295: (1966) 1 SCA 747 16
 AIR 1966 SC 828: (1966) 1 SCA 835 11
 AIR 1959 SC 490: (1959) Suppl 1 SCR 787: (1960) 1 SCA 33 16
 AIR 1952 Orissa 344: ILR (1952) Cut 410 12

R. C. Deb, K. K. Maitra and A. K. Mukherjee, for Petitioners; A. K. Dutta and S. Banerjee, (for No. 6) S. Gupta Addl. Advocate General and S. Mustafi, for the State.

ORDER:— The subject-matter of challenge in this writ application is the acceptance of the tender submitted by respondent no. 6, Narayan Roy for supply of dietary articles in the hospitals of the Murshidabad District arbitrarily and in violation of the principles of natural justice. The facts of this case as well as the case of Tapan Kumar Ghosh are almost identical and as such the statement of the facts of Barun Kumar Sinha's case will suffice for the purpose of decisions of these two rules.

2. The petitioner Barun Kumar Sinha who has been supplying dietary articles in the State-owned hospitals in Murshidabad since 1974 submitted a tender in pursuance of tender notice issued by the Chief Medical Officer of Health, Murshidabad, respondent No. 2, for the year 1981-82 inviting tenders from bona fide contractors for supply of dietary articles. It has been stated in the said notice that the intending tenderers shall quote overall percentage of rate for each category of contract in each zone falling in Part-I either 'Above' or 'At par' or 'Below' the schedule of rates prepared for the purpose. It has been further stated in the said notice that in respect of the State-owned hospitals and health centres falling under zone in Part-II the intending tenderers may quote overall percentage of one rate for three categories of contracts either 'Above' or 'Below' the schedule of rates as one contract for each zone for three categories as shown in Part-II. A copy of the schedule of rates and the tender form, it has been stated in the tender notice, is obtainable from the

office of the respondent No. 2 on payment of Rs. 5/- in Treasury Challan to be deposited on week days and the last date for submission of tenders was fixed on 30-4-1981 up to 12 noon. It is also stated therein that the tenders would be opened on 30-4-1981 at 3 p.m. The selection of tenders and acceptance of rates would be communicated to the parties concerned by the respondent No. 2 for and on behalf of the Government of West Bengal. It has also been provided in the tender notice that the Governor of West Bengal reserves the right to reject any tender without assigning any reason thereof and acceptance of lowest rates will not be obligatory to the contracting officer. This tender notice has been annexed as annexure 'B' to the petition. A schedule of rates of dietary articles for the year 1981-82 categorywise has been annexed as annexure 'A' to the petition. The tender submitted by the petitioner has been annexed as annexure 'C' to the petition and the rates quoted therein for all three categories of articles are much lower than the rates submitted by the respondent No. 6 and the rates offered by the petitioner are the lowest rates. On Apr. 30, 1981, at 3 p.m. all the tenders were opened in the office of the respondent No. 2. On 9th of May, 1981, the petitioner came to know from the office of the respondent No. 2 that respondent No. 6 was selected for supply of dietary articles for the year 1981-82 in the hospitals within the district of Murshidabad. It has been stated that the respondent No. 6 was not a bona fide contractor as he has no experience as a diet contractor and the respondent No. 6 is a close associate of the respondent No. 2, the Chief Medical Officer of Health, Murshidabad and as such this unusual award of contract in favour of respondent No. 6 has been made. It has also been submitted that no reason has been assigned in not accepting the tender wherein the lowest rate was quoted for supply of these dietary articles by the petitioner, nor any opportunity of hearing was given to the petitioner before rejecting his tender. It has been submitted that the order of appointment made by the Dietary Committee consisting of respondents Nos. 1 to 5 is arbitrary and discriminatory and no reasons have been assigned for appointing respondent No. 6 as successful contractor. It has also been submitted

that this appointment is in contravention of the fundamental right of the petitioner guaranteed under Art. 14 of the Constn. of India. This writ application along with other applications was also moved before this court and the instant rules were obtained. There was also interim order of maintaining status quo as on that day regarding supply of dietary articles to the hospitals for three weeks with liberty to pray for extension of the period on the same application upon notice to the respondents.

3. On 17th June, 1981, after hearing the learned advocates for all the parties the interim order was extended till the disposal of the rules. The petitioners Barun Kumar Sinha and Tapan Kumar Ghosh it was stated therein, would continue to supply dietary articles on and from 18-6-1981. Thereafter on 6th of July, 1981, the matter was mentioned by the learned advocate for the petitioner who made an application for clarification of the above order and after hearing the parties the order passed on 17-6-1981 was modified to the extent that Tapan Kumar Ghosh who did not supply dietary articles from the date of issuance of this Rule cannot be permitted to continue to supply dietary articles on and from 18-6-1981 on the basis of the interim order of maintaining status quo.

4. An affidavit-in-opposition sworn by Dr. M. K. Chattaraj, Assistant Chief Medical Officer and the Secretary, Diet Committee, Murshidabad was filed. In para. 3 of the said affidavit-in-opposition it has been stated that the tenders were opened by the District Diet Committee consisting of the respondents Nos. 1 to 5. It has also been stated therein that these members took a resolution for selection of tender for the year 1981-82 on 30-4-1981 to the following effect :—

(a) That the articles of tender would be up to the standard quality at such low rates would not be maintained.

(b) The rates quoted by the tenderers at the rate of 25% below the scheduled rates would be accepted.

5. A copy of the resolution has been annexed as annexure 'A' to the affidavit-in-opposition.

6. It has been stated that on the basis of this norm laid down by the meeting

of the District Diet Committee, the respondent No. 6 whose rate is 25% below the schedule rates has been decided to be appointed by the District Diet Committee. It has also been stated in the said affidavit-in-opposition that by a resolution of the District Diet Committee the petitioner who has been supplying the Diet articles and whose term of contract which was due to expire on 30th of March, 1981 was allowed to continue supplying dietary articles up to 15th of May, 1981. This was communicated to the other contractors including the petitioner who had been given contract the previous year to continue supply of dietary articles under such contracts up to 15th of May, 1981. It has been stated that his rate was accepted by the Committee and on that ground he was asked to supply the articles with effect from 1st May, 1981 as wrongly stated in the petition. It has also been stated that with a view to obtain a Rule and interim order wrongfully the petitioners deliberately made false statements by suppressing receipt of the order, set out in annexure 'D' to the affidavit-in-opposition and as such for this suppression and misrepresentation of facts and misleading this Hon'ble Court the writ application should be rejected in limine and the interim order should be vacated. It has been stated that respondent No. 6 is not a close associate of the respondent No. 2 nor any unusual favour was shown to respondent No. 6 as the respondent No. 6's tender is the lowest in accordance with the resolution of the Diet Committee and so it was accepted.

7. An affidavit-in-reply has been filed on behalf of the petitioner reiterating the statements and allegations made in the petition. It has also been stated in the affidavit-in-reply in para 4 that the petitioner did not know when and how such resolution was adopted for considering the case of successful Dietary Contractor for 1981-82. It has also been stated that in the tender notice no such restriction or condition was imposed in respect of rates of the articles and as such the resolution adopted on 30-4-1981 is a clear departure from the terms of the open tender notice for 1981-82. It has also been stated that the petitioner was not aware of the arrangement of the extension of the period of contract up to 15-5-1981

and he was not aware also of any such resolution as alleged to have been made.

8. Mr. Kashikanta Moitra, learned Advocate appearing on behalf of the petitioner made a four-fold submission before this Court. His first submission is that in the tender notice no guideline was set up as to the eligibility for acceptance of tender to be submitted by intending candidates by the District Diet Committee and as such it was not open to the members of the District Diet Committee to lay down a norm or a guideline at its meeting for the selection of tenders submitted by different contractors. It has also been submitted that public authorities are bound by the terms and conditions as set out in the tender notice and they cannot lay down a different guideline for selection of tenders after tenders are submitted on the basis of such tender notice. It has also been secondly submitted that as a rule lowest tender is to be accepted unless exceptional circumstances justifying the decision of the authorities concerned in accepting tenders offering higher rates exist. The existence of such exceptional circumstances are necessary and or imperative to justify the decision of the tender committee to accept a tender quoting higher rate rejecting the tender quoting lowest rates. Mr. Moitra has referred in this connection to West Bengal Health Manual Vol. I (Administration) published in 1970 at page 56-57 in support of his above submission. It has been further submitted by Mr. Moitra that the tender notice expressly provides that the intending tenderers may quote rates 'Below' 'At par' or 'Above' the schedule rates. Therefore, this tender notice does not indicate that rates offered below certain percentage of the Schedule rate will not be entertained. The resolution by the District Diet Committee adopted on the date of opening the tender, that is, 30-4-1981 is arbitrary and contrary to the terms and conditions of the tender notice. As such selection of tenders solely on its basis is illegal, unwarranted and arbitrary. It has been further submitted that after sealed tenders are opened by the District Diet Committee, formation of such a norm by resolution of the committee for selection of tenders at higher rates in preference to tender quoting lowest rates will be per se discriminatory and ultra vires of Art. 14 of the Constn.

It has also been lastly submitted that non-acceptance of the tender without recording any specific reasons or assigning reasons therefor is a case of non-application of mind and it is arbitrary and mala fide.

9. Mr. Gupta, learned Additional Advocate General appearing on behalf of the respondent No. 7, State of West Bengal has urged in the first place that the tender-in-question is not an ordinary kind of tender but it is a special kind of tender invited for supply of dietary articles for patients in the hospitals and health centres in the District of Murshidabad and as such it is essential that the dietary articles supplied must conform to the standard, otherwise it will tell upon the health of the patients of the hospitals and with this end in view the District Diet Committee which consisted of high and responsible officers like the District Magistrate, The Chief Medical Officer of Health etc. considered this aspect of the matter and in order to ensure the supply of food articles of the standard quality they came to the opinion that standard quality articles could not be supplied at low rates. As such after deliberation they adopted a resolution that rates quoted by the tenderers at the rate of 25% below the schedule rates would be accepted. It has been submitted by the learned Additional Advocate General that if tenders at such rates are accepted it will ensure supply of articles of standard quality. This norm as laid down in the resolution taken in the meeting of the Diet Committee cannot be termed as arbitrary or mala fide and acceptance of the tender submitted by the respondent No. 6 whose rate conforms to the rate as specified in the above resolution cannot be termed as arbitrary or discriminatory. This decision cannot also be assailed on the ground of mala fide. It has been further submitted that it is not possible to ensure absolute equality where conflicting interests are involved, still then considering the overall aspects of the thing the norm that has been laid down in the resolution is expected to maintain supply of food articles of standard quality. It has been next submitted by the Additional Advocate General that the authority has the discretion to accept a tender and reject another. Non-acceptance of the tender of the petitioner does not involve any arbitrary

trariness and particularly when the selection was made on the basis of the norm provided by the decision taken in the meeting of the Diet Committee. It has been lastly submitted by Mr. Gupta that the conduct of the petitioner disentitles him to get the contract. It has been submitted that in para 7 of the petition it has been stated that the tender of the petitioner being lowest and accepted by the committee he was asked to continue supply in respect of articles in categories 1 and 2 and 3. It has been stated that the authority being satisfied with the performance of the petitioner in respect of the purity of articles considered the petitioner's case by allowing him to continue the supply and was further told that formal letter of appointment will be sent soon. Thereafter on the basis of the said assurance the petitioner was directed by the D. M. O. to supply dietary articles in categories I, II and III with effect from 1-5-1981 and up-till now the petitioner has been supplying such articles. It has been stated in para 9 of the affidavit-in-opposition that in order to obtain a rule and interim order wrongfully the petitioner deliberately made these false statements by suppressing receipt of the order as mentioned in the annexure 'D' to the affidavit-in-opposition, that is, the petitioner was asked to continue the supply of dietary articles from 1-5-1981 to 15-5-1981. It has been submitted that by making this false statement and suppressing receipt of the copy of the order from the respondent No. 2 the petitioner obtained the instant Rule and the interim order and as such for the suppression of the material facts this rule should be discharged in limine and no relief should be given to the petitioner.

10. Mr. Dutt, learned Advocate appearing on behalf of the respondent No. 6 has submitted that the rule prima facie has become infructuous as the impugned order whereby the respondent No. 6 was appointed as contractor or, in other words, whereby the tender of respondent No. 6 was accepted has not been annexed and as such relief in terms of prayer 'A' of the petition as to why the impugned order should not be quashed or withdrawn or should not be given effect to cannot be granted. It has also been submitted that the selection cannot be challenged as selection

is in the hands of the Expert Committee and the decision is final and it is not open to judicial review. Mr. Dutt has referred to the provisions of the Health Manual regarding tenders in support of his submission. It has been next submitted that the petitioner has got no legal right to get a contract or to have his tender accepted and as such non-acceptance of tender does not entitle the petitioner to come before this court to challenge the same in a writ petition. Some decisions have been cited at the bar in this respect. It has been next submitted that the writ petition will also fail inasmuch as the petitioner did not challenge the tender notice in the writ petition.

11. The preliminary objection that has been raised in this case by Mr. Dutt, Advocate for respondent No. 6 that this writ application is not maintainable as no legal right of the petitioner has been infringed requires to be decided first. It has also been submitted that the District Diet Committee consisting of the respondents Nos. 1 to 5 has the absolute discretion to accept one tender and reject another tender and its decision is final and even if its decision is wrong such a decision cannot be challenged in a writ petition as no legal right of the petitioner has been impaired or infringed by such decision of the public authority. This preliminary rejection, in my opinion, is liable to be rejected in limine. The meaning of the word "locus standi" for the purpose of maintaining a writ application has now been widened very much by the pronouncements of the Supreme Court as well as of our court. Ordinarily the petitioner who seeks to file an application under Art. 226 of the Constn. should be one who has a personal or individual right in the subject matter of his petition. This personal right need not be in respect of proprietary interest, it can also relate to an interest of a trustee. That apart, in exceptional cases as the expression 'ordinarily' indicates a person who has been prejudicially affected by an act or an omission by an authority can file a writ petition even though he has no proprietary or fiduciary interest in subject-matter thereof. The above observation has been made in the case of Venkateswar Rao v. State of Andhra Pradesh, AIR 1966 SC 828. This view has been further elaborated

in a latter case in AIR 1976 SC 578 at p. 581 para 12, *Jashbai Motibhai v. Basir Ahmed*. It has been observed by Sarkaria, J. who spoke for the Supreme Court that the expression "aggrieved person" denotes an elastic, and to an extent an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of petitioner's interest, and the nature and extent of the prejudice or injury suffered by him. It is flexible enough to take in those cases where the applicant has been prejudicially affected by an act or omission of an authority even though he has no proprietary or even a fiduciary interest in the subject-matter. In the case of *In Re : Monoranjan Maity v. District School Board, Midnapore* decided on 31-3-1981* I have held that in order to maintain an application for a writ in the nature of mandamus or in the nature of certiorari or for any other appropriate order or directions under Art. 226 of the Constn. it is not the sole test to be specified that the person making the application must show that any of his individual or personal rights either conferred by Part III of the Constn. or by any statute has been infringed illegally by the purported action or inaction on the part of the statutory authority. If a person has been shown to have a genuine grievance by an action or inaction on the part of the authority to discharge his public duties enjoined upon him by the Act, in that case such person will be an aggrieved person having locus standi to maintain an application for a writ in the nature of Mandamus and/or Certiorari against the purported action or inaction on the part of such public authority.

12. In the instant case the petitioner who submitted tender in compliance with the tender notice inviting tenders within the time specified is entitled to have his tender considered as it is a case of distribution of public contracts. True that the petitioner has got no legal right to claim that the tender submitted by him must be accepted by the Tender Committee, that is, District

Diet Committee still he has a right to have his tender fairly and properly considered by the public authority before the same is rejected. The arbitrary rejection of his tender without considering the same at all and the acceptance of the tender of respondent No. 6 who quoted rates much higher than the rates quoted by the petitioner undoubtedly affects the petitioner and the petitioner is an aggrieved person. Therefore the instant writ application at the instance of the petitioner is maintainable. The decision in AIR 1972 SC 1816 does not apply as the facts are totally different from the facts of this case. In that case the highest bid offered by the respondent No. 1 for country liquor shop was rejected as in the opinion of the Government it did not fetch adequate price as a result of collusion between the bidders. Thereafter tenders were invited and tenders were duly received. The Government accepted the tender in respect of one shop and rejected the other tenders as price offered was inadequate. Ultimately the 7 shops were settled by negotiations with some of the tenderers and the price fetched was much higher than that offered either at the auction or by the tenderers. It was held that the Government reserves the powers to accept or to reject the highest bid. The highest bid was rejected as it did not fetch appropriate price and as such the writ application was rejected. There was no arbitrariness or unfairness in settling 7 shops by private negotiations with some of the tenderers at a much higher price. Similarly the decision in the case of *Manjula Manjari Dei v. M. C. Pradhan, D. P. I., AIR 1952 Orissa 344* also has got no application to this case as the facts of that case are different from the facts of the instant case. In that case the petitioner, a publisher of text books for schools challenged the action of the Director of Public Instruction in accepting the decision omitting some books of the petitioner from the list of text books made by a committee set up by the Director of Public Instruction. It was held that the petitioner has no legal right which could be enforced against a public officer and the choice of text books is entirely within the discretion of the Director of Public Instruction. He exercises his discretion according to the direction of the Government and as such

*Reported in 1981 Lab IC NOC 179 (Cal).

held that he acted bona fide and in good faith.

13. The respondent No. 2 issued a tender notice in the year 1981-82 inviting sealed tenders from bona fide contractors for supply of dietary articles to the State owned hospitals, Health Centres, etc. in the district of Murshidabad. It has been specifically mentioned in the said tender notice that the intending tenderers are to quote rates either 'below' or 'at par' or 'above' the schedule of rates of dietary articles for the year 1981-82 in respect of three categories mentioned therein. A copy of the said schedule of rates have been annexed as annexure 'A' to the petition. It has also been provided in the said tender notice that the Governor reserved the right to reject any tender without assigning any reason thereof and acceptance of lowest rates will not be obligatory to the contracting officer. It was also provided in the said tender notice that all the tenders are to be submitted by 30-4-1981 up to 12 noon and the tenders will be opened by the Chairman of the District Diet Committee on that day at 3 p. m. The petitioner undoubtedly submitted tenders within the specific time provided in the tender notice and rates quoted by him are undoubtedly the lowest rates in respect of articles mentioned in all the three categories — the rates being much below the schedule rates. The respondent No. 6 also submitted tender but the rate quoted by him was much higher than the rate quoted by the petitioner. On April 30, 1981, the District Diet Committee at its meeting adopted a resolution to the effect that rates quoted by the tenderers 25% below the schedule rates would be accepted. This resolution has been annexed as annexure 'A' to the affidavit-in-opposition sworn by the respondent No. 5 on 8th of June, 1981. It has been stated that the respondent No. 6 whose rates in the tender submitted by him having coincided with the rate as specified in the resolution of the District Diet Committee was accepted and the respondent No. 6 has been selected for appointment as a contractor for supply of dietary articles to the hospitals in the district. This order of the respondent No. 2, Chief Medical Officer of Health, Murshidabad who is the Chairman of the District Diet Committee has been assailed and or questioned in the writ petition as arbitrary and unfair and also discriminatory. It has

also been alleged that no reason has been recorded or assigned by the respondent No. 2 while rejecting the lowest tender of the petitioner and accepting the tender of the respondent No. 6 at a much higher rate. It has, therefore, been contended that this order of respondent No. 2 is violative of Art. 14 of the Constn. In a Division Bench decision of this court to which myself was a party reported in (1978) 2 Cal LJ 166 Kanchanoor Bhaskar Shetty v. State of West Bengal a similar question was raised. It has been observed that Art. 293 of the Constn. provides that the executive powers of the Union and the State shall extend to carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. Thus the State can carry on this executive function either by making a law or without making a law. The exercise of this executive power is subject to Part III of the Constn. and as such Art. 14 of the Constn. is applicable to the exercise of such powers. So in the matter of public contract equal opportunities are to be given to the citizens who apply and they cannot be discriminated against in the matter of giving their offer for such contracts and of having the same considered. In other words, there cannot be any discrimination at the threshold or at the time of entry in the field of consideration of persons with whom contracts will be made by the Government. The decision in AIR 1975 SC 266, Erusian Equipment and Chemicals Ltd. v. State of West Bengal and AIR 1977 SC 1496, Radhakrishna Agarwal v. State of Bihar were referred to. Therefore, I hold that the petitioner having genuine grievance against the impugned order dated 30-4-1981 accepting the tender of respondent No. 6 at rate much higher than that offered by him in his tender is an aggrieved person competent to maintain the instant writ petition and this preliminary objection raised on behalf of respondent No. 1 having no merits is rejected.

14. As regards the second submission of Mr. Moitra, learned Advocate for the petitioner contends that the discretionary power of the public authority in accepting or rejecting a tender has to be exercised according to rule of law and reasonably and fairly on a proper consideration of the individual tenders

submitted and not arbitrarily, capriciously or according to its own whims. It has also been submitted that in the tender notice no guideline nor any norm has been laid down specifying the eligibility for acceptance of tenders to be submitted. Public authorities cannot deviate from it and set out a different norm subsequent to the submission of tenders laying down a different guideline for acceptance of tenders. If this is done then such action of the public authority will be arbitrary, capricious rendering the same as invalid and void. It has been submitted that the tender of the petitioner has been rejected arbitrarily without considering it at all even though the rates offered were lowest and no reasons were assigned for such arbitrary rejection of the tender of the petitioner and acceptance of tender of respondent No. 6 at a higher rate though he had no experience in this regard. This has been done simply following the resolution of District Diet Committee passed on 30-4-81.

15. It appears from the tender notice annexed as annexure 'B' to the petition that it has been specifically mentioned therein that intending tenderers may submit tenders quoting rates either 'Above' or 'At Par' or 'Below' the schedule rates prepared for the purpose which has been annexed as annexure 'A' to the petition. There is no restriction nor inhibition nor any guideline as to the rates to be quoted in the tenders. The petitioner submitted tender for supply of dietary articles included in all the three categories at the lowest rates whereas the tender submitted by respondent no. 6 quoted rates much higher than that of the petitioner. The tender of the petitioner has been annexed as annexure 'C' to the petition. It appears from para 3 of the affidavit-in-opposition sworn on 8th June, 1981 by the respondent no. 5 that the tenders were opened on the 30th of April 1981 by the District Diet Committee consisting of respondents Nos. 1 to 5 and a resolution was adopted by the members of the Diet Committee on that very day that "rates quoted by the tenderers at the rate 25% below the Scheduled rates would be accepted." It has been further stated that on the basis of this resolution that respondent no. 6 was selected. The respondent no. 2 appointed respondent No. 6 to supply dietary articles to the

hospitals. It is, therefore, evident from the above averments that the tender of the petitioner offering lowest rates was not at all considered on merits and the tender of respondent No. 6 was accepted solely on the basis of the guideline embodied in the resolution of the District Diet Committee even though there was no such guideline or restriction as to the rates to be quoted by intending tenderers in their tenders in the notice inviting tenders.

16. Therefore, the decision of the District Diet Committee which was adopted at its meeting on 30th April 1981 laying down the manner of selection of tenders is wholly arbitrary and contrary to the terms and conditions laid down in the notice inviting tenders. It has been tried to be submitted by the learned Additional Advocate General appearing on behalf of the State that this decision was taken in order to formulate and/or to lay down a norm or standard for acceptance of tenders for the purpose of ensuring supply of dietary articles of standard quality and as such the norm set out in the resolution is not arbitrary nor it can be said to be mala fide. The selection of respondent no. 6 on the basis of above norm laid down by the District Diet Committee cannot be questioned as arbitrary or discriminatory. This argument cannot be entertained on the ground that the petitioner has been supplying dietary articles to the hospitals and health centres in the district being the lowest tender and there was no allegation that articles supplied by him were much below the standard. Similarly Tapan Kumar Ghosh also supplied dietary articles in the year 1977-78 successfully and there was no adverse report against him as to the quality of foodstuff supplied by him. It is impossible to hold that a contractor who has quoted rates 25% below the Schedule rates will surely supply dietary articles of the standard quality whereas the lowest tenderer quoting rates much below that rate will invariably supply articles of lower standard and quality. Moreover, this decision of the District Diet Committee taken on the day when the sealed tenders are opened by the respondent no. 2, the Chairman of the District Diet Committee, is not only arbitrary but also contrary to the standards laid down in the said tender notice. The Supreme Court in no uncertain terms observed in the case of

R. D. Shetty v. International Airport Authority, AIR 1979 SC 1628 at p. 1635 that it is well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its action to be judged and it must scrupulously observe those standards and on pain of invalidation of an act violation of them. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. It is indeed unthinkable that in a democracy governed by rule of law the executive government or any of its officers should possess arbitrary powers over the interests of individual. Every action of the executive government must be informed with reason and should be free from arbitrariness. That is the very essence of rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of power involves affection of some right or denial of some privilege. It has been tried to be contended on behalf of the respondent No. 6 that in view of the term embodied in the tender notice that the "Governor of West Bengal reserves the right to reject any tender without assigning any reason thereof and acceptance of lowest rates will not be obligatory to the contracting officer, "the Chairman of the District Diet Committee or for that the District Diet Committee has got the absolute power to pick and choose any of the tenderers who according to them is fit and proper to supply dietary articles and decision of the selection committee is final. Such a decision selecting a particular tenderer even though his rate is higher and not selecting the tenderer who offered the lowest rate cannot be questioned as discriminatory and violative of Art. 14 of the Constn. of India. In support of this submission some decisions have been cited. The Supreme Court in the case of P. R. Quenim v. M. K. Tandel (1974) 3 SCR 64 at p. 68; (AIR 1974 SC 651 at p. 653) held that cl. 7 of the tender which provided that the highest tender shall ordinarily be accepted but the Government reserved the right to select any tender or reject a tender without assigning any reason thereof is not violative of Art. 14 of the Constn. It was further held that in matters relating to contracts with the Government the latter is not bound to

accept the tender of the person who offers the highest amount. This decision was rendered by the Supreme Court relying on its earlier decision in the case of C. K. Achuthan v. State of Kerala (1959) Suppl. 1 SCR 787; (AIR 1959 SC 490). In this case the petitioner and the third respondent, the Co-operative Milk Supplies Society, Cannanore, submitted tenders for supply of milk to the Government hospitals at Cannanore for 1948-49. The Superintendent accepted the tender of the petitioner who offered the lowest rate and communicated his decision to the department of Public Health. Subsequently, the contract of the petitioner was cancelled and the tender of respondent No. 3 was accepted after giving requisite notice in terms of cl. 20 of the tender. The petitioner was intimated that it was the policy of the Government that in the matter of supply to Government Medical Institutions in Cannanore the Co-operative Milk Supplies Union was to be given contracts on the basis of price fixed by the Revenue Department. It was held that there was no discrimination because it was perfectly open to the Government even as it was to a private party, to choose a person to their liking, to fulfil contracts which they wished to be performed. When one person is chosen, rather than another, the aggrieved party cannot claim the protection of Art. 14 because the choice of the person to fulfil a contract must be left to the Government. Similarly a contract held from the Government stands on no different footing from a contract held from a private party. This view of the Supreme Court no longer holds the field as it is evident from the decision of the Supreme Court in the case of Barium Chemicals Ltd. v. Company Law Board (AIR 1967 SC 295) where it has been held that before the discretion conferred by S. 237 (b) of the Companies Act, 1956 to order an investigation can be exercised, there must exist circumstances which in the opinion of the authority suggest what has been set out in sub-cl. (i) (ii) or (iii). If it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the

scope of the statute. The formation of opinion may be subjective but the court can interfere if question whether circumstances for formation of opinion as provided in S. 237 (b) of the said Act exist or not. Therefore, even in this case of administrative decision made on subjective satisfaction by the executive officer the party aggrieved can question the administrative decision and or the formation of the opinion for exercise of the administrative power and it is incumbent on the concerned authorities to show that the opinion was formed on considering all relevant circumstances which exist. Similarly in AIR 1975 SC 266 at p. 268, *Erusian Equipment and Chemicals Ltd. v. State of West Bengal* A. N. Ray, C. J. who spoke for the Supreme Court observed, "The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constn. Art. 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has therefore the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination." This decision was referred to in AIR 1978 SC 1496, *Radhakrishna Agarwal v. State of Bihar* and it was held that Art. 14 of the Constn. imports a limitation or imposes an obligation upon the State's executive power under Art. 298 of the Constn. All constitutional powers carry corresponding obligations with them. Therefore these decisions clearly laid down that in the exercise of executive powers by administrative authorities or public authorities they cannot act arbitrarily and cannot select a tenderer having offered a higher rate in preference to another offering lowest rate according to their whims without assigning cogent reasons therefor. Art. 14 of the Constn. of India applies to such cases of arbitrary selection of a tenderer as the authority concerned is under an obligation to consider all the tenders on their respective merits and he cannot pick and choose. It will be pertinent to refer in this connection the observation of the Supreme Court in AIR 1971 SC 40, *Union of India*

v. J. N. Sinha where it was held that administrative authorities in making orders affecting rights of the person must act fairly and not capriciously or arbitrarily. In other words, rules of natural justice are called in aid to prevent miscarriage of justice and to ensure a just decision. Similar view was also expressed in the case of D. F. O., South Kheri v. Ram Sanehi Singh, AIR 1973 SC 205. It has been already stated hereinbefore that in a Division Bench judgment of this Court in (1978) 2 Cal LJ 166 it has been observed that principles of natural justice can be invoked in cases of decision of public officers affecting civil rights of a person. In AIR 1979 SC 1628, *R. D. Shetty v. International Airport Authority of India* it has been held that the doctrine of equality envisaged in Art. 14 of the Constn. posits that a corporation which is an instrumentality or agency of Government in exercise of its discretion cannot act arbitrarily while dealing with public whether by way of giving jobs, or largesse or entering into contracts or otherwise. Its action must be in conformity with some principle which meets the tests of reason and relevance. The Government is not and should not be as free as an individual in selecting the recipients for its largesse. Whatever its activity, the Government is still the Government and will be subject to restraints inherent in its position in a democratic society. A democratic government cannot lay down arbitrary and capricious standards with whom it will deal. Therefore from these decisions cited hereinbefore it is well settled that the Public Authorities cannot exercise its discretion arbitrarily in the matter of giving contracts to a party at its own sweet will and pleasure. It has to exercise its discretion in the matter of selecting right person for the giving of largesse or contract or for selecting persons for giving contract fairly and on a just consideration of all the tenders submitted on a reasonable basis and in the case of selecting a tender of a person offering higher rate in preference to another offering a lower rate it has to record valid, relevant and cogent reasons therefor. A selection of higher tender in preference to a lower tender without assigning any reason will be violative of the provisions of Art. 14 of the Constn. In the instant case the tenders were invited and the petitioner

and other persons including respondent No. 6 submitted tenders offering rates below the schedule rates as stated hereinbefore. In the tender notice there was no such term that tenders offering rates more than 25% below the schedule rates will not be considered for selection. The District Dietary Committee on 30-4-81 that is, the date fixed for opening the sealed tenders, adopted a resolution to the effect that only tenders offering to supply dietary articles in categories 1 to 3 at rate 25% below the schedule rate would be accepted. The tender of respondent No. 6 was accepted solely on the basis of this decision without considering at all that the tender submitted by the petitioner offering rates much below the rates that was offered by the respondent No. 6 and as such if the tender of the petitioner was accepted there will be a great deal of saving of public money. The acceptance of the tender of respondent No. 6 on the basis of the above decision of the Dietary Committee is, in my opinion, wholly arbitrary inasmuch as it is contrary to the terms and conditions laid down in the tender notice. Secondly, this decision of the Dietary Committee imposed a restriction in consideration of the tender of the petitioner and thereby it discriminates between the petitioner and the respondent No. 6. Such a decision is clearly in violation of the provisions of Art. 14 of the Constn. as it does not provide equal opportunity in the matter of consideration of the tenders submitted by all the tenderers including the petitioner himself for the purpose of selection of the tenderer to be entrusted with the supply of dietary articles. Furthermore this decision of District Diet Committee is a clear deviation from the terms and conditions embodied in the tender notice inviting tenders and therefore the selection of respondent no. 6 is wholly illegal and the same cannot be given effect to. Reference may be made in this connection to the observation of the Supreme Court in AIR 1979 SC 1628 where it has been held that public authorities must conform to the standards or terms and conditions laid down in the tender notice and they cannot be permitted to deviate from it. Therefore the acceptance of tender of the respondent no. 6 without at all considering the lowest rate submitted by the petitioner in his tender is wholly arbitrary, unwarranted and bad. It is

a well settled rule of administrative law that executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them.

17. Mr. Dutt, learned Advocate for respondent no. 6 submitted that governmental action is presumed to be reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. Mr. Dutt referred in this connection the decision in (1980) 4 SCC 1 at p. 13: (AIR 1980 SC 1992 at p. 2000) para 14, *Kasturi Lal Lakshmi Reddy v. State of J. and K.* I have already held that the petitioner proved that impugned action in appointing respondent no. 6 as successful tenderer and in giving him the contract is arbitrary, unreasonable and not in public interest. It will be pertinent to refer to the Memorandum No. Medi. 980/H/R. 3D-10-48 dated 16th Mar. 1949 issued by Asst. Secretary to the Government of West Bengal contained in Health Manual Vol. I (Administration) page 57 excerpt from the said memorandum is quoted hereinbelow:—

"1. (b) Tenders should be invited from the open market and the lowest tender should, as a rule, be accepted. Higher rates may, however, be accepted in exceptional cases to ensure supply of better quality of articles, and the reasons for such acceptance should invariably be recorded." In the instant case the lowest tender submitted by the petitioner was neither considered nor accepted but the tender of respondent no. 6 quoting rates higher than those of the petitioner has been accepted by the District Diet Committee without recording any reasons for such acceptance as required by this memo. Therefore, the impugned order made by the District Diet Committee accepting tender of respondent No. 6 is also illegal and bad.

18. The last submission advanced on behalf of the respondents that the writ application is liable to be dismissed on the ground of suppression of material facts, in my opinion, has got no merits. True that a statement has been made in the petition to the effect that on 30-4-81 at 3 p. m. the respondents 1 to 5 opined that the petitioner's tender being the lowest could be accepted and

he would be declared successful. It has also been stated that thereafter he came to know on enquiry that his tender was not accepted and the tender of respondent no. 6 was accepted. This statement made in the writ petition cannot be considered to be a suppression of material facts inasmuch as this statement did not at all influence the mind of the court in the matter of issuance of the rule and the interim order. Of course, an observation was made by this Court that such loose statements ought not to have been made by the petitioner in the writ petition. I am, therefore, of the opinion that there was no suppression of material facts. The main challenge against the impugned order was that the tender of the petitioner quoting the lowest rate was not accepted and the tender of respondent no. 6 quoting the rate higher than that of the petitioner was accepted. Therefore this contention is devoid of any merit and hence it is overruled.

19. For the reasons aforesaid the contentions raised on behalf of the petitioners having succeeded the rule succeeds and the same is made absolute.

20. Let a writ of Mandamus be issued directing the respondent Nos. 1 to 5 to forbear from giving effect to the order dated 30-4-81 accepting the tender of respondent no. 6 for supply of items in category nos. 1, 2 and 3 in the hospitals and health centres within the district of Murshidabad.

21. Let a writ of Certiorari be also issued directing the respondents to quash and set aside the impugned order dated 30-4-81 passed by the District Diet Committee or for that the Chairman of the said Committee appointing the respondent no. 6 as contractor for supply of the said dietary articles.

22. There will be no order as to costs.

23. This order will govern all the three matters, in re: (1) Barun Kumar Sinha, in re: (2) Tapan Kumar Ghosh and in re: (3) Dharendra Nath Ghosh.

24. Let operation of the order be stayed up to 17-9-1981 as prayed for.

Rule made absolute.

AIR 1982 CALCUTTA 30

Mrs. PRATIBHA BONNERJEA, J.

Bayer Aktiengesellschaft of Leverkusen Federal Republic of Germany, Petitioner v. Controller of Patents, Government of India, Respondent.

Patent Act Matter No. 2564 of 1980, D/- 29-7-1981.

(A) Patents Act (1970), S. 71 — Application under, for rectification of entry relating to a patent — Filing of — No limitation prescribed under the Act — Limitation would be governed by Art. 137 of Limitation Act. (Limitation Act (1963), Art. 137).

If any special or local law did not prescribe any time limit for an application to be made to a Court under that Act, the application would be governed by Art. 137 of the Limitation Act (1963) which should be made within three years from the date when the applicant's right to apply accrued. AIR 1977 SC 282 Rel. on.

(Para 6)

Where the Patent of the petitioner was sealed on 23-4-1977 and was recorded in the register on 4-6-1977, the documents of which were issued to him on 28-6-1977 then the application of the petitioner filed on 1-12-1980 under S. 71 for rectification of the entry relating to Patent would be barred by limitation of three years in view of the Art. 137 of the Limitation Act. (Para 6)

(B) Patents Act (1970), S. 2 (1) (i) (iv) — Word 'weedicides' in S. 2 (1) (i) (iv) includes 'herbicides' — Patentee claiming "Chlorothio-N-Phthalimide" as an intermediate product suitable for producing herbicidal compound — Classification of the intermediate product as medicine or drug is proper. (Words & Phrases — 'Herbicides', 'Weedicides', 'Medicines' and 'Drugs'). (Para 12)

Cases Referred : Chronological Paras

AIR 1977 SC 282	5, 6
AIR 1974 SC 480	4
AIR 1969 SC 872	4
AIR 1942 All 429 : 1942 All LJ 592 (FB)	4

Lall, for Petitioner; N. C. Roy Chowdhury, for Respondent.

ORDER :— This is an application under S. 71 of the Patents Act 1970 for rectification of the entry relating to Patent No. 139978 in the register of the respondent. This application is contested by the respondent.

2. It is alleged in the petition that Chlorothio-N-Phthalimide is a novel compound and is a new intermediate product suitable for producing various products such as herbicidal compounds or auxiliary agents for rubber. This compound can also be used in the preparation of other compounds which in turn can be used in the treatment of disease in human beings and animals. But this compound by itself is not intended nor is capable of being used as a drug or medicine as defined in S. 2 (1) (i) of the Act. The respondent, however, wrongly classified this product as a 'drug' and fixed the period of the patent for 7 years from the date of the sealing. According to the petitioner the period of this novel compound should have been 14 years by virtue of the provision of S. 53 of the Act. Hence this application for rectification of the register by deleting 7 years and inserting in its place 14 years.

3. The respondent filed an affidavit-in-opposition affirmed on 12-1-1981 by one Shanti Kumar, Joint Controller of Patents and Designs. According to the respondent this compound is a medicine or drug within the meaning of S. 2 (1) (i) of the Patents Act 1970 and as such the period of patent should be limited to 5 to 7 years from the date of sealing or the date of the patent whichever term is shorter, under the provision of S. 53 (1) (a) of the said Act. Classification of this compound and its 7 years term have been correctly done in accordance with this Act. The respondent further stated that the petitioner as a patentee did not raise any objection when the patent document was issued to him on 28-6-1977 providing for 7 years time from 5-5-1974. This belated application is barred by limitation.

4. According to the respondent's counsel, the application under S. 71 of the Act would be governed by the residuary Art. 137 of the Limitation Act of 1963 and as such the application should have been taken out within 3 years from the date of receipt of the patent documents on 28-6-1977 when his right to apply accrued. This application was made on 11-12-1980 and was out of time. The counsel for the petitioner submitted that the Act was a complete and a self-contained Code and in respect of any application under this Act, the Limitation Act of 1963 would not apply. In

support of his contention he relied on AIR 1969 SC 872 (K. Venkateswara Rao v. Bekkam Narasimha Reddy). This is a case on Representation of the People Act of 1951 as amended in 1966. The Supreme Court after construing different sections of this Act held that the Act was a complete and a self-contained Code which did not admit of the introduction of the principles or the provisions of law contained in the Limitation Act. The petitioners' counsel also construed various sections of the Patents Act of 1970 and invited my attention to the provisions of different sections to show that whenever this Act wanted to put a time limit, the relevant sections have made express provisions for the same. Therefore Limitation Act of 1963 would have no application. According to him there was no time limit for an application under S. 71 of the Act. The next case relied on by him was AIR 1974 SC 480 (Hukumdev Narain Yadav v. Lalit Narain Misra). This was also a case on Representation of the People Act 1951 and it was held that the Act being self-contained and complete, the provision of S. 5 of the Limitation Act would not apply. He also cited AIR 1942 All 429 (FB) (Raja Pande v. Sheopujan Pande) where a Division Bench of that High Court had held that the Provincial Insolvency Act was a self-contained Act and Limitation Act of 1908 would not apply.

5. The respondent's counsel Mr. N. C. Roy Chowdhury invited my attention to S. 71 of the Patents Act 1970 which provided that an aggrieved party may apply to the High Court for rectification of the register of Patents. He submitted that if any special or local law did not prescribe any time limit for an application to be made to a court under that Act, the application would be governed by Art. 137 of the Limitation Act of 1963 and in support he relied on AIR 1977 SC 282 (The Kerala State Electricity Board, Trivandrum v. T. P. Kunhaliumma). In that case the question arose whether a petition under S. 16 (3) of Telegraph Act would fall within the scope of Art. 137 of the Limitation Act 1963 or not. It was held in that case (at p. 286) :

"The changed definition of the words 'applicant' and 'application' contained in Ss. 2 (a) and 2 (b) of the 1963 Limitation Act indicates the object of the Limi-

tation Act to include petitions, original or otherwise under special laws. The interpretation which was given to Art. 131 of the 1908 Limitation Act on the principle of ejusdem generis is not applicable with regard to Art. 137 of the 1963 Limitation Act. Art. 137 stands in isolation from all other Arts. in Part I of the third division. Art. 137 includes petitions within the word 'applications'. These petitions and applications can be under any special Act."

6. In my opinion, the decision reported in AIR 1977 SC 282 puts an end to the controversy regarding applicability of 1963 Limitation Act to special laws or local laws. There is no doubt that in this case Art. 137 will apply as no time limit was put by the Act itself and this application has to be made to the High Court. This application should have been made within 3 years from the date when the petitioner's right to apply accrued. It was not disputed by the petitioner that the relevant patent was sealed on 23-4-1977, recorded in the register on 4-6-1977 and the Patent documents were issued to the petitioner on 28-6-1977. This application made on 1-12-1980, was clearly beyond three years from the date of accrual of right to apply and is barred by limitation on the face of the application.

7. So far as the merit of this application is concerned, I find that the petitioner had submitted a complete specification along with its application to the respondent where the petitioner had alleged :—

"Chlorothio-N-Phthalimide is a new intermediate product which by virtue of its reactive group is suitable for producing various end products such as herbicidal compound or auxiliary agents for rubbers."

8. The provisions of S. 2 (1) (i) of Patents Act 1970 are as follows :—

(i) "Medicine or drug" includes—

(i) to (iii).....

(iv) insecticides, germicides, fungicides, weedicides and all other substances, intended to be used for the protection or preservation of plants,

(v) all chemical substances which are originally used as intermediates in the preparation or manufacture of any of the medicines or substances above referred to." (emphasis supplied).

9. During hearing, a printed copy of the complete specification was shown to

me and the same was kept in the records of this case.

10. The petitioner's counsel, tried to distinguish between the words 'herbicide' used in the complete specification and 'weedicide' mentioned in S. 2 (1) (i) (iv) of this Act. Accordingly to him 'herbicide' is a much broader term than 'weedicide'. Herbicide destroys all herbs whereas weedicide destroys only weeds.

11. In Webster's New World Dictionary, the meaning of the word 'herbicide' is given as follows :—

"any chemical substance used to destroy plants esp. weeds".

12. It is therefore, clear that a 'herbicide' is also a 'weedicide'. In my opinion the respondent had correctly classified the product and had fixed the term of the patent in accordance with the provisions of S. 53 (1) (a) of the Act.

13. For all the reasons mentioned above, the application fails. The petitioner is to pay the cost of this application to the respondent.

Application dismissed.

AIR 1982 CALCUTTA 32

B. C. RAY, J.

In re Soumitra Kumar De.
D/- 23-6-1981.

Constitution of India, Art. 226 —
Writ against Universities — Student of Law College — Less attendance at classes — Student detained from appearing at final Law examination — Petition by student — Attendance register produced found to be in perfunctory state — University directed to allow student to appear at examination but to keep his result in abeyance till he secures minimum attendance in current session — State of affairs of Law College depreca.ed. (Calcutta University Act (2 of 1966), S. 53 (c)). (Para 1)

R. N. Mitra and N. C. Saha, for Petitioners, S. Mukherjee, D. K. Bakshi and S. K. Chakraborty, for Principals University College of Law, Calcutta (Respondent No. 4).

ORDER :— After having heard Mr. Mitra, learned Advocate for the petitioner and Mr. Mukherjee on behalf of the Principal, University College of Law though I was very much reluctant to

GY/JY/D353/81/VVG

interfere in this matter still after having seen the sorrowful state of affairs going on in the University Law College particularly in its Hazra Branch I am quite clear in my mind that the authorities of the college including Shri Upadhaya the Principal, University College of Law, are not aware nor do they try to be over conscious of their duties and serious responsibilities of running this sacred Institution and to see that the students reading there are properly trained and instructed. The attendance registers have been produced before this Court and I am constrained to say that all these attendance registers clearly show in what perfunctory manner they have been kept. It appears that in several months six or seven lectures have been recorded to have been delivered by the teachers concerned; no dates have been mentioned when these lectures were delivered and it is surprising that for the rest of the month there was no record why any lecture was not delivered, if this be the state of affairs can it be expected that the students who are reading in this branch of the Law College are properly instructed? It is, therefore, useless to blame the students when the teachers are not conscious of their duties and responsibilities in the matter of imparting instruction to the students. I fail to see why the authorities of the Law College are not conscious of this state of affairs. It is not only the duty of the Law College to see that the students having not attended the required number of classes or the minimum number of classes their names should be struck off from the rolls but at the same time it is the duty of the Principal also to see that the teachers are also maintaining certain norms or discipline in the matter of holding classes in the Law Colleges and if the principal does not do so I am constrained to say that he has signally failed in his duties as Principal or Vice Principal of the Law College. It is expected that the teachers who are also highly educated persons and who occupy some responsible position in the society should be aware of their duties and responsibilities to their pupils and also to their country and they should devote their time for imparting instructions to the pupils during the period the college remains open. For the present I leave it

at that. Of course I will at the same time say in this connection that it is not expected that the students will often come to this Court for having orders for enabling them to sit in the final examination of law of the Calcutta University or to get themselves declared passed. The students should be conscious of their duties and they should know that they must study hard and sincerely in order to acquire knowledge and to become successful in the Law Examination. The students should not forget that by anyhow obtaining a birth mark i. e. a certificate or passing the examination will not enable them to be successful in their career. They should follow the norm that it is the foremost duty of a student to devote his entire energy for the pursuit of study specially in regard to Law which is a very hard and growing subject. However, I leave this matter at that. Though I am not satisfied with the state of affairs regarding the attendance of classes by the petitioner still seeing the entire state of affairs I am constrained to dispose of this application by directing the University to allow the petitioner to appear in the ensuing LL. B. Final Examination which is scheduled to commence on the 24th of June, 1981 as notified. The respondent no. 4 is directed to offer all facilities to the petitioner to allow him to sit for the ensuing final LL. B. Examination with effect from 24th June, 1981. The examination answer papers submitted by the petitioner will be duly examined by the authorities concerned or other examiners in accordance with law. The publication of the result will be kept in abeyance in respect of the petitioner till the petitioner attends classes of the final year in the current session and he secures the minimum percentage of attendance. After the petitioner secures such minimum percentage of attendance in the current year in the final Law classes the Principal of the University College of Law at Calcutta (respondent no. 4) will certify the same and send the same to the Controller of Examinations of the University of Calcutta who will accordingly publish the result of the petitioner on receipt of the same.

(2) The application is thus disposed of.

(3) Office is directed to send a copy of this order to the Calcutta University Council for consideration.

(4) Learned Advocates for the parties may take a plain copy of this order, as prayed for.

Order accordingly.

AIR 1982 CALCUTTA 34

S. C. GHOSE, Ag. C. J.

Delhi Cloth & General Mills Co. Ltd., Applicant (Decree-holder) v. Ramjidas Shriram and others, Respondents (Judgment-debtor).

Execution Case No. 6 of 1975, D/- 7-8-1981.

(A) Civil P. C. (5 of 1908), Ss. 47, 2 (2) — Decree — Executability of — Decree passed by Court having jurisdiction to entertain it — All defendants submitting to jurisdiction of court — Decree, not a nullity. AIR 1954 SC 340 Dist. (Evidence Act (1872), S. 115).

(Paras 9, 8)

(B) Civil P. C. (5 of 1908), O. 37 R. 2 — Suit for recovery of sale proceeds of goods of plaintiff (holder of hundies) — Suit based on hundies accepted by defendant — Held, maintainable — Fact that hundies not endorsed in favour of plaintiff — Not material.

(Para 9)

(C) Civil P. C. (5 of 1908), S. 20 — Suit based on hundies filed in Delhi High Court — Hundies drawn at Delhi and accepted at Calcutta — Part of cause of action arising in Delhi — Held, Delhi High Court did have jurisdiction to entertain such suit.

(Para 11)

(D) Civil P. C. (5 of 1908), S. 47 — Question as to validity of decree — Execution — Challenge to validity of decree — Mere plea that it is contrary to law — Not open.

It is true that a decree which is passed without jurisdiction to pass it is a nullity and the question as to the absence of jurisdiction may be raised even in execution proceeding or in collateral proceedings. But where such an objection is raised in an execution proceeding the decree must be apparently without jurisdiction i. e. on the face of it the decree must show that it was passed by a court which was incompetent to pass it. Where in execution proceeding the question raised is whether the court which passed it had or had not jurisdiction to pass it, and as such it is necessary to make investigation, then the executing court has no competence

to permit that investigation to be made. The question must be regarded as finally decided by the decree of the court which tried the suit. In execution no plea that merely challenges the validity or propriety of the decree on the ground that it is contrary to the provision of law, can be raised. (Paras 12, 13)

(E) Civil P. C. (5 of 1908), Ss. 47, 11 — Question as to nullity of decree — Incorrectness of decision of court passing decree — Pleas as to — Barred by principle of res judicata. (Para 13)

(F) Civil P. C. (5 of 1908), S. 47 — Question of liability of certain property to attachment and sale — Properties must be within jurisdiction of Executing Court.

An executing court has no jurisdiction to attach immoveable property unless such immoveable property is within the jurisdiction of such court or the person against whom the execution is sought is or resides within the jurisdiction of such court. When the moveable properties of the judgment-debtors are within the jurisdiction of Calcutta High Court and those judgment-debtors reside within the jurisdiction of the court, the properties can be sold in execution. Thus in the instance case it can be decided which are the properties of the judgment debtors that are liable to be sold in execution of the decree. AIR 1932 Cal 213 and AIR 1938 Cal 113 Foll.

(Para 13)

Cases Referred:	Chronological	Paras
AIR 1974 SC 471		12
AIR 1973 SC 1311		11
AIR 1972 SC 1371		10
AIR 1971 SC 315		11
AIR 1971 SC 2355		11
AIR 1970 SC 1475		8
AIR 1970 SC 1525		8
AIR 1969 SC 823		9
AIR 1965 SC 1144		9
AIR 1965 SC 1698		9
AIR 1965 SC 1718		9
AIR 1964 SC 907		13
AIR 1963 Cal 36		10
AIR 1962 SC 199		8
AIR 1958 SC 321		11
AIR 1957 Pat 380 (FB)		9
AIR 1956 SC 374		8
AIR 1956 Bom 258		12
AIR 1956 Bom 513		13
AIR 1954 SC 340: 1954 All LJ 551		9
AIR 1954 SC 554		9
AIR 1953 SC 65		13
AIR 1953 Cal 758: 57 Cal WN 744		13
AIR 1942 Bom 15		11

AIR 1938 Cal 113: 42 Cal WN 87	13
AIR 1935 Cal 268	8
AIR 1934 Bom 356	9
AIR 1933 Cal 85	12
AIR 1932 Cal 213: 35 Cal WN 1096	13
AIR 1931 Cal 387	11
AIR 1929 Cal 529: 33 Cal WN 620	10
AIR 1927 Rang 258 (2)	10
(1870-72) 14 Moo Ind App 529 (PC)	10

ORDER :— This is an application in execution of part of a decree transmitted for Rs. 30 lacs for execution against the judgment-debtors Nos. 1 to 6. Execution is sought against the judgment debtor Nos. 1 to 6 that is to say M/s. Ramjidas Shriram, a partnership firm. Mr. Shrawan Kumar Agarwal in his individual capacity and as Karta of H. U. F. business of Shrawan Kumar Agarwal and Brothers, Mr. Onkarnath Agarwal in his individual capacity and as Karta of H. U. F. business of Onkarnath Agarwal and Brothers, Mr. Asok Kumar Agarwal, son of Mr. Premnath, Smt. Sushila Wati, wife of Ramnath, Mr. Kedarnath Agarwal, son of late Balaprasad all of 46, Upper Chitpur Road, Calcutta.

2. The execution is sought by attachment and sale of movable and immovable properties of the judgment-debtors Nos. 1 to 6. The mode in which the execution is sought is stated in Column 10 of the tabular statement filed herein.

3. The said mode is the attachment and sale of the right, title and interest of judgment-debtors Nos. 1 to 6 in 42, 43 and 46, Upper Chitpur Road now known as No. 216, 218 and 222, Rabindra Sarani, the right title and interest of the defendants, Nos. 3 and 6 in properties No. 36, 37, 38, 40 Upper Chitpur Road now re-numbered as premises No. 212, Rabindra Sarani, Calcutta as also also 13A, Bagbazar Street, Calcutta within the jurisdiction of this Court. The judgment-creditor also wants to have Plots Nos. 1189, 1190, Bakultalla, Baltikuri, Howrah and superstructure built over there also to be sold. But the said property cannot be attached and sold in execution of the decree by this Court. The shares of the judgment-debtors in different Joint Stock Companies and partnership firms details of which are given in Schedule 2 are also sought to be attached and sold in execution. The said shares in Joint Stock Companies

and partnership firms have been set out in Annexure 2 to the tabular statement. Besides the same, various bank accounts of the judgment-debtors have been mentioned and other movable properties and household goods belonging to the judgment-debtors have been set out in Annexure 3 to the tabular statement for being attached and sold in execution of the decree. The decree sought to be executed is dated 17th April, 1974 passed by the High Court at Delhi in Suit No. 472 of 1972.

4. The following defence has been raised to the execution of the decree by Kedarnath Agarwal, the respondent No. 6.

(1) The said Suit in Delhi could not be validly instituted under Order 37 of the Code of Civil Procedure as the same was not based on any negotiable instrument or hundi.

(2) None of the said alleged hundies was duly stamped.

(3) Although, the said Suit was purported to have been filed under Order 37, the same was really based on original consideration and thus no decree could have been passed.

(4) None of the said hundies was payable to or assigned in favour of the plaintiff.

(5) The learned Judge of the Delhi High Court had no jurisdiction to pass the said decree without any evidence.

(6) No part of the cause of action as alleged in the plaint arose within the jurisdiction of the Delhi High Court.

(7) The defendants did not reside or carry on business within the jurisdiction of the Delhi High Court.

(8) The plaintiff has started execution proceedings of the said decree in the Delhi High Court being the Execution Case No. 39 of 1974. The said execution case is still pending at Delhi Court.

(9) The plaintiff decree-holder is purported to split up its decretal claim into two parts — one for Rs. 15 lacs and another for Rs. 30 lacs and simultaneously executing the said decree partly in the High Court at Delhi and partly in this Hon'ble Court.

(10) The two plots of land Nos. 1189 and 1190 at Bakultalla, Baltikuri, Howrah are situated outside the jurisdiction of this Court. The said two properties are situated within the jurisdiction of the District Court at Howrah.

(11) In 1943, Kedarnath had been taken into adoption by his maternal uncle, grandfather of late Balaprosad of Delhi and ceased to have any interest in the properties of his natural father. He has no interest in premises Nos. 42, 43 and 46, Upper Chitpur Road, now Nos. 216, 218 and 222, Rabindra Sarani, Calcutta, save and except as a tenant in respect of a portion of premises No. 46, Upper Chitpur Road.

(12) Kedarnath's share in the 212, Rabindra Sarani, Calcutta is 1/12th and 1/18th which he acquired by purchase in 1960 and 1965 respectively. His total undivided share thus in the said 212, Rabindra Sarani is 5/36, Kedarnath has no interest in premises No. 13A, Bagbazar Street, Calcutta or the Bakultalla properties at Howrah.

(13) Kedarnath denies the particulars of moveable properties as alleged to be lying at No. 46, Upper Chitpur Road, Calcutta.

5. The plaintiff's suit is based on an agency agreement between the plaintiff and the defendant No. 1 in which the defendant No. 1 was selling agent of the plaintiff in the eastern territory of India and was to receive a commission of $\frac{1}{2}\%$ in respect of the yarn and at the rate of 1.56% for all the items of clothes except tapestry for which the commission was at the rate of 4.69%. The expenses for everyday cartage and godown rent etc. incurred by the defendant No. 1 were to be paid by the plaintiff to the defendant No. 1. Upon account of the said agency agreement being taken, nothing will be found due to the plaintiff. But the plaintiff managed to obtain the decree in the Delhi High Court by suppression of all material facts. The main burden of the defence was that the decree obtained at the Delhi High Court is null and void and cannot be executed. The respondent No. 2, Shrawan Kumar Agarwal in his affidavit-in-opposition to the tabular statement states as follows :

No writ of summons in the suit was served on the respondent No. 2 M/s. Shrawan Kumar Agarwal and Brothers. The said decree thus is void and unenforceable against the respondent No. 2, Shrawan Kumar Agarwal and Brothers, the H. U. F. was not a partner of the judgment-debtor No. 1 Ramjidas Shriram, Shrawan Kumar Agarwal himself was a partner of Ramjidas Shriram.

The said decree was passed without jurisdiction and is a nullity for the following reasons :

(1) The said suit was not and could not be validly instituted under O. 37 of the Code of Civil Procedure. The said suit is not based on any negotiable instrument or hundi.

(2) None of the alleged hundies have been duly stamped.

(3) The suit No. 472 of 1972 was a suit based on original consideration and was not maintainable under Order 37 of C. P. C.

(4) The plaintiff is not payee of any of the alleged hundies and thus no decree could have been passed in favour of the plaintiff.

(5) None of the said alleged hundies were assigned or endorsed in favour of the plaintiff.

(6) The suit not having been validly instituted under Order 37 of the Code of Civil Procedure, the Delhi High Court had no jurisdiction to treat the same as a suit under Order 37 of C. P. C. and pass the decree therein.

(7) No decree could be passed without any evidence in the said suit in violation of the principles of natural justice.

(8) No part of the cause of action in the said suit arose within the jurisdiction of the Delhi High Court.

(9) The defendants in the said suit resided outside the jurisdiction of the Delhi High Court.

(10) Drawing of hundies, as has been alleged, within the jurisdiction of the said court, is not a part of the cause of action.

(11) The plaintiff has already proceeded with execution proceeding of part of the said decree in the Delhi High Court; as such, this execution proceeding is void.

(12) His personal share will be 1/54th in the said three 206, 218 and 222, Rabindra Sarani and 13A, Bagbazar Street, Calcutta.

6. In fact, the main plea of Shri Shrawan Kumar Agarwal is that he in his personal capacity is a partner of the judgment debtor defendant No. 1 and the decree of the Delhi suit is a nullity. In the affidavit of respondent No. 3, it has been pleaded that the decree in the Delhi suit is a nullity and not executable.

7. The suit at Delhi was filed by the decree-holder Delhi Cloth Mills Ltd. against the defendant No. 1 Ramjidas Shriram for recovery of Rs. 36,07,167.21 p. under Order 37 of the Code of Civil Procedure on the basis of 118 hundies drawn on the defendant No. 1 and accepted by it at Calcutta. No writ of summons was served upon the respondent No. 3 in his individual capacity or as the Karta of H. U. F. of Onkarnath Agarwal and Brothers at 46, Chitpur Road, Calcutta. Thus the Court had no jurisdiction to pass any decree against him in his individual capacity or as a Karta of another H. U. F. He denies that he has 1/6th share in premises Nos. 36, 37 and 38 to 40, Upper Chitpur Road or that any share in No. 13A, Bagbazar Street, Calcutta. It appears from the facts of the case that the suit in which the decree was passed was instituted on 27th Oct. 1972 in the High Court at Delhi under Order 37 of the Code of Civil Procedure for a decree for Rs. 36,07,164.21 p. with interest and cost. On the 25th May, 1973, the judgment-debtor No. 1 made an application under Order 37, Rule 3 of the Civil Procedure Code in the High Court at Delhi for leave to defend the suit filed by the decree-holder. The said application was dismissed by the Delhi High Court. On the 14th Oct. 1973, the judgment-debtor filed a suit in the High Court at Delhi being the suit No. 454 of 1973 for a declaration that the hundies sued upon be attached, declared void, delivered up and cancelled. On the 7th Sept. 1977 an order was made by the Supreme Court of India on the application of the judgment-debtors herein for special leave against the order passed by the High Court at Delhi whereby the judgment debtors were granted leave to defend the suit filed by the decree-holder herein on condition that the judgment-debtors would furnish a bank guarantee to the extent of Rs. 10 lacs within 3 months from the date of the said order and also give security for a further sum of Rs. 10 lacs within a further period of 3 months from the date of furnishing the bank guarantee. On the 4th Mar. 1974, the judgment-debtors applied to the Supreme Court of India for modification of order dated 7th Dec. 1973. But the application was dismissed by the Supreme Court. On the 6th Mar. 1974 time to furnish bank guarantee under the order of the Sup-

reme Court expired and no bank guarantee was furnished by the judgment-debtors. On the 13th Mar. 1974, the judgment-debtors made an application under S. 151 of the Code of Civil Procedure in the suit in the Delhi High Court. The said application was dismissed. On the 17th Apr. 1974 the decree under execution was passed by the High Court at Delhi for Rs. 36,07,164.21 p. with interest at the rate of 12% per annum on the principal sum of Rs. 30,28,873.50 p. up to the date of the decree and thereafter at the rate of 8% per annum until realisation. By an order made on 16th Sept. 1975, the High Court at Delhi ordered simultaneously execution of the decree at Delhi and at Calcutta. But the execution at Calcutta was limited to a sum of Rs. 30 lacs. Even after the said order dated 16th Sept. 1975, the judgment-debtors went up in appeal against the said order and obtained an interim stay of execution which was finally discharged by an order dated 5th May, 1976. The interest of Onkarnath and Kedarnath in 212, Rabin-dra Sarani is 7/36 jointly. The judgment-debtors have throughout challenged the decree even up to the Supreme Court of India.

8. Mr. S. K. Kapoor appearing with Mr. Jayanta Mitter submitted that the decree is executable against the shares of the coparceners of H. U. F. business of M/s. Onkar Nath Agarwal and Bros. M/s. Shrawan Kumar Agarwal and Bros. as the Kartas of the joint Hindu families which carried on the said businesses were partners of the defendant No. 1. Mr. Kapoor relied on the case of Firm Bhagatram Mohanlal v. Commr. of Excess Profits Tax, Nagpur reported in AIR 1956 SC 374 wherein the Supreme Court has held that a decree against a firm in which the Karta of H. U. F. is a partner with stranger is executable against all the coparceners. Mr. Kapoor then relied on the case of Premilata v. Laxman Prasad reported in AIR 1970 SC 1525 wherein it was held that simultaneous execution at different States of the same decree can be allowed in exceptional cases. Mr. Kapoor further relied on the case of Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman reported in AIR 1970 SC 1475 for the proposition that the executing court cannot go behind the decree even if the decree is erroneous in law or on facts except when the decree is made by a court

which has no inherent jurisdiction to make it. Objection as to the validity cannot be raised in execution. In the instant case, according to the learned counsel, on the face of the decree, the decree is quite valid and proper. So no objection can be raised as to the validity of the decree. The learned counsel then relied on the case of *Gurudas Adhya v. Jnanendra Narayan Bagchi* reported in AIR 1935 Cal 268 wherein in construing S. 39 of the Civil Procedure Code, a Division Bench of the Calcutta High Court held that simultaneous execution is permitted. A court has jurisdiction to execute its decree and at the same time send it to another court to execute it simultaneously. The counsel then relied on the case of *Hiralal Patni v. Kal'nath* reported in AIR 1962 SC 199 wherein it has been laid down that the validity of a decree can be challenged in execution proceeding only on the ground that the court which passed the decree was lacking inherent jurisdiction in the sense that it could not have seisin of the case because the said matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or the decree passed or such further ground which can have the effect of rendering the court entirely lacking any jurisdiction in respect of the subject matter of the suit or over the parties to it. The counsel submitted that this case was not such a case. Delhi High Court had certainly jurisdiction to entertain and try the suit and thus the decree passed by the Delhi High Court is not a nullity and cannot be challenged in execution.

9. The respondents relied on the case of *Kiran Singh v. Chaman Paswan* reported in AIR 1954 SC 340 wherein it was laid down that it is the fundamental principle that a decree passed by court without jurisdiction is a nullity and that its validity can be challenged whenever and wherever it is sought to be enforced or relied on even at the stage of execution and even in collateral proceeding. A defect of jurisdiction whether it is pecuniary or territorial or whether it is in respect of the subject matter of the case strikes at the very authority of the court to pass any decree and such a decree cannot be cured even by consent of parties. It appears to me that is not the case here in the instant matter. In the instant case the Delhi High Court certainly had jurisdiction

to try and entertain the suit and all the defendants submitted to the jurisdiction of the Delhi Court. The decree in the instant case cannot be said to be a nullity. The other points raised in defence to the execution are barred by res judicata or principles analogous thereto. I shall now shortly deal with the cases cited by the either side. The case relied on is the case of *Jagjivan Mavji Vithlani v. M/s. Ranchhoddas Meghji*, AIR 1954 SC 554 which laid down that in order to be liable on a promissory note the drawee must accept it. The next case cited was the case of *Virappa Andandaneppa Manvi v. Mahadevappa Basappa Katti* reported in AIR 1934 Bom 356 where a Division Bench of the Bombay High Court held that the holder of a promissory note cannot recover on it unless it is endorsed in his favour. The next case cited is the case of *Bachaprasad v. Janki Rai* reported in AIR 1957 Pat 380 (FB) wherein a Full Bench of Patna High Court decided that no person could sue unless he was a named payee or was entitled as endorsee of a negotiable instrument. The next case cited was the case of *Milkhiram (India) Private Ltd. v. Chamanlal Bros.* reported in AIR 1965 SC 1698 wherein it was held that where promissory notes executed by defendant in favour of plaintiff for advances made from time to time, suit on promissory notes was independent of the agreement and fell under O. 37, R. 2. Thus in the instant case, hundies accepted by the defendant No. 1 for the sale proceeds of the goods of the decree-holder could be sued upon under O. 37, of C.P.C. The next case relied on was *Mandalsa Devi v. M. Ramnarain Private Ltd.* reported in AIR 1965 SC 1718, which deals with Ss. 86, 87B, O. 30, R. 1, O. 21, R. 50 of the Civil Procedure Code, does not seem to be of any assistance in the instant case. The next case of *Ramkaran Das Radhaballav v. Bhagawan Das Dwarkadas* reported in AIR 1965 SC 1144 was also cited on the scope inter alia of R. 2 of O. 37 of the C. P. C. and is not necessary to deal with in detail. In the case of *Official Trustee, West Bengal v. Sachindra Nath Chatterji* reported in AIR 1969 SC 823 it was held that where a clause in a Trust Deed empowers the settlor to alter one term of interest given to its beneficiaries by Will alone, order of the court permitting settlor to revoke that clause and

to permit such alteration being done by Deed inter vivos was void as the court was not competent to pass such order. This is a case, in my opinion, of inherent lack of jurisdiction of the court and is not of any help to any of the parties in the proceeding.

10. The next case cited is the case of Bhavan Vija v. Solanki Hanuji Khodaji Mansang reported in AIR 1972 SC 1371 in which Supreme Court laid down the duty of an executing Court, in the following words (at p. 1374) :

"It is true that an executing court cannot go behind the decree under execution. But that does not mean that it has no duty to find out the true effect of that decree. For construing a decree it can and in appropriate cases it ought to take into consideration the pleadings as well as the proceedings leading up to the decree. In order to find out the meaning of the words employed in a decree the court often has to ascertain the circumstances under which these words came to be used. That is the plain duty of the executing court and if that court fails to discharge that duty it would be deemed to have failed to exercise the jurisdiction vested in it."

The next case was the case of K. K. Deb, v. N. L. Choudhury, AIR 1927 Rang 258 (2) wherein it was laid down that there was nothing in the Civil Procedure Code of 1908 which prohibited the sending of a decree for execution to two courts at the same time. The said dictum was laid down on the basis of Saroda v. Luchmeput, (1870-72) 14 Moo Ind App 529. The next case cited was the case of Dwarka Chuckerbutty v. Imperial Bank of India reported in (1929) 33 Cal WN 620 : (AIR 1929 Cal 529) wherein a Division Bench of this Court inter alia observed that decree can be sent for execution to the court within the jurisdiction of which the judgment debtor lives, for execution before all the properties attached by the court which passed the decree, are sold in satisfaction of the decree. The next case cited is the case of Tailors Priya, a Firm v. Gulabchand Danraj, a Firm, AIR 1963 Cal 36 wherein a Special Bench of this court laid down that absence of prescribed form of plaint under O. 37 enables the plaintiff to maintain a suit under O. 37 by presenting plaint showing his cause of action on the instrument and his intention to proceed

under O. 37. This was cited in support of the plea made by the applicants that although there was no prescribed form of the plaint made by the Delhi High Court, the suit was filed not on the original consideration but on the negotiable instrument and this was validly decreed under O. 37 of the Code of Civil Procedure by the Delhi High Court.

11. In the case of Canara Industrial and Banking Syndicate Company Limited v. Narayan Venkatesh Shenoy, AIR 1942 Bom 15 the Bombay High Court held that where Bill of Exchange was drawn in Bombay but accepted by drawee at Calicut, the Bombay High Court has jurisdiction to entertain the suit for recovery of the amount if leave is obtained under Cl. 12 of the Letters Patent. In the instant case, the hundies were drawn at Delhi and accepted at Calcutta. Thus part of the cause of action arose in Delhi and Delhi High Court had jurisdiction to entertain a suit in respect of the same. In Harkishore Barua v. Gura Mia Chowdhury, AIR 1931 Cal 387 a Division Bench of this Court held that only a holder of promissory note or hundi can sue on the same. In the instant case the holders of the hundies were the plaintiffs decree-holders. In the case of Santosh Kumar v. Bhai Moolsingh, AIR 1958 SC 321, the Supreme Court held that when defence to a negotiable instrument raises triable issue conditions cannot be imposed for giving leave to defend the suit. In the instant case as we have seen the Supreme Court itself imposed conditions for granting leave to defend the suit. Thus the defence in this case cannot be said to be bona fide. In the case of Jijabai Vithalrao Gajre v. Pathan Khan, AIR 1971 SC 315 it was held that father was the natural guardian of minor children and mother comes only after the death of the father. It was contended on behalf of the respondents that the decree is a nullity, because Delhi High Court has no jurisdiction to entertain or try the suit. The respondents relied on the case of Mathura Prasad Sarju Jaiswal v. Dossibai N. B. Jeejeebhoy, AIR 1971 SC 2355 and submitted that the question relating to jurisdiction of a court cannot be deemed to have finally determined by an erroneous decision of that court if by an erroneous interpretation of the Statute, the court holds that it has no jurisdiction, the question would

not operate as *res judicata*. Similarly by an erroneous decision if the court assumes jurisdiction which it does not possess under the Statute, the question cannot operate as *res judicata* between the same parties. The next case cited was the case of *K. K. Chari v. R. M. Seshadri*, reported in AIR 1973 SC 1311 in which it was laid down that the court must satisfy that a ground for eviction exists under the Tamil Nadu Buildings (Lease and Rent Control) Act, otherwise a decree passed even on compromise between the landlord and the tenant would be a nullity.

12. The next case cited was *Nagindas Ramdas v. Dalpat Ram Iccharam* reported in AIR 1974 SC 471 wherein it was decided that under the Bombay Rents Hotel and Lodging House Rates Control Act existence of one of the statutory grounds mentioned in Ss. 12 and 13 is a *sine qua non* for passing a decree for eviction. A decree passed by consent of parties without a court's satisfaction about the existence of a statutory ground for eviction is a nullity. In the case of *Kali Charan Singha v. Bibhuti Bhusan Singha*, AIR 1933 Cal 85 a single Judge of this Court held that the executing court cannot go behind the decree and question its validity except when lack of jurisdiction is obvious. Thus it was held that the decree against person under disability without proper representation cannot be challenged on that ground in execution. The decree will be binding. In the case of *P. Krishnan Nair v. Ramchandra Vithal Sanghavi*, AIR 1956 Bom 268 it was held that a decree which is passed without jurisdiction to pass it is a nullity and the question as to the absence of jurisdiction may be raised even in execution proceeding or in collateral proceedings. But where such an objection is raised in an execution proceeding, the decree must be apparently without jurisdiction i.e. on the face of it the decree must show that it was passed by a court which was incompetent to pass it. Where the court which passed it had or had no jurisdiction to pass it, it is necessary to make investigation then the executing court has no competence to permit that investigation to be made. The question as to whether the court had or had no jurisdiction to entertain the suit, must be regarded as finally decided by the decree of the court which tried the suit.

13. In execution no plea that merely challenges the validity or propriety of the decree on the ground that it is contrary to the provision of law can be raised. Thus in the instant case all the pleas that have been raised by the respondent is about the validity or propriety of the decree as being contrary to law cannot be raised in execution. (See AIR 1956 Bom 513) *Rana Harkrishnadas Lallubhai v. Rana Gulabdas Kalyandas*. In the case of *Mohanlal v. Benoy Krishna*, AIR 1953 SC 65 it was observed by the Supreme Court that even an erroneous decision on a question of law operates as *res judicata* between the parties to it, the correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as *res judicata*. The pleas taken by the respondents-judgment-debtors are about the incorrectness of the decision of the Delhi High Court and thus are barred by the principles of *res judicata*. It has even been held by the Supreme Court that decree passed in suit barred by time will not be a nullity provided the court passing the decree had jurisdiction over the party and subject matter. (See *Ittyavira Mathai v. Varkey Varkey*, AIR 1964 SC 907). In *Haridas Basu v. National Insurance Company Limited*, (1931) 35 Cal WN 1096 : (AIR 1932 Cal 213) a Division Bench of this court held that an executing court has no jurisdiction to attach immoveable property unless such immoveable property is within the jurisdiction of such court or the person against whom the execution is sought is or resides within the jurisdiction of such court. In the instant case following the principle of that case the moveable properties of the judgment debtors which are within the jurisdiction of this court and of those judgment debtors who reside within the jurisdiction of this court, can be sold in execution. In *Nirode Kali Roy Choudhury v. Rai Harendra Nath Choudhury*, (1938) 42 Cal WN 87 : (AIR 1938 Cal 113) it has been held that the question whether a property is the property of the judgment debtor and is liable to be sold in execution and a decree passed against him is a question relating to the satisfaction of the decree and comes within the purview of S. 47. Thus in the instant case it can be decided which are the properties of the judgment debtors that are liable to be sold in execution of the decree. The case of

Ambalal Purushattam Das & Co. v. Jawarlal Purushattam Dave, (1953) Cal 57 WN 744 : (AIR 1953 Cal 758) was cited in support of the contention that where a payee by a negotiable instrument is not certain, it is not a negotiable instrument. In the instant case the payee was certain and in any event if the decree has been made this question cannot be taken up in execution proceeding, in my opinion. It appears therefore that all the points raised in defence to the application must fail. There shall be an order in terms of the column 10 of the Tabular Statement except that the immoveable property at Baltikuri cannot be sold in execution of the decree by this court. Costs shall be added to the claims of the Decree-holder. Certified for two Counsel.

Order accordingly.

AIR 1982 CALCUTTA 41

Mrs. MONJULA BOSE, J.

Mirta Lina Pr. Ltd. v. The Finlay Mills Ltd. and another.

Suit No. 961 of 1979, D/- 3-6-1981.

(A) Civil P. C. (5 of 1908), S. 10 — Applicability — First suit by A for declaration that notice by B terminating leave and license agreement was void ab initio and that B was not entitled to unilaterally terminate/ revoke agreement — Second suit by B for ejectment of A and for mesne profits and/or compensation for use and occupation of premises by A — Held, while first suit was patently a title suit, in second suit a claim for money was made, and, therefore, the matters in issue were not substantially the same as to attract S. 10. (Para 21)

(B) Civil P. C. (5 of 1908), S. 10 — Expression "having jurisdiction to grant the relief claimed" — Contemplates the competency of the first court to grant the reliefs claimed in the second suit — Held, second suit valued at Rs. 78,000 was beyond pecuniary jurisdiction of City Civil Court in which first suit was filed, and, City Civil Court was, therefore, incompetent to grant either decree for possession and/or decree for mesne profits claimed in second suit. AIR 1917 Cal 248, AIR 1933 Cal 887, AIR 1938 Mad 602 and AIR 1954 Pat 314 Rel. on. (Para 21)

(C) Civil P. C. (5 of 1908), Ss. 10, 11 — 'Matter in issue' — Means disputed material questions in the latter suit, which are directly and substantially in issue in the former suit — Matters not in issue cannot be regarded as heard or finally decided so as to operate as res judicata in the latter suit. AIR 1975 Cal 411, AIR 1976 Cal 358 and AIR 1975 Cal 69 Rel. on. (Para 21)

(D) West Bengal Court-Fees Act (10 of 1970), S. 7 (vi) (b) (i) — Applicability — Suit for ejectment of licensee — Valuation of suit for purpose of court-fees shall be made u/s. 7 (vi) (b) (i) and value for jurisdictional purposes shall be same as for court-fees in view of S. 8, Suits Valuation Act. (Suits Valuation Act (1887), S. 8). (Para 21)

(E) Civil P. C. (5 of 1908), Ss. 10, 151 and O. 39 — Power of Court to restrain party from proceeding with suit in another court — Suit sought to be stayed under O. 39 not found to be vexatious or an abuse of process of Court — Neither O. 39 nor Court's inherent powers u/s. 151 can be invoked to stay suit. AIR 1962 SC 527 Rel. on. (Para 22)

Cases Referred: Chronological Paras

AIR 1976 Cal 358	11, 21
AIR 1975 Cal 69	9, 21
AIR 1975 Cal 411	10, 21
AIR 1972 Cal 128	6, 10
AIR 1972 Mys 112: (1971) 2 Mys LJ 449	17
AIR 1971 Cal 345	7, 12, 13, 16
AIR 1962 SC 527	7, 22
AIR 1957 Cal 727: 61 Cal WN 559	6, 7, 10
AIR 1954 Pat 314	15, 17, 21
AIR 1938 Mad 602	16, 21
AIR 1935 Cal 1: 38 Cal WN 818	12
AIR 1933 Cal 887	15, 16, 21
AIR 1917 Cal 248: 24 Cal LJ 514	10, 15, 21

J. N. Roy, for Applicant; S. K. Kapur, for Plaintiffs-Respondents.

ORDER:— The short point requiring determination in this application is whether the applicants, Finlay Mills Ltd. and the Gold Mohar Mills Ltd., are entitled to an order of stay of a subsequent suit filed in this Court by the plaintiff Co. u/s. 10 of the Civil P. C. ? To appreciate the contentions that have been raised before the Court, it will be necessary to give a very brief resume' of the material facts not in dispute. The plaintiffs are the tenants of the entire ground floor of premises No. 12-B/1.

Park Street, Calcutta and the defendant Mills are in occupation of the premises under an agreement dt. Dec. 26, 1975. contended by the plaintiff company to be a leave and licence agreement, whilst the defendants asserting that a greater interest is created in its favour thereunder.

2. On or about Nov. 8, 1979 the applicants filed Title Suit No. 2013 of 1979 in the City Civil Court at Calcutta, inter alia, praying for a declaration that the notice dt. Aug. 29, 1979 issued by the respondent Co. is invalid, inoperative and void ab initio and that the agreement dt. Dec. 26, 1975 is still subsisting and that the defendant No. 1 is not entitled to unilaterally terminate the same or to revoke the grant made thereunder. A permanent injunction restraining the defendants from disturbing and/or interfering with possession of the plaintiffs in the suit premises and from disturbing or interfering with the plaintiff's enjoyment of all rights, agreements and facilities in connection therewith and from giving any further effect to the impugned notice in breach of the agreement was also sought.

3. On Dec. 14, 1979 the present suit was filed in this Court by the respondent Co. claiming inter alia, a declaration that the plaintiff's tenancy of 12-B/1, Park Street, Calcutta is not subject to or incumbered by any sub-tenancy in favour of the defendants and its possession of the suit premises, mesne profits and/or compensation for use and occupation of the suit premises by the defendants from Dec. 1, 1979 until possession is delivered. It is contended by learned Counsel for the applicants that taking any further steps in this suit would incur unnecessary costs and result in multiplicity of judicial proceedings as the principal issue likely to arise in both the suits are identical and substantially the same matters are in issue. Alternatively, if the application is not maintainable u/s. 10, an order of stay should be passed under O. 39 of the Code and/or u/s. 151 invoking the Court's inherent jurisdiction so to, do.

4. Mr. J. N. Roy, Ld. Counsel for the applicants, in support of his submissions draws my attention to the two complaints filed, and submits that it is apparent therefrom that the parties are the same persons although admittedly in the earlier suit filed by the appli-

cants the two Directors of the defendant Co. were made party-defendants along with the defendant Co. He contends that the Terms of Agreement whereunder the applicant was put in occupation of the suit premises is an issue, which is required to be considered in both the suits. The question thus is whether determination of the first suit will make the material questions in the second suit *res judicata*? Relying on the averments in the plaint filed in the City Civil Court suit, he contends that the validity of the notice dt. Aug. 29, 1979 as also the scope of the agreement between the parties is required to be construed in the City Civil Court proceedings and in that context relief is sought claiming that the notice dt. Aug. 29, 1979 is void and inoperative, that the respondents are not entitled to unilaterally terminate the agreement entered upon and that the applicants are legitimately entitled to a declaration that the agreement dt. Dec. 26, 1975 is still subsisting, as also an injunction restraining the defendants from interfering with or disturbing their possession. He points out that in the said earlier proceedings an interim order was obtained on Nov. 9, 1979, and this factor is an additional point to be considered when determining this application for stay.

S. 10 of the C. P. C. reads as follows:—

"No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or in any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

Explanation:— The pendency of a suit in a foreign Court does not preclude Courts in India from trying a suit founded on the same cause of action."

5. Construing this section Mr. Roy contends that the provisions thereof apply with full force to the facts of the instant case and the section contemplates that the previously instituted suit

must be a proper suit in a Court which would be competent to grant the relief claimed and the question to be considered as such, is whether the City Civil Court has jurisdiction to deal with the prayers made in the City Civil Court suit.

6. Placing reliance on *Shorab Modi v. Mansata Film Distributors and Arun General Industries Ltd v. Rishabh Manufacturers Pvt. Ltd.*, reported in AIR 1957 Cal 727 and AIR 1972 Cal 128 he next contends that the matters directly and substantially in issue in both suits need not be of complete identity of disputes and/or parties and the ratio of that case is that the matter in issue in the two suits may be substantially the same though different reliefs may have been claimed by two different plaintiffs on the basis of their respective cases and/or causes of action. The fact that one is a suit under the agreement entered into by the parties and the other is the suit dehors the agreement is of no consequence. In that case the Court also construed the words "same parties" used in S. 10 and held the same meant parties as between whom the matter substantially in issue has arisen and has to be decided. The fact that there was an additional party in the suit filed subsequently did not, by itself, make S. 10 inapplicable as the Court viewed that no separate issue had been joined between the additional party and the plaintiffs so as to make Sec. 10 inapplicable. Mr. Roy stresses on the fact that the only aspect required to be considered when considering a case u/s. 10 of the C. P. C. is whether there is a possibility of conflicting decisions if the subsequent suit filed is not stayed.

7. Relying on *Manohar Lal Chopra v. Seth Hiralal* reported in AIR 1962 SC 527, he contends that the provisions of S. 10 are clear, definite and mandatory and the Court is prohibited from proceeding with trial of the second suit in certain specified conditions. He next cites, AIR 1971 Cal 345 as an authority for the proposition that the test in an application u/s. 10 is whether the matter in the later suit will be *res judicata* if the earlier suit is taken to have been decreed as prayed for in the plaint. In that case the Court considering that the validity of an agreement was in issue in both suits *inter alia* found that the subsequent suit would be hit by the

principles of constructive *res judicata* and held S. 10 to be applicable, and thus observed :— (at p. 347).

"In my opinion, the test to be applied in deciding an application u/s. 10 of the C. P. C. is whether the matter in the later suit will be *res judicata* if the prior suit is taken to have been decreed in the manner as prayed in the plaint"

In that case furthermore relying upon the decision reported in AIR 1957 Cal 727 it was *inter alia* held that the joinder of an additional party raised no separate and substantial issue as between the additional party and the plaintiff so as to make S. 10 inapplicable.

8. Mr. Kapur, learned Counsel for the plaintiff, on the other hand contends that the provision of S. 10 of the C. P. C. is not attracted and that the cause of action in the City Civil Court is a different cause of action and/or limited in scope to the extent that the notice of 29th Aug. 1979 alone is challenged as being void, inoperative and as of no effect. He contends there can be no case of *res judicata* in so far as the proceedings in the instant case are concerned as the field of controversy between the parties is more comprehensive in the subsequent suit and the issue which will be required to be decided is a much broader one, namely, as to whether the defendant company is liable to be rejected on any of the grounds set out in the plaint and the material point for determination herein is whether there has been revocation of the grant in favour of the defendants so as to disentitle them from continuing in possession of the suit premises. He points out that the proceedings in the City Civil Court will not effectively and/or completely decide and/or adjudicate upon the wider issue as to whether the defendant mills are liable to be ejected and the earlier suit filed proceeds merely on the basis of the notice being bad. Recovery of possession could thus not be obtained in a suit which is merely a declaratory suit seeking consequential reliefs. He contends that to invoke the provision of S. 10 what is required to be seen is whether the very same question will be in issue between the parties in two courts of concurrent jurisdiction and even if the defence of the company in the earlier suit fails and notice held to

be bad the landlord cannot be debarred from relying upon another cause of action in a subsequent suit for ejectment. Drawing my attention to paras. 12 and 13 of the plaint it is contended that the cause of action of the plaintiff's claim for ejectment is the total repudiation of the agreement dt. 26th Dec. 1975 by the defendant mills, which resulted in the determination of the relationship of grantor and grantee between the parties. It is further contended by the plaintiff that having accepted the said repudiation and/or determination for greater safety the notice of 29th Aug. 1979 was caused to be served on the defendant mills requesting them to deliver up vacant possession of the suit premises on the expiry of Nov. 1979. It is contended that to invoke S. 10 one of the principles applicable is the test of *res judicata*, namely, that the matter in issue must be directly and substantially the same in both the suits, and the question of mesne profits and/or compensation and/or claim for possession not being an issue in the City Civil Court proceedings the same is a material aspect of the matter.

9. Relying upon *Brijlal & Co. v. Madhya Pradesh Electricity Board*, reported in AIR 1975 Cal 69 Mr. Kapur contends that whether the suit is required to be stayed would be on the basis of the decision in the other suit on the principles of actual or constructive *res judicata*, and only if the entire field of controversy between the parties is finally decided and/or determined by the earlier suit, a stay would have been permissible and not otherwise. In that case A filed suit against B claiming refund of price in respect of defective supply of goods under a contract. Subsequently B filed a suit claiming certain amounts under the contracts and also for damages for breach of the contract by A. The claim in the later suit far exceeded the claim in the former and on an application u/s. 10 praying for stay of the suit filed by B, the Court held that the entire controversy between the parties could not be finally determined in the suit instituted first since the field of controversy and claim in the later suit was far more comprehensive although there was some common issue in both the suits.

10. Reliance was also placed on a Division Bench Judgment of this Court reported in AIR 1975 Cal 411. (Shaw

Wallace & Co. v. Bholanath Nandanlal Sherawala) the ratio decidendi of which case is that mere identity of some issues is not sufficient to attract the provisions of S. 10 of the C. P. C. and unless the decision of the suit operates as *res judicata* in the other suit it cannot be said that the matter in issue is directly and substantially the same in both the suits. In other words, the decision in one suit must non-suit the plaintiff in the other suit before it can be said that the matter in issue in both the suits is directly and substantially the same. The Court further viewed that it was well-settled that unless an issue was framed and decided by the Court it could not operate as *res judicata* in a subsequent suit between the same parties or their privies. The Court speaking through Deb, J. was also of the opinion that the expression "principal matter in issue" used by the learned Chief Justice Chakravarti in AIR 1957 Cal 727 and followed by Mitra and S. K. Mukherjee, JJ. in AIR 1972 Cal 128 should be read, understood and construed in consonance with and subject to the following statement of Sri Ashutosh Mookerjee in *Bepin Behary v. Jogendra Chandra*, reported in 24 Cal LJ 514 at p. 515: (AIR 1917 Cal 248 at p. 249), the relevant passage whereof reads:—

"What then is the meaning of the expression 'the matter in issue.' The defendants invite us to hold that the expression is equivalent to 'any of the questions in issue.' The obvious answer is that if that had been the intention of the framers of the section, appropriate words might have been used to bring out such sense. We are of opinion that the expression 'the matter in issue' has reference to the entire subject in controversy between the parties. The object of the section is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue."

11. Reliance was next placed on *Shiva Prasad Agarwal v. Semiconductors Ltd.*, reported in AIR 1976 Cal 358 for the scope and effect of the meaning of matters in issue directly and substantially in both the suits. In that case the question involved in the previously instituted suit was whether there was proper performance of a contract by the defendant-respondent and if not, to what damages if any, the

plaintiff-applicant was entitled, whereas the question involved in a subsequent suit was whether there was wrongful repudiation of the contract by the defendant-applicant and if so whether the plaintiff-respondent was entitled to damages. In that background the Court held that the two questions being separate questions the disposal of one issue would not resolve the need for adjudication of the other issues and thus held that the matters in issue directly and substantially in both the suits were not the same.

12. Mr. Kapoor submits that the decision cited in AIR 1971 Cal 345 relied upon by the applicant is of no assistance inasmuch as that decision merely reiterates the proposition that one of the tests for the applicability of Section 10 is the test of *res judicata*. In any event, it is to be noticed at page 346 in para 9 of the judgment of the said report, the Court took cognisance of the fact that the first Court had pecuniary jurisdiction to try the second suit. The test laid down in para 12 of the judgment is to ascertain whether the matter in the latter suit will be *res judicata* if the prior suit is taken to have been decreed in the manner as prayed for, was not intended by the Court to be a singular test to be infallibly applied to every circumstance and/or set of facts. He contends that the said decision is no authority for the proposition that the prayers in the earlier suit must be so deemed and/or that the presumption is to be conclusive for all purposes. He illustrates and submits that startling prayers cannot be taken cognisance of by a Court of Law in presuming that such a decree will be deemed to have been passed. In any event the decision is an authority for the proposition that the question for the Court is whether the earlier suit disposes of issues in the second suit, Para 13 of the judgment moreover reported at page 347 clearly underlines the principle and object of S. 10 which was to achieve finality in litigation and to prevent multiplicity of proceedings as also a conflict of decisions in respect of the same subject-matter involved in the two different suits filed by and between the same parties, and the decision in *Durga Prasad v. Kanti Chandra Mukherjee* reported in AIR 1935 Cal 1 was quoted with approval. In that case the Division

Bench of this Court at page 7 observed:—

".....The real criterion to apply is this. Supposing the first suit was determined; would the position then be that when the second suit was instituted the matters raised in the second suit were *res judicata* by reason of the decision of the prior suit. In that way, the provisions of S. 10, logically and naturally precede S. 11."

13. Thus, if these tests approved by Dutta, J. in AIR 1971 Cal 345, are followed in the instant case no question of stay will arise as matters in issue are not substantially and directly the same in both suits. Drawing the Court's attention to paras. 12 and 13 of the plaint he contends that the wrongful acts on the part of the defendant amounted to a repudiation of the agreement of Dec. 26, 1975 for the reasons given therein and the notice of 29th Aug. 1979 was a notice issued for greater safety and this fact ought to be considered when considering this application. It is also urged in para 14 of the plaint that no counter-claim could have been made in the City Civil Court suit by reason of the fact that the City Civil Court suit would have no pecuniary jurisdiction to entertain a claim for the money decree sought. Para 8 of the Written Statement in fact does not deny that this is the factual position.

14. So far as valuation for the purpose of Court Fees and jurisdiction is concerned Mr. Kapoor relies upon S. 7 (vi) (b) of the West Bengal Court Fees Act which reads as follows:—

"(vi) for recovery of possession of immovable property : In a suit for recovery of possession of immovable property from—

(a) a trespasser,

(b) a licensee upon revocation or termination of his license,—

(i) Where a license fee is payable by the licensee in respect of the immovable property to which the suit refers according to the amount of license fee of the immovable property payable for the year next before the date of presenting the plaint, or

(ii) Where no such license fee is payable by the licensee."

15. The other obstacle in the way of the applicant in succeeding in this ap-

plication is that construing S. 10 of the C. P. C. it must be held that the earlier Court must have jurisdiction to grant relief claimed in the subsequent suit. He contends that the three essential conditions for the application of S. 10 of the C. P. C. are:—

(i) that the matter in issue in the second suit is directly and substantially in issue in the previously instituted suit; (ii) that the parties in the two suits are the same and claim under the same title, (iii) the Court in which the first suit is instituted is the Court of competent jurisdiction to grant the relief claimed in the subsequently instituted suit. In support of the aforesaid submissions he cites *Kalipada Banerjee v. Charubala Dassi* reported in AIR 1933 Cal 887, *Nanu Singh v. Muni Nath Singh* reported in AIR 1954 Pat 314 and *Bepin Behari v. Jogendra Chandra* reported in 24 Cal LJ 514: AIR 1917 Cal 248.

16. In reply learned Counsel for the applicant contended that the cases cited on behalf of the respondents do not give a correct interpretation of S. 10 of the C. P. C. and it must be held that the term 'relief claimed' provided u/s. 10, contemplates the relevant claims in the first suit, and the question before the Court is whether that Court was competent to grant the reliefs sought. There is thus no scope for urging that the first Court must be competent to grant the reliefs claimed in the subsequent suit and as such there is no basis for urging that both the Courts must necessarily be courts of concurrent jurisdiction. To emphasise this point he relies on S. 11 of the C. P. C. which enacts that no Court shall try any suit or issue in which the matter is directly and substantially in issue in a former suit between the same parties and/or persons claiming under same title. This section embodies the principles of *res judicata* and it is this test which has been made applicable in AIR 1971 Cal 345 at p. 347. Thus, if the prayers made in the City Civil Court plaint are deemed to be decreed the same would be *res judicata* and the plaintiff in this suit must be bound thereby. The judgment reported in AIR 1933 Cal 887 is *obiter* and cannot be of any assistance to the plaintiff, whereas the decision in AIR 1938 Mad 602 merely supports the observations of Mulla and advances no cogent reason for interpreting the relevant section in the manner

done. In fact the third ground of reasoning relied upon by the Court in approving Mulla's commentary namely if the suit is stayed a very important suit in a superior Court would have to be stayed pending the decision of suit in the Small Cause Court should be unacceptable on the face of it.

17. The Divisional Bench decision in AIR 1954 Pat 314, is also criticised on the same ground that no reasons were given and/or authorities relied upon to support the view expressed. My attention was also drawn to the decision in *Chennabasappa Kamal Lal & Sons v. Kissen Chand & Co.*, reported in AIR 1972 Mys 112 which case was relied upon to support the applicant's proposition that the competency of the jurisdiction of the first court to grant reliefs claimed in the second suit is of no consequence. In that case cited, the Court held, *inter alia*, that "even if the first court has no territorial jurisdiction to entertain the second suit, even then S. 10 of the C. P. C. would be applicable."

18. Learned Counsel for the applicant alternatively argues that if this Court holds that the provisions of Section 10 are not attracted in the facts and circumstances of the case, to save multiplicity of proceedings and to avoid a conflict of decisions, reliefs sought should be granted under O 39 and/or S. 151 of C. P. C. invoking the inherent jurisdiction of the Court to pass necessary orders in the interest of justice.

19. On the point of valuation, it is contended, that S. 7 (vi) (b) of the W. B. C. F. Act. 1970, is not applicable for valuation for the purpose of jurisdiction, and S. 8 of the Suits Valuation Act, was the relevant section requiring consideration.

20. Lastly, it is contended that the matters in issue in both the suits are substantially the same and the question to be determined is what is the *jural* relationship between the parties under the agreement relied upon, and the scope of the earlier suit cannot be narrowed down by contending that the second suit with different facts is a more comprehensive suit.

21. Having carefully considered the respective submissions made on behalf of the parties, I am satisfied that the contentions of Mr. Kapur, Learned Counsel for the plaintiff Co., is of more

substance and must be upheld on the following grounds :—

1. The materials on record evidence that the matters in issue and/or the subject-matter of the two suits cannot be said to be identical so as to attract the provisions of S. 10. The subsequent and more comprehensive suit, is sought to be stayed, being one primarily for ejectment, whereunder, inter alia, the relief of possession and mesne profits and/or compensation i.e., a claim for money is made, whereas the earlier suit filed in the City Civil Court is patently a title suit limited in its scope, merely seeking a declaration that the notice of Aug. 29, 1979 terminating the agreement dated Dec. 26, 1975, is invalid, inoperative and void ab initio, and that the defendant company is not entitled to unilaterally terminate and/or revoke the grant made, thereby in favour of the plaintiff mills. The entire field of controversy between the parties, therefore, cannot be held to be substantially the same, as sought to be contended by the Learned Counsel for the defendants.

2. Secondly and the greater hurdle, to my mind, which faces the applicant in obtaining the order for stay u/s. 10 of the C. P. C. is that it cannot be lost sight of that the section which merely enacts a rule of procedure, is to prevent the courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue, as held in *Bepin Behary v. Jogen-dra Chandra*, reported in 24 Cal LJ 514: AIR 1917 Cal 248, where Chief Justice Mookerjee, speaking for the Court, interpreted the expression "matter in issue" occurring in S. 10 of the C. P. C. One of the prerequisites of S. 10 being the court in which the subsequent suit instituted or any other court, whether superior, inferior or co-ordinate, such a court is a court competent to grant relief claimed in the subsequent (previous?) suit and the weight of authority supports this interpretation as is the ratio decidendi of several decisions cited, viz., vide, AIR 1933 Cal 887, AIR 1938 Mad 602 and AIR 1954 Pat 314.

To my mind, S. 10 dealing with Court's jurisdiction to proceed to determine a suit is required to be strictly construed and I see no reason for construing the provisions thereof in the manner as suggested by the Counsel for the applicants. I am fortified in my

views not only by the decisions cited as also by the observation of the learned author Mulla. No decision has been cited or referred to which is contrary to the views expressed. I am, therefore, of the view that S. 10 of the Code has received authoritative interpretation by judicial decisions and/or long way of practice and see no reason to depart therefrom and as such must hold that the meaning "having jurisdiction to grant the relief claimed" occurring in S. 10 of the C. P. C. contemplates the competency of the first court to grant the reliefs claimed in the second suit.

In the instant case, the City Civil Court is undoubtedly incompetent to grant either the decree for possession (such a prayer not being made) and/or a decree for mesne profits as sought herein, as admittedly the subsequent suit valued at Rs. 78,000/- is patently beyond the pecuniary jurisdiction of that Court.

3. Thirdly, the 'matter in issue' contemplated by S. 10 means disputed material questions in the subsequent suit, which are directly and substantially in issue in the previous suit, and matters not in issue cannot be regarded as heard or finally decided so as to operate as res judicata in the subsequent suit. This being so, any decision in the earlier suit cannot non-suit the plaintiff in the subsequent proceedings and the ratio decidendi of the case reported in AIR 1975 Cal 411, is plainly attracted. As observed by the Divisional Bench, it is well-settled that unless an issue is framed and decided by a Court, it cannot operate as res judicata in a subsequent suit between the same parties or their privies.

The other Divisional Bench decision of this Court relied upon *Shiva Prosad Agarwalla v. Semi Conductors Limited* reported in AIR 1976 Cal 358 is also an authority which lends force to Mr. Kapur's contention that disposal and/or adjudication of one issue alone (in the instant case at best notice of Aug. 29, 1979 is invalid and inoperative) would not resolve the other pertinent issues, which would necessarily arise in the subsequent and more comprehensive suit, viz., whether the defendant mills are liable to be ejected on any of the grounds alleged and whether any mesne profits and/or damages are payable by them as claimed by the plaintiff company.

Brijlal v. Madhya Pradesh Electricity Board, reported in AIR 1975 Cal 69, is also an authority for the proposition that the entire controversy between the parties in both the suits is required to be finally determined in the earlier suit before the subsequent suit is liable to be stayed on the basis of the earlier decision, on the principle of actual or constructive res judicata.

4. Lastly, so far as the pecuniary jurisdiction of the Court is concerned, S. 8 of the S. V. Act provides that the value as determinable for the computation of court-fees and the value for the purpose of jurisdiction shall be the same. In my view, in computing Court-fees, substance and form of the plaint must be kept in mind and the question of court-fees payable must necessarily be considered in the light of the allegations made in the plaint and cannot be influenced either by the pleas in the written statement and by the final decision of the suit on the merits. This being so, from a plain reading of the plaint, the status of the defendants appears to be that of a licensee and the question required to be determined in the suit is whether permissive occupation allowed to the defendant has been terminated and/or put to an end, entitling the plaintiff to a decree for ejectment? If this be the basis of the plaint, whether substantiated or not, the present suit has been correctly valued on the basis of the reliefs sought attracting S. 7 (vi) (b) (i) of the W. B. C. F. Act of 1970 and no other basis of valuation has been suggested by the Ld. Counsel for the defendants. The plaintiff, has accordingly valued this claim for the purpose of court-fees and jurisdiction at Rs. 78,000/-, which valuation, to my mind, has not been shown to be an arbitrary assessment capriciously made and thus it is this amount which is required to be taken cognisance of when considering whether the Court's pecuniary jurisdiction is attracted.

22. This Court, furthermore, sees no reason in view of the facts aforesaid, as to why its inherent jurisdiction should be invoked, and indeed there is no cause for so doing. In the premises the court's discretion is not called for to be exercised and neither O. 39, and/or the Courts inherent powers u/s. 151 is required to be invoked. The decision reported in

Monoharlal Chopra v. Seth Hiralal, reported in AIR 1962 SC 527, is an authority for the proposition that temporary injunction under O. 39 can be issued only when the circumstances as prescribed under the said order are made applicable and ordinarily the Court is not to use its inherent powers in the interest of justice but is merely to see whether the circumstances of the case bring it within the prescribed rule, the Civil Courts generally having no inherent jurisdiction in cases not covered by Rr. 1 & 2 of O. 39 to restrain the parties from proceeding before them. The said decision is also an authority for the proposition that the inherent powers of the Court u/s. 151 are to be exercised by the Court only in very exceptional circumstances such as when it is found that the subsequent suit is a vexatious one. It has not been established nor shown that the present proceedings filed are vexatious and/or an abuse of process of the Court and as such no grounds have been made out invoking the Court's inherent jurisdiction.

23. For the aforesaid reason, I hold that the applicants have not satisfied the exigencies of law and the facts of the case do not attract the provisions of S. 10 of the C. P. C. Nor are the applicants entitled to an injunction in terms of prayer (b) under O. 39 and/or S. 151 of the C. P. C.

24. The application is accordingly dismissed with costs.

Application dismissed.

AIR 1982 CALCUTTA 48

SALIL KUMAR ROY CHOWDHURY, J.

M/s. Kalipada Das, Petitioner v. M/s. North Bihar Sugar Mills Ltd. Respondent.

Spl. Suit No. 88 of 1980, D/- 5-1-1981.

Arbitration Act (10 of 1940), S. 20 — Application for filing of arbitration agreement — Maintainability — Applicant also seeking change of named arbitrator in the agreement — Court would not exercise its discretion in favour of applicant and order filing of agreement.

Where the conduct of the party applying for filing of arbitration agreement clearly demonstrated that he had no intention to go to arbitration but to take recourse to suit and apart from this

AY/CY/A437/81/A AJ/SNV

fact he himself alleged bias and unsuitability of the arbitrator appointed under the arbitration agreement and, therefore, asked for variation of the arbitration agreement in his application under S. 20 by changing the name of the arbitrator, the court would not exercise its discretion in favour of the applicant as the conduct of the party constituted sufficient cause for not making an order under S. 20. (Para 6)

Cases Referred: Chronological Paras

AIR 1962 SC 406 4. 6

AIR 1962 Cal 360 4

Sunrhit Deb, for Petitioner; Bimal Chatterjee, for Respondent.

ORDER :— This is the second application under Section 20 of the Arbitration Act for filing the arbitration agreement dated 24th August, 1977.

2. Shortly the facts are that pursuant to an invitation of tender made by the respondent/defendant for construction of a paper plant building at Bagaha, District West Champaran in the State of Bihar the petitioning creditor submitted its tender and work order was placed by the respondent/defendant dated 16th August, 1977 and formal contract was entered into, being dated 24th August 1977, a copy of which is annexed to the petition. The said contract contained an arbitration clause in the following terms :

"In the case of any dispute/differences arise during the course of execution of this contract and/or thereafter relating to this contract, the matter/dispute/difference shall be referred to arbitration of the Architect, namely, Messrs. Kothary & Co., Calcutta, whose decision shall be final and binding on both the parties."

It appears that certain disputes arose between the parties in respect of the said contract and the petitioner-plaintiff alleged breach on the part of the Architect M/s. Kothari & Co., the named arbitrator in the said arbitration clause and the petitioner-plaintiff claimed certain amount and thereafter on or about 11th January, 1979 the petitioner-plaintiff instituted a suit being Title Suit No. 79 of 1979 (Messrs. Kalipada Das v. Messrs. North Bihar Sugar Mills Ltd.) in the City Civil Court inter alia praying for a decree for declaration that the said contract dated 24th August 1977 was still subsisting and also for injunction

and other reliefs. In the said suit the plaintiff made an interlocutory application for temporary injunction against the respondent/defendant from obstructing the petitioner plaintiff from carrying out the work under the said contract which was rejected and from the said order the petitioner plaintiff preferred an appeal on 23rd January 1977 which was also dismissed on 25th February, 1980. On 23rd August, 1980 the petitioner plaintiff made the first application under Section 20 of the Arbitration Act before this court which was dismissed by S. C. Deb, J. on the 12th September, 1980 inter alia on the ground that there is a likelihood of conflicting decisions between the two forums, one being the said suit pending before the City Civil Court and another by the arbitrator if appointed under Section 20 of the Arbitration Act. It appears to me that in the said short judgment of Deb, J. dated 12th September 1980 his lordship held that there was sufficient cause not to make an order under Section 20 of the Arbitration Act. Subsequently the petitioner plaintiff made an application under Section 23 (1) (3) of the Code of Civil Procedure before the City Civil Court for withdrawing the said title suit unconditionally and for an order granting the petitioner leave and/or permission to institute fresh suit in respect of the subject-matter of the title suit No. 79 of 1979 in the appropriate court. The City Civil Court, 12th Bench by an order dt. 26th Sept. 80 made an order under Sec. 23, Rule 1, sub-rule (3) after contest and the petitioner plaintiff was permitted to sue afresh on the said subject-matter or cause of action if not otherwise barred and payment of Rs. 200/- was made a condition precedent to be made by the petitioner plaintiff to the respondent/defendant. Thereafter the present application under Section 20 was presented on the 1st October, 1980 and after directions were given for filing affidavits the matter came up for hearing.

3. Mr. Sunrhit Deb, appearing for the plaintiff-petitioner submitted that all the conditions under S. (20?) subsection (1) are satisfied and the respondent/defendant has failed to show sufficient cause why the arbitration agreement should not be filed and order of reference should be made as prayed for in the present petition. He also sub-

mitted that the previous Section 20 application was dismissed by Deb, J. only on the ground of possibility of conflicting decisions between City Civil Court and the arbitrator to be appointed under the Arbitration Act and such a situation should not be allowed to happen and, therefore, the application was dismissed. Mr. Deb submitted that thereafter the suit having been withdrawn under Order 23, R. 3, sub-rule (3) of the Civil Procedure Code the said suit is no longer pending and liberty was given to file a fresh suit on the same subject-matter and, therefore, the petitioner has instituted the present application under Section 20 which is to be treated as a suit under Section 20, sub-section (2) of the Arbitration Act. Therefore, all the conditions being satisfied an order should be made as prayed for.

4. Mr. Bimal Chatterjee, appearing for the respondent/defendant, submitted that the petitioner-plaintiff having instituted a suit before the City Civil Court has indicated its intention to abandon the arbitration agreement and take recourse to ordinary course of law by filing the said suit. Therefore, that constituted a sufficient cause why the arbitration agreement should not be filed. He drew my attention to the order of the City Civil Court, a certified copy of which was produced in court being Order No. 39 dated 26th September, 1980 in the said Title Suit No. 79 of 1979 (M/s. Kalipada Das v. North Bihar Sugar Mills Ltd.) and submitted that leave was granted only for the purpose of filing a fresh suit on the same subject-matter and not for reference to arbitration by making an application under Section 20 of the Arbitration Act. Therefore, the petitioner-plaintiff is estopped from making this application under Section 20 and that constitutes sufficient cause for not granting the order as prayed for. He referred to the well known principle that the court is to exercise its discretion in making an order under Section 20 and the principle under Sections 20 and 34 of the Arbitration Act as to the exercise of court's discretion is same. Reference may be made to the decision of Gannon Dunkerley & Co., AIR 1962 Cal 360. Mr. Chatterjee also referred to the principle on which the discretion of the court is to be exercised and what is meant by sufficient cause under Section 20, sub-section (4) of the Arbitration Act as laid

down in the Supreme Court decision in Abdul Kader's case reported in AIR 1962 SC 406. Therefore, Mr. Chatterjee submitted that the present application should be dismissed as sufficient cause has been shown by the respondent/defendant as to why the order should not be made for filing the arbitration agreement. Mr. Chatterjee also pointed out that in the arbitration agreement the reference is made to named arbitrator being Kothari & Co., which is a firm of architect and well known engineers and not a tribunal of arbitration or a person who can be appointed as arbitrator. The said contention is not absolutely without substance as it may be contended that a firm of architect cannot be appointed as an arbitrator as it is not a tribunal of arbitration which generally takes institutional arbitrations. For the purpose of the present application it is not necessary for me to make any comment on the said submission and express any final opinion on this aspect of the matter.

5. Considering the matter very carefully it appears to me that the petitioner-plaintiff after filing the said Title Suit No. 79 of 1979 in the City Civil Court, in which he made successive interlocutory application for injunction and preferred an appeal therefrom and also failed in the appeal then came up before this court in a previous Section 20 application filed the very same arbitration agreement and order of reference which was dismissed by S. C. Deb, J. on the ground of the pendency of the suit before the City Civil Court and possibility of conflicting decisions between the court and the arbitrator. In the present petition it appears that the petitioner-plaintiff has made specific allegations against the said appointed arbitrator M/s. Kothari & Co. being biased and unsuitable for being appointed as arbitrator. The said averments are in paragraphs 25 and 26 of the petition. That perhaps, in my view, constitute sufficient cause why the arbitration agreement should not be filed as the petitioner-plaintiff is really asking to amend the arbitration agreement by replacing the arbitrator by another, other than the appointed arbitrator. Prayer (c) of the petition itself shows that the petitioner is asking for appointment of another arbitrator in place of Kothari & Co., the appointed arbitrator in the said agreement. In my view the

said contention of the petitioner-plaintiff and the prayer in the petition make it quite clear that the petitioner-plaintiff is asking for varying the arbitration agreement between the parties by a sole arbitrator to be appointed by the court. In my view that will amount to substitution of the original arbitration agreement by the court. Section 20 is a machinery section by which the arbitration agreement is filed and reference is made to the appointed arbitrator in terms of the arbitration agreement. It is an admitted position that there is a named arbitrator, whether a firm of engineers and architect can be appointed as arbitrator is a different question but assuming such an appointment can be made then the petitioner-plaintiff is asking for appointment of another arbitrator than the appointed arbitrator which amounts to varying the original arbitration agreement which is sought to be filed by the petitioner-plaintiff in this application. Therefore, on the well-settled principle that under Section 20 of the Arbitration Act the court has no power to substitute one agreement by another agreement at the request of one of the parties. It appears to me that this also constitutes a sufficient cause why the arbitration agreement should not be filed under Section 20 of the Arbitration Act. The petitioner himself has made specific allegations of bias and unsuitability against the arbitrator and, therefore, the question of filing the arbitration agreement as such cannot arise unless it is amended by replacing the appointed arbitrator by the parties under the arbitration agreement by another arbitrator. Mr. Deb appearing for the petitioner-plaintiff submitted that on instruction from his client he is withdrawing the allegations against the arbitrator made in the petition so that the order can be made for filing the arbitration agreement as such and order of reference may be made to the arbitrator appointed under the arbitration agreement. In my view, it is too late and cannot be encouraged by court as from the conduct of the petitioner-plaintiff all through first instituting a suit before the City Civil Court in respect of the said contract, making interlocutory applications and after the same failed, preferring an appeal which also became unsuccessful then made an application under Section 20 which was

also dismissed due to the pendency of the City Civil Court suit at that time, as hereinbefore stated; thereafter withdrawing the City Civil Court suit with liberty to file a fresh suit on the same subject-matter and is now coming forward with another application under Section 20 is something which the court should not encourage and it amounts to estoppel by the procedure and, in my view, Mr. Chatterjee is right in his submission that by the conduct of the petitioner-plaintiff it has demonstrated its intention to abandon the arbitration agreement and take recourse to suit and that constitute a sufficient cause.

6. After carefully considering the facts of this case and the petitioners' own averments in paragraphs 23, 24, 25 and 26 I am satisfied that there is sufficient cause why the arbitration agreement should not be filed and prayer asked for substituting the appointed arbitrator by another arbitrator at the instance of the petitioner-plaintiff in this application is not permissible under Section 20 of the Arbitration Act and court has no such power. Therefore, in my view, in the peculiar facts of this case which constitute sufficient cause being shown by the respondent/defendant why an order under Section 20 should not be made. I have already referred to the Supreme Court decision in Abdul Kader's case reported in AIR 1962 SC 406 where the Supreme Court has observed that the power of the court to make an order under Section 20 is a matter of discretion (at p. 410) :

"The words of this sub-section leave a wide discretion in the court to consider whether an order for filing the agreement should be made and a reference made accordingly. It is neither necessary nor desirable to lay down in general terms what would be sufficient cause which would entitle the court to refuse to make an order of reference. The court will have to decide on the facts of each case whether sufficient cause has been made out for not ordering the agreement to be filed and not making the order of reference."

Therefore, it is quite clear that the court has to exercise its discretion in making an order under Section 20 taking into consideration all the facts and circumstances of a particular case in its proper perspective and come to a conclusion whether an order under Section 20 should be made in the facts

of a particular case. As I have analysed the facts of this case, from the conduct of the petitioners it has been demonstrated clearly that it has no intention to go to arbitration but filed a suit before the ordinary court of law, as he has done in this case, and withdraw the suit with liberty to file a fresh suit on the same subject-matter. Apart from the said fact the petitioner himself has alleged bias and unsuitability of the arbitrator appointed under the arbitration agreement and, therefore, asking for variation of the arbitration agreement under Section 20 of the Arbitration Act and his prayer (c) in the petition makes the said intention of the petitioner to vary the arbitration agreement by changing the arbitrator unilaterally by this court which the court has no power. Therefore, in my view, this is a fit case where the court should not exercise its discretion in favour of making an order for filing the arbitration agreement as the arbitration agreement, as it stands now, is not asked for by the petitioner to be filed but he is asking for a different arbitration agreement by changing the name of the arbitrator to be filed which the court has no power to do. As a result there is some force in the contention of Mr. Chatterjee that a firm of architect and engineers being Kothari & Co. cannot be appointed as an arbitrator as it is not a person or an institutional arbitrator what is known as tribunal of arbitration and as such there is some force in that contention and constitute a sufficient cause for not making an order under Section 20 of the Arbitration Act.

7. In the result, there will not be an order under Section 20 of the Arbitration Act and the application is dismissed with costs.

8. This order will not prejudice the rights of the petitioner-plaintiff to proceed according to law, if so advised.

Application dismissed.

AIR 1982 CALCUTTA 52

BANERJEE AND B. N. MAITRA, JJ.

Lalit Mohan Mondal (Defendant).
Appellant v. Profulla Kumar Mondal (Plaintiff) (Deceased through his L. Rs.), Respondent.

A. F. O. D. No. 382 of 1976. D/- 11-12-1981.

LY/LY/F909/81/SMA/SNV

Succession Act (39 of 1925), S. 84 — Construction of Will — Testator stating in his Will that his wife would get the property absolutely with full right of alienation by way of gift, sale etc. — Testator must be deemed to have intended to confer absolute estate on her and not a mere life estate — Subsequent clauses would be of no effect — Some of the sons named as beneficiaries in the will — Will not probated by wife — Effect — Suit instituted by sons for Letters of Administration — Maintainability. (Hindu Succession Act (1956), S. 14 (1)) (Para 10)

Law is that in order to gather the testator's intention the will has to be read as a whole.

Where the testator stated that his wife would get the property absolutely with full right of alienation by way of gift, sale etc. at her pleasure, the use of those words conferring unfettered power of transfer showed that the testator's intention was to confer an absolute estate on her and consequently, the subsequent clauses that in case she dies leaving any portion of those properties, the testator's third son, fourth son and youngest son or in the absence of any of them, his or their heirs will receive the same would be of no effect. From a construction of the contents of the entire will it could be said that the testator intended to confer an absolute estate with full power of alienation to his wife and he did not intend to confer a mere life estate on her. Hence, when his wife, who was the executrix under the will, applied for a probate after his death and then withdrew the suit according to the provisions of S. 14 (1) of Hindu Succession Act, she would get an absolute estate. Therefore, after her death, all the children of the testator and his wife and not some of them who were the beneficiaries under the will would get the testator's property. Further, the suit instituted by the sons who were beneficiaries under the will for grant of Letters of Administration would not be maintainable as they would have no locus standi to file the suit. Case law discussed. (Paras 11 and 12)

Cases Referred : Chronological Paras

AIR 1979 SC 1345 : (1981) 3 SCC 586 :
(1979) 2 SCJ 385 9

AIR 1976 SC 794 : (1976) 1 SCC 630 7, 9

AIR 1964 SC 1323 : 1964 SCD 47 7, 9

AIR 1914 PC 18 : (1915) 42 Ind App 71 :
(1915) 13 All LJ 217 4. 8

Ranjit Kumar Banerjee and Naresh Nath Banerjee, for Appellant; S. N. Ganguly, Kumud Ranjan Purkait and Parimal Das, for Respondent.

B. N. MAITRA, J.:— The plaintiffs instituted the suit for the grant of Letters of Administration. They alleged that on the 21st Nov. 1955, their father, Nagendra Nath Mondal, executed a will. On the 18th Dec. 1967, he expired. The executrix under the will was his wife, Aiswarjyamoyee Dasi. She instituted Original Suit No. 13 of 1968 for grant of a probate in her favour. But she was prevailed upon by the interested parties to withdraw that suit. The plaintiffs, who are three of his sons, are the beneficiaries under the will.

2. Defendants Nos. 1 and 2, who are Nagen's sons, filed a written statement. It has been alleged, *inter alia*, that the suit is not maintainable and the plaintiffs have no locus standi to bring it. Nagendra Nath Mondal did not execute any such will. It is not at all a genuine document. He had been suffering from illness from before the execution of the alleged will. There was no reason to deprive his two sons (contesting defendants) of his property. Moreover, Nagendra Nath Mondal filed Title Suit No. 714 of 1965 in the 3rd Munsif's Court, Sealdah. After his death, all his legal heirs and representatives including the defendants were duly substituted in his place.

3. The learned Additional District Judge accepted the plaintiff's version, decreed the suit and issued Letters of Administration with a copy of the will annexed. Hence this appeal.

4. It has been argued on behalf of the appellants that the suit is not maintainable. Reference has been made to Jarman on Wills, 7th Edition, Vol. III, page 2080, to show that it has become an established rule, that where the bequest is simply to 'A', and in case of his death, or if he dies, to 'B', 'A' surviving the testator takes it absolutely. Reference has also been made to Williams on Executors and Administrators, 14th Edition, Vol. II, paragraph 1022, at page 665, to show that if there is an immediate absolute grant, to which is annexed a condition, no matter how it is worded, to the effect that if the legatee dies, then the property shall go over

to another, this condition will be held to refer to the death of the legatee in the testator's lifetime, unless there appears in the will an intention to the contrary. The case of Jehangir Dadabhoi v. Kaikhusuru Kavasha in L. R., (1915) 42 Ind App 71 at page 78 : (AIR 1914 PC 18 at p. 20) has been cited to show, how after the testator's death, his estate has to be made over.

5. The learned Advocate appearing on behalf of the respondents has stated that the suit was rightly decreed. Reference has been made to Ss. 87 and 88 of the Indian Succession Act. S. 87 shows that the testator's intention shall not be set aside because it cannot take effect to the full extent. S. 88 provides for a contingency where two clauses of a will are incongruous so that they cannot possibly stand together and in that event, the last one shall prevail. It has been stated that the will in question clearly shows that no absolute interest was given by Nagendra Nath Mondal to his wife, Aiswarjyamoyee Dasi. On the contrary, the entire reading of the will shows that a life interest was given to her because it has been stated that in case she dies leaving any portion of those properties, the testator's third son, Amulya Kumar Mondal, fourth son, Sankar Hari Mondal, and youngest son, Rabindra Nath Mondal, or in the absence of any of them, his or their heirs will receive the same. These clauses are inconsistent. So, the last one will prevail and the Court will find that the testator's intention was to confer a mere life estate on her.

6. Reference has also been made for the respondents to Theobald on the Law of Wills, 10th Edition, page 303, to show that the fact that the will contains other devises with words of limitation will not prevent a devise without such words from passing the fee. A devise without words of limitation, followed by a devise of the same property to another person with words of limitation, will give the first devisee a life interest only. In this case, there are such limitations and the court will hold that a mere life interest was given by Nagendra Nath Mondal to his wife.

7. The case of Ramachandra v. H. Brite in AIR 1964 SC 1323 has been referred to for them to show that it is one of the cardinal principles of construction of wills that if it is legally possible, effect should be given to every

disposition contained in the will unless the law prevents effect being given to it. Lastly, the case of *Navneet Lal v. Gokul* in AIR 1976 SC 794 at p. 797 has been referred to show that in construing the language of the will, the court is entitled to put itself in the testator's armchair and is bound to bear in mind also other matters than merely the words used. The court must find out the intention of the testator by reference to the words which have been actually employed. The true intention has to be gathered not by attaching importance to isolated expressions, but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory.

8. In the case of *Jehangir v. Kai-khusru* (AIR 1914 PC 18) (supra) the will laid down that the testator's estate would be divided equally between his two sons, Pallonji and Jehangirji, and the latter would manage the estate. If Pallonji gets a son, half of the estate will go to him on his attaining full age. If he has no son, Jehangirji will give away his son as Pallonji's adopted son. The testator died in 1866 and Pallonji in 1897 intestate and without any son. It was alleged that in 1866, Jehangirji gave his son to Pallonji. Jehangirji's son claimed to succeed under the will to Pallonji's half estate. It was held that such claim could not be allowed and the will vested a moiety of the estate in Pallonji absolutely upon the testator's death.

Now, the broad fact is that Nagendra's wife did not die during his lifetime. He instituted Title Suit No. 714 of 1965 in the 3rd Munsif's Court at Sealdah. During the pendency of that suit, he breathed his last and all his heirs and legal representatives were duly substituted. Then his widow filed Original Suit No. 13 of 1968 for grant of a probate in her favour and withdrew the same. Let us now consider the provisions of the entire will with a view to gathering the testator's intention and for arriving at a finding whether an absolute estate or a mere life estate was conferred on Aiswarjyamoyee Dasi. That will, Ext. 1, shows, "I give away thereafter to my lawfully married wife, Srimati Aiswarjyamoyee Dasi, all those that will remain after meeting the expenses of my funeral rites absolutely with the rights of gift, sale etc. user at her pleasure. But if she dies leaving

anything of those properties, my third son, Sriman Amulya Kumar Mondal, and the fourth and the youngest son, Sriman Sankar Hari Mondal and Sriman Rabindra Nath Mondal, or in the absence of any of them, his or their legal heirs will receive the property."

9. A proper reading of the entire will, Ext. 1, clearly shows that there are no such limitations, as envisaged by Theobald on his treatise on the Law of Wills at page 303. The cases of *Ramachandra v. H. Brite* (AIR 1964 SC 1323) (supra) and of *Navneet Lal v. Gokul* (AIR 1976 SC 794) (supra) do not lay down any contrary proposition. Moreover, the case of *Navneet Lal v. Gokul* was considered by a Bench of three Judges presided over by Chandrachud, C. J., in the latest Supreme Court case of *Gopala Menan v. Sivaraman Nair* in (1981) 3 SCC 586 : (AIR 1979 SC 1345). There also the testator used the expression that his property "shall vest in my wife.....with power of alienation," as in the present case. It has been stated in that case that an unrestricted power of disposal is necessary to make it an absolute estate for the wife and not a limited interest. In case of conflict between the provisions of a will, the conflicting clauses will have to be reconciled. The words "property shall vest in my wife.....with power of alienation" suggest that the testator intended to confer on her an absolute estate and not a limited interest in the property.

10. Law is that in order to gather the testator's intention the will has to be read as a whole.

11. It has already been stated that the testator stated that Aiswarjyamoyee would get the property absolutely with full right of alienation by way of gift, sale etc. at her pleasure. The use of those words conferring unfettered power of transfer show that the testator's intention was to confer an absolute estate on her and consequently, the subsequent clauses are of no effect whatsoever. From a construction of the contents of the entire will, we hold that Nagendra Nath Mondal intended to confer an absolute estate with full power of alienation to his wife, Aiswarjyamoyee Dasi, and he did not intend to confer a mere life estate on her.

12. She applied for a probate and then withdrew the suit. She did not execute any will. According to the provi-

sions of S. 14 (1) of the Hindu Succession Act, she got an absolute estate. After her death, all the children of Nagendra Nath and Aiswarjyamoyee Dasi will get that property, and we hold accordingly. The submissions advanced on behalf of the respondents cannot be accepted. We, therefore, find that the suit instituted by their three sons for grant of Letters of Administration is not maintainable in law and they have no locus standi to file the suit.

13. The appeal is allowed. The judgment and decree appealed against be set aside and the suit dismissed without any order as to costs.

BANERJEE, J:— I agree.

Appeal allowed.

AIR 1982 CALCUTTA 55

SUDHINDRA MOHAN GUHA, J.

Asit Kumar Dey, Petitioner v. Bishudhananda Chaudhury and another, Opposite parties.

C. O. No. 3240 of 1981, D/- 8-12-1981.

West Bengal Premises Tenancy Act (12 of 1956), S. 17 (1), (2), (3), and (4) — Suit for ejectment on ground of default in payment of rent — Application for permission to deposit arrear of rent earlier deposited with Rent Controller — Application cannot be refused by Court on technical ground of non-mention of section therein.

Where in a suit for ejectment on the ground of default in payment of rent for certain months, an application with a prayer for permission to deposit the arrear of rent which had been earlier deposited with the Rent Controller was filed by the tenant without mentioning any section of the Act under which it was filed, the Court could not refuse such application on the technical ground of non-mention of the section and it would not be proper for the Court to dispose of the application under Section 17 (3) and S. 17 (4) without disposing of the said application which was pending before it. ILR (1953) 2 Cal 385 Rel. on. (Para 10)

In the administration of justice, the Court will not refuse any application which on the merits the Court can grant, simply because the application asked the Court to exercise its admitted powers under a wrong section. The

judicial procedure has been framed for the furtherance of justice and not to defeat it and the Court cannot refuse to act in aid of justice merely on technical grounds. (Para 10)

Cases Referred : Chronological Paras
(1977) 2 Cal LJ 508 : 79 Cal WN 1017

9

(1975) 79 Cal WN 112 9

1975 Cal HN 342 9

(1971) 75 Cal WN 372 : 1971 Ren CR 449 9

ILR (1953) 2 Cal 385 10

Kalyanbrata Roy, for Petitioner; Saktinath Mukherjee, for Opposite parties.

ORDER :— The petitioner tenant has challenged the order dated 11-8-1981 whereby Sri T. K. Paladhi, Munsif, 3rd Court, Burdwan rejected the application under S. 17 (4) of the West Bengal Premises Tenancy Act.

2. The petitioner, a practising physician was a tenant since the time of the predecessor of the opposite parties in respect of suit premises, used as chamber and Medicine shop at Memary, Dist. Burdwan at a rental of Rs. 40/- per month according to Bengali calendar. A suit for ejectment being Title Suit No. 206 of 1976 in the 3rd Court of Munsif was filed against him on ground of default in payment of rent for the month of Chaitra 1382 B. S. and Baisakh 1333 B. S.

3. On receipt of notice to quit on 4th June, 1976 the petitioner remitted the rent for those two months on 5th June, 1976 which was however refused. On June 18, 1976 the petitioner deposited the sum of Rs. 120.50 P. as rent for Chaitra 1382 B. S. and Baisakh and Jaistha, 1383 B. S. with the Rent Controller. The summons of the suit was served on 10-11-1976. On 22-12-1976 the petitioner filed an application with a prayer for permission to deposit the arrear of rent which had been earlier deposited with the Rent Controller. No order, however, was passed by the Court disposing that application.

4. On an application under S. 17 (3) of the Act the defence against ejectment was struck out on a finding that as the first challan with Rent Controller included payment of rent for three months, namely, Chaitra 1382 B. S. to Jaistha 1383 B. S. the same was not valid, having not been deposited month by month.

5. Then the petitioner filed an application for review of the order, which was rejected on 6-10-1980 on the ground of limitation.

6. Last of all the petitioner came with the application under S. 17 (4) of the Act. By the impugned order this application was rejected. It has been observed that the petition dated 22-12-1976 in support whereof there was no affidavit could not be treated as one under S. 17 (2) of the Act, and the petitioner having failed to apply under Sections 17 (1) and 17 (2) of the Act cannot get protection under S. 17 (4) of the Act.

7. Mr. Kalyanbrata Roy, the learned Advocate for the petitioner argues that the learned Munsif failed to appreciate the scope of the application dated 22-12-1976, which could be treated as one under Ss. 17 (1) and 17 (2) of the Act. It is also contended that the learned Munsif committed an error in allowing the application under S. 17 (3) and rejecting the petitioner's application under S. 17 (4) of the Act without disposing of the application dated 22-12-1976 which is still pending.

8. Mr. Saktinath Mukherjee, the learned Advocate for the opposite parties contends that the learned Munsif was perfectly justified in not taking notice of the application dated 22-12-76 as it had been filed beyond the prescribed period of 30 days.

9. With reference to the decision in the case of Mahendra Krishna Nundy v. Smt. Bela Debi, reported in 1975 Cal HN 342 Mr. Mukherjee argues that sub-sec. (1) of S. 17 does not contemplate filing of any application. S. 5 of the Limitation Act is not applicable in the matter of deposit to be made in terms of sub-sec. (1) of S. 17. But the application date 22-12-1976 does not mention any section under which it was filed. Next it is contended by Mr. Mukherjee that this application cannot also be considered as one under S. 17 (2) as no deposit of rent in arrear was made along with the application. Reliance is made on the decision of a Division Bench of this court in the case of Gunwantrao T. Kamdar v. Satyanarayan Jhunjhunwalla, reported in (1971) 75 Cal WN 372. This was also followed by another Division Bench in the case of Hindusthan Industrial Co. v. Chandi Prasad More, reported in (1977) 2 Cal

LJ 508. Lastly, it is argued by Mr. Mukherjee that to treat this application as one under S. 17 (2) of the Act is misconceived. The decision of a Division Bench of this Court in the case of Jitendra Chandra Dey v. Tarak Nath Mullick, (1975) 79 Cal WN 112 is referred to. But this is not a case of conversion of an application under Section 17 (1) of the Act into one under S. 17 (2) of the Act. Moreover an order is expected to say whether the application is maintainable or not.

10. It has already been pointed out that the application dated 22-12-1976 would not show under which Sections of the Act it was filed. Certain facts of the case require mention in this connection. The suit was filed on the ground of default in payment of rent for two months. At the time of the hearing of the application under S. 17 (3) of the Act rent for the period in question was in deposit with the Rent Controller but such deposit was not valid. The application dated 22-12-1976 was drafted and filed in a mofussil Court. It did not state under what sections of the Act the application was filed. It is the established principle of law that the Court should not be too much concerned as to the form, but look into the substance thereof. In the case of Trailakhya Nath Maity v. Bimala Sundari Dasi, reported in ILR. (1953) 2 Cal 385 it is held that in the administration of justice, the court will not refuse any application which on the merits the court can grant, simply because the applicant asked the court to exercise its admitted powers under a wrong section. The judicial procedure has been framed for the furtherance of justice and not to defeat it and the court cannot refuse to act in aid of justice merely on technical grounds. In the instant case there was no error but omission in mentioning the sections under which the relief was sought for. To my mind the same principle will apply. It cannot be conceived that the Court will not take notice of an application on such technical ground. The application dated 22-12-1976 remains undisposed of or is still pending. It was not proper for the learned Munsif to dispose of application under Ss. 17 (3) and 17 (4) of the Act without disposing of the said application. That application is first to be disposed of in accordance with law.

11. The application is thus, allowed without costs. The orders under Sections 17 (3) and 17 (4) of the Act are set aside.

Application allowed.

AIR 1982 CALCUTTA 57

SALIL KUMAR ROY CHOWDHURY, J.

Bank of India, Petitioner v. Andhra Steel Corporation Ltd. and others, Respondents.

Suit No. 295 of 1977, D/- 21-8-1981.

Civil P. C. (5 of 1908), O. 23, R. 3 — Locus standi — Shareholders of company have no locus standi to intervene in suit of parties representing company.

The shareholders of company have no locus standi to present application and intervene in the suit or the application for putting in the terms of settlement under O. 23, R. 3 made in the suit by the plaintiff Bank and other parties representing the company who signed the terms of settlement. Case law discussed. (Paras 9, 10)

The question of right to intervene by a shareholder is a pure question of law as that would depend on the status, position and power of a shareholder in a public limited company. (Para 10)

Cases Referred : Chronological Paras

(1974) 78 Cal WN 1 : ILR (1974) 2 Cal 1 7

AIR 1969 Cal 424 : 40 Com Cas 138 5

AIR 1955 SC 74 : 1955 SCJ 68 3. 10

AIR 1955 Mad 28 : (1955) 1 Mad LJ 58 6

AIR 1951 SC 41 : 1951 SCJ 29 4

AIR 1941 Cal 174 : 72 Cal LJ 458 6

(1924) 8 Tax Cas 704 4

1904 AC 120 : 89 LT 678 : 73 LJ PC

22. Natal Land v. Pavline Colliery 7

ORDER :— This is an application by one Purna Investment Limited, a company incorporated under the Companies Act, 1956, and having its Registered Office at No. 33A, Chowringhee Road, Calcutta, alleged to be holding 956 Equity Shares of Rs. 10/- each fully paid up in the Capital of Andhra Steel Corporation Ltd.

2. The petition is signed and verified by Promod Kumar Mittal, a son of Mohan Lal Mittal, the Defendant No. 3 in the suit. The suit was filed by the Bank in 1977 inter alia for a decree for Rs. 4,43,41,209.59 P. and also for a de-

claration of charge under an agreement on hypothecation in respect of the goods mentioned in the Deed of Hypothecation, the sale of the said hypothecated goods, appointment of Receiver etc. In the said suit an interlocutory application was made and Receiver was appointed over the Undertaking the Defendant No. 1 Company, Andhra Steel Corporation Ltd. of its Dunkuni Unit. The plaintiff bank also filed a winding up application in 1978 in this Court for realisation of its dues which was not the subject matter of the present suit. Both the suit and the winding up petition by the plaintiff bank are pending. In 1977 the Defendant No. 3, Mohan Lal Mittal instituted a proceeding under Ss. 397-98 of the Companies Act, 1956, relating to the management of affairs of the said Defendant No. 1 Company, Andhra Steel Corporation Limited, and various interim orders were made from time to time in the said proceeding. It is alleged by the applicant, Purna Investment Limited, through the said Promod Kumar Mittal, the son of Mohan Lal Mittal, that the Defendant No. 1 company, Andhra Steel Corporation Limited, did not file its Balance Sheets after the year ending 31st March, 1975. As such, the petitioners are unaware of the real state of affairs of the company. By a consent order passed in the Sections 397-98 application on the 25th May, 1977, an Extraordinary General Meeting of the Defendant No. 1 Co., Andhra Steel Corporation Limited, was directed to be convened and held for the purpose of election of Directors. The said Extraordinary General Meeting was eventually held on the 12th July, 1977. In the said meeting the petitioners, Purna Investment Limited and various other members of the said Andhra Steel Corporation Limited, participated in the voting. At the said meeting those persons who were representatives of various Financial Institutions including the plaintiff bank were unanimously elected as Directors of the Defendant No. 1 Co. Besides the said six persons, four other persons after hot contest were alleged to be elected on the basis of the report of the Chairman of the meeting appointed by this Court by the said consent order dated 25th May, 1977. The said report of the Chairman has been challenged by Mohan Lal Mittal group in the pending Sections 397-98 application pursuant to a liberty given by the Appeal Court order

dated 23rd Apr. 1979. It is alleged that the said four persons belong to the other camp of Mohan Lal Mittal and were elected by a slender majority of votes controlled by the alleged delinquent management of the said Andhra Steel Corporation Limited. It is alleged that on the 22nd May, 1980, Purna Investment Ltd. came to know from M/s. M. G. Poddar, Advocate-on-Record of Mohan Lal Mittal, that the plaintiff bank was trying to put certain terms of settlement in the suit as also in the Extraordinary Suit No.....of 1980 (Dena Bank v. Andhra Steel Corporation Limited) and in the pending winding up proceedings, and the petitioners are alleged to have succeeded in obtaining a copy of the proposed terms of settlement forwarded by the plaintiff bank's Advocate-on-Record inter alia to the said M/s. M. G. Poddar by its covering letter dated 21st May, 1980, and the alleged two copies of the said terms of settlement are annexed to the petition. It is alleged that on the 23rd May, 1980, when the parties to the suit tried to put in certain terms of settlement (sic) intervened through its Counsel and made submissions successfully opposing such terms being put in wherein it is alleged that the Court was pleased to direct the plaintiff bank to make a formal application for the purpose of recording the terms of settlement in view of the serious controversies involved in this matter and the dispute raised to such terms being put in inter alia by the said petitioner, Purna Investment Limited, and also by the Defendant No. 3, Mohan Lal Mittal. Pursuant to such leave the present application was made by the petitioner who state that they are members of the Defendant No. 1 company and as such, vitally interested in the management of its affairs which have been carried on in a manner most detrimental to the interest of the defendant No. 1 company and its minority shareholders including the petitioner. It is stated in the petition that if the terms of settlement are permitted to be put in it would most prejudicially affect the interest of the defendant No. 1 company and the interest of the minority shareholders including the said petitioner, Purna Investment Limited. In para 9 of the petition some of the alleged infirmities of the formal application were put in the terms of settlement and to pass a decree on the compromise

inter alia (1) the proposed terms of settlement are alleged to have been approved by the Managing Committee of the said Defendant No. 1 Company, Andhra Steel Corporation Limited, constituted by an order of the Appeal Court dated 26th July 1977. The said order of the Appellate Court is annexure 'B' to the petition and are at pages 44, 45 and 48. By the said order of the Appeal Court the Board of Directors was restrained from acting as a Board but they were deemed to be constituting a Committee of Management. It was submitted that the said Committee of Management has no power to approve the proposed terms of settlement by which it is alleged that substantial part of the Undertaking of the Defendant No. 1 Company being the said Dunkuni Unit was proposed to be sold virtually as a gift to one Grand Steel Alloy Limited which is alleged to be a Concern of one Shiv Kumar Agarwalla, the brother-in-law of Ratan Kumar Mittal, one of the brothers of Mohan Lal Mittal, who is alleged to be in the camp of I. S. Mittal, the defendant No. 4 in this suit who is alleged to be responsible for the mismanagement of the Defendant No. 1 company. The said Grand Steel Alloy Limited has been recently incorporated on or about 11th Sept. 1979 having its Registered Office at No. 7 Kiran Sankar Roy Road, Calcutta-1, with a nominal capital of Rs. 7,000/-, (2) it is alleged that the proposed term of settlement is the sale of the Dunkuni Unit of the Defendant No. 1 company although lying closed since last few years, it is a very valuable asset and forms part of the substantial Undertaking of the Defendant No. 1 company and, therefore, it is hit by Sec. 293 (1) (a) of the Companies Act, 1956, which requires consent of the General Body of members of the Defendant No. 1 company and no such General Meeting was held or even proposed to be convened and, therefore, the terms of compromise are illegal, (3) the Defendant No. 1 Company through its said Committee of Management has purported to enter into an agreement with the plaintiff bank for sale of the said Dunkuni Unit to the said Grand Steel Alloy Ltd. on the basis of Cash Purchase, Money to be advanced by the plaintiff bank and it is alleged that such agreement is proposed to be recorded by putting in the terms of settlement. It is submitted that such

agreement is invalid, illegal, inoperative and ineffectual by reason of singular absence of all powers of the Committee of Management to enter into such agreement. (4) that in the plaint leave under O. 2 R. 2 has been obtained in the suit regarding the plaintiff bank's alleged right under equitable mortgage of immovable properties of the Defendant No. 1 company situated at Dunkuni and Bangalore outside the jurisdiction of this Court. Such immovable properties are not the subject matter of the above mentioned suit. The Defendant No. 1 company under the proposed terms of settlement is proposing to dispose of the Dunkuni Unit and is further proposing to affect the immovable properties of the Defendant No. 1 company at Bangalore by proposing to create a charge over such immovable properties at Bangalore as security for payment of the part of the decretal dues of the plaintiff bank under the proposed terms. Therefore, this Court has no jurisdiction to record such terms of settlement as it purports to affect immovable properties outside the jurisdiction of this Court. (5) the proposal to dispose of the Dunkuni Unit of the Defendant No. 1 company by private treaty without public auction is unfair, improper and in any event would not enure for the benefit of all. (6) it is alleged that the Defendant No. 3 Mohan Lal Mittal, the father of Promod Kumar Mittal, who has verified the petition on behalf of the said Purna Investment Pvt. Ltd. has not agreed to sign the said terms of settlement which was attempted to be put in on the 23rd May, 1980. Therefore, O. 23 R. 3 of the C. P. C. has no application as consent of all the Defendants is required for the proposed terms of settlement. On these grounds it was submitted that leave should be granted to the petitioner Purna Investment Pvt. Ltd. to intervene and various orders of injunction to be issued as prayed for in the prayers.

3. Mr. R. C. Nag, appearing with Mr. Ahin Chowdhury, for the petitioner, Purna Investment Pvt. Limited, submitted that the shareholder has a right to intervene in this matter as being a party interested in the company's welfare and benefit. Mr. Nag cited a passage from Okeck on Modern Corporate Law, an American Book Article 1596, page 668 where rights of a share-holder vis-a-vis

the company's interests are summarised. The decision of the Supreme Court referred to is Mrs. Bacha F. Guzdar v. Commr. of Income-tax. Bombay, AIR 1955 SC 74 where Gulam Hassan, J, observed in para 7 at p. 77 as follows:—

"That a shareholder acquires a right to participate in the profit of the company may be readily conceded but it is not possible to accept the contention that the share holder acquires any interest in the assets of the company.....
.....A Shareholder has got no interest in the property of the company though he has undoubtedly participated in the profit if and when the company declares to divide them....."

The company is a juristic person and is distinct from shareholders. It is the company which owns the property and not the shareholders. The dividend is a share of the profits declared by the company as liable to be distributed among the shareholders. There is nothing in the Indian Law to warrant the assumption that a shareholder who buys shares buys any interest in the property of the company which is a juristic person entirely distinct from the shareholders.

The true position of a shareholder is that on buying share, an Investor becomes entitled to participate in the profits of the company in which he holds the shares if and when the company declares, subject to the Articles of Association, that the profits or any portion thereof should be distributed by way of dividends among the shareholders. He has undoubtedly a further interest to participate in the assets of the company which would be left over after winding up but not in the assets as a whole as Lord Anderson puts it."

4. In that decision the leading English decision in Commissioner of Inland Revenue v. Forrest 1924 (8) Tax Cases 704 at page 710 the observation of Lord Anderson was referred to and also the decision of the earlier Supreme Court in Sholapur Mills' case, i. e., Charanjit Lal v. Union of India AIR 1951 SC 41 at pages 54 and 55 was referred to and relied on.

5. Reference was also made to the Division Bench decision of this Court in Shyam Lal Purohit v. Jaggan Nath Roy AIR 1969 Cal 424 where the question whether a shareholder in a compulsory winding up has any locus standi to apply for setting aside the sale of

property belonging to the company arose under O. 21 R. 90 of the C. P. C. and dealing with this question D. N. Sinha, C. J., observed in para. 15 summarising the position of a share-holder as follows at pp. 429-430.

"The result of these decisions may be summarised as follows:—

(1) In the case of Public Limited company registered under the said Act, the company is a separate entity from its shareholders. It is the company which is the owner of its assets, including immovable properties and not the shareholders.

(2) The shareholder in such a company has a right to share in the profits, by way of receipt of dividends. He has a right in an appropriate case to apply for the winding up of the company and to take part in the distribution of the surplus assets after payment of the debts and liabilities which must of course be done in accordance with the Articles of Association and the provisions of the said Act.

(3) As long as the company continues to exist, that is to say before its dissolution no shareholder can be said to have any interest in the properties and assets of the company, either legal or equitable. Shareholders in a company are certainly interested in the properties and assets of the company in the sense that a wastage or frittering away of the assets might affect their rights to enjoy the profits and eventually the distribution of surplus assets in a winding up. This, however, is too remote an interest and cannot be included within the definition of 'interest' within the meaning of O. 21 R. 90 of the Civil P. C.

(4) The words 'or whose interests are affected by the sale' in O. 21 R. 90 are no longer confined to an interest in immovable property or to proprietary or possessory rights. The word 'interest' must be given a wide meaning and may include a contingent interest, but the right may be exercised by one who is directly and immediately affected by the sale of an immovable property. Rights which are likely to be affected or interest which may hypothetically or remotely be affected cannot be considered as coming within the four corners of O. 21 R. 90."

6. Mr. Chowdhury also cited another Division Bench decision of the Madras High Court in Registrar of Joint

Stock Company, Madras v. Dalmia Cement AIR 1955 Mad 28 where also the same question was discussed. Therefore, Mr. Chowdhury submitted that the shareholder has a right to be heard in an application under O. 23 R. 3 of the Civil P. C. and as such, he analysed the terms of settlement and submitted that it could not be for the benefit of the company and, therefore, the petitioner being a shareholder should be given right in this application for putting the terms of settlement and passing a compromise decree under O. 23 R. 3 of the Civil P. C. made by the plaintiff bank and opposed the application on various grounds set out in the affidavit which I have already mentioned before. Mr. Chowdhury also referred to the question of registration of the terms of settlement and submitted that it is not fair and reasonable and, therefore, it should not be accepted and the application should be allowed.

Mr. Nag also submitted referring to the dictionary meaning of the word 'intervention' which includes the right of the shareholder to appear in a proceeding where the interest of the company is being adversely affected. He referred to the decision in Jhajharia Brothers Ltd. v. Sholapur Spinning & Weaving Company Limited (1940) 72 Cal LJ 458: (AIR 1941 Cal 174) where a suit was filed by a shareholder and it was held that there can be a suit by the shareholder against the company for individual wrong done to them. Apart from individual wrong there may be suits to restrain acts ultra vires the company and the Court will interfere in cases of ultra vires acts because they are not within the constitution.

7. For the same purpose of the leading English decision in Natal Land Etc. Company v. Poulin Colliery 1904 A. C. 120 which was referred to in the Division Bench decision of this Court in Venkatarama Krishnamurthy v. C. V. Rama Aiyer (1974) 78 Cal WN 1 where question of illegal agreement in a Section 34 application of the Arbitration Act, 1940, came up and the said English decision in Natal Land's case was referred to and it was held that party who is not a party to the arbitration agreement and if he objects to the jurisdiction of the Arbitrator and in spite of that the Arbitrator makes the award the Court can go into that question and it was further held that the company cannot

adopt a preincorporation agreement which is illegal.

8. Mr. R. C. Nag, appearing with Mr. Ahin Chowdhury, for the petitioner, Purna Investment Pvt. Limited was supported by Mr. Some Nath Chatterjee, Mr. Aninda Mitra and Mr. Pratap Chatterjee, for Mohanlal Mittal, the father of Promod Kumar Mittal, who is a Director of the petitioner being Purna Investment Private Limited. The present application is really a second front opened by Mohan Lal Mittal to oppose the application of the plaintiff Bank and other parties representing the company who have signed the terms of settlement to prevent the decree of compromise on the terms of settlement put in, being passed under O. 23 R. 3 of the Civil P. C. In my view, the allegations and the submissions made on behalf of the petitioner, Purna Investment Private Limited, of which if the veil is lifted Mr. Mohan Lal Mittal's face appears as he is making this representation through his son on the principle that by repeating the same points through different sets of leading Counsel and parties, if possible re-enforces and establishes a proposition, although that may not be sound both in law or in fact.

9. The application was opposed by Mr. R. C. Deb, appearing with S. B. Mukherjee and Mrs. U. B. Mukherjee, for the Respondent Company, Andhra Steel Corporation Limited, and for B. C. Mittal, I. S. Mittal, Chagan Lal Mittal and Damodar Lal Mittal and submitted and in my view quite rightly, that the applicant has no locus standi to present this application and intervene in the suit or the application for putting in the terms of settlement under O. 23 R. 3 of the Civil P. C. made in the suit by the plaintiff bank and other respondents consenting to the same.

10. The question of right to intervene by a shareholder is a pure question of law as that would depend on the status, position and power of a shareholder in public Limited Company. Unless the applicant has locus standi, there is no question of going into the other matter raised in the petition and also argued from the Bar to re-enforce the arguments of Mohan Lal Mittal in different forms once in the said application under O. 23 R. 3 of the C. P. C. and again in Sections 397-98 application

for removal of the Managing Committee. The present application appears to me to be an abuse of the process of the Court and utterly mala fide and it is not necessary for me to go into the other questions raised as those are already being raised in the application under O. 23 R. 3 of the C. P. C. The position of the shareholder is defined under the Companies Act, 1956, and particularly the principles laid down in the Supreme Court decision in Mrs. Bacha F. Guzdar v. Commr. of Income-tax AIR 1955 SC 74. Para 7 at pages 76 and 77 which I have already quoted before has clearly laid down the position of the shareholder of a company although Mr. Nag has in his usual thoroughness and erudite scholarship quoted the passage from Oleck on Modern Company Law, an American Publication, in which generally the proposition as to the position of a shareholder has been summarised but that passage, in my view, does not help in any way the position of a shareholder in India which is governed by the Indian Companies Act, 1956, and also the said decision of the Supreme Court which is the law of the land under Art. 141 of the Constitution of India. Therefore, on this preliminary issue of the petitioner having any locus standi to intervene and/or be added as a party in the application under O. 23 R. 3 of the C. P. C. in my opinion, should be answered in the negative and must be held that the said Purna Investment Private Limited has no locus standi to intervene to be added as a party either to the petition under O. 23 R. 3 of the C. P. C. or in the suit or to (sic). The present application is a mere abuse of the process of the Court and is a machination of Mohan Lal Mittal through his son, Promod Kumar Mittal, to set up one of his companies, Purna Investment Private Limited holding some shares as hereinbefore stated in the capital of the Respondent Company, Andhra Steel Corporation Limited.

4. Therefore, I need not go into the other question which has been raised by Mohan Lal Mittal in the main application under O. 23 R. 3 of the Civil P. C. and, therefore, the said question cannot be raised again by this circuitous process by adding or intervention of a party who has no locus standi in the suit where the Respondent Company, Andhra Steel Corporation Limited, is

represented and Mohan Lal Mittal himself is representing through leading Counsel and opposing the application by raising some objections as sought to be raised in the present application.

12. In that view of the matter. I have no hesitation in dismissing this application with costs.

Application dismissed.

AIR 1982 CALCUTTA 62

Mrs. PRATIBHA BONNERJEA J.

Krishna Kishore Kar, Plaintiff v. United Commercial Bank and another, Defendants.

Suit No. 1520 of 1966, D/- 8-7-1981.

(A) Contract Act (9 of 1872) Sec. 171 — Banker's lien — Lien cannot be exercised where there is express contract to contrary (Banker's lien).

An express contract between the parties creating a lien or security would exclude operation of the statutory general lien under Sec. 171. Therefore, where the plaintiff and the Bank had an express contract by way of counter guarantee providing the method of reimbursement, this contract would exclude application of Sec. 171. (Para 20)

(B) Contract Act (9 of 1872), Sec. 171 — Separate Accounts in Bank — Adjustment — Banker's lien — Plaintiff having cash credit account and other account — All proceeds of fixed deposits duly credited in cash credit account — Balance can be adjusted by appropriating amount lying in separate account in exercise of its general lien under S. 171. (Banker's lien). (Para 21)

Cases Referred: Chronological Paras

AIR 1960 Punj 632: ILR (1960) 2 Punj 823 17

AIR 1956 Punj 118: 58 Pun LR 14 16

(1954) 1 All ER 734: 218 LT 158: (1954)

1 WLR 644, Lloyds Bank Ltd v. Mar-golis 14

AIR 1946 Nag 114: 1945 Nag LJ 468 18

(1930) 2 Ch 293 6

(1918) 2 KB 833: 119 LT 727: 88 LJ

KB 85, Bradford Old Bank Ltd. v. Sutcliffe 13

LR (1) PC 296, George Henry Chambers v. Patrick Davidson 19

R. C. Deb, with Rajat Ghosh, for plaintiff; Bachawat with Sujit Sinha. (for No. 1) and Brotin Ghosh (for No. 2), for Defendants.

JY/KY/E603/81/MVJ

JUDGMENT:— This is a suit for recovery of Rs. 2,26,858.26 instituted by the plaintiff against the defendants on account of the following facts:

It is alleged in the plaint that the plaintiff, in his business of Isis Coal Company, had opened a cash credit account with the defendant bank. In his said business, the plaintiff had dealings and transactions with Durgapur Project Limited, the defendant No. 2 herein. On 2-8-62, the defendant No. 1 at the request of the plaintiff, executed a bond for Rs. 2,00,000/- in favour of the defendant No. 2 guaranteeing payment for coal supplied and to be supplied to the plaintiff by the defendant No. 2. As against this bond, the plaintiff, on 2-8-1962, executed a counter guarantee in favour of the defendant No. 1 on certain terms and conditions contained therein. The period of guarantee was from 2-8-1962 to 1-8-1963 (Ext. A pages 6 and 7). In respect of the Bank guarantee the defendant No. 2 had demanded margin money from the plaintiff to cover the said guarantee and pursuant to the same the plaintiff from time to time paid an aggregate sum of Rs. 1,83,500/- which was admitted by the defendant bank by letter dated 4-5-1963 (Ext. A page 27).

2. The plaintiff alleged that the guarantee period in favour of the defendant No. 2 had expired and he had paid in full the entire dues of the defendant No. 2 and had demanded refund of the margin money of Rs. 1,83,500/- from the defendant Bank but it failed and neglected to refund the same. The bank is holding the said sum by way of Trust or money had and received and is bound to refund the same with interest. Hence this suit.

3. The defendant bank filed its written statement disputing that plaintiff had paid the defendant No. 2 in full on account of the fact that the bond was not returned by the defendant No. 2 duly discharged. According to the defendant Bank a sum of Rs. 19,787.32 p. was due to the Bank by the plaintiff in the cash credit account and the bank is entitled to recover the same. It was further alleged that on 27-11-1962, the Bank at the request of the plaintiff, had executed another guarantee bond for Rs. 1,00,000/- in favour of the President of India guaranteeing payment for plaintiff's transactions with the Eastern Railway. As against this guarantee, the

plaintiff also executed a counter guarantee in favour of the bank. In terms of these two bonds, the bank was unconditionally authorised to pay to the President of India and/or the Eastern Railway on demand without any reference to the plaintiff. It was also agreed that the plaintiff would reimburse the Bank on demand and in default Bank was to recover the same from the accounts or securities held or to be held by the Bank (Ext. A pages 14 and 17). The defendant bank alleged that it had paid Rs. 56,740/- to the Eastern Railway on their demand and as such became entitled to recover the same from the plaintiff. The sum of Rs. 19,787.32 and Rs. 56,740/- aggregating to Rs. 76,527.32 were adjusted by the bank against the sum of rupees 1,83,500/- in exercise of its lien and/or general lien. Alternatively, the defendant bank was entitled to appropriate and set off its said claims against Rs. 1,83,500/- and had already appropriated the said sum of Rs. 76,527.32 against the said sum of Rs. 1,83,500/-. The plaintiff was not entitled to refund as the defendant No. 2 did not return the guarantee bond duly discharged. The allegations of trust or money had and received as alleged in the plaint were all denied specifically.

4. The defendant No. 2 filed its written statement admitting that nothing was due to it from the plaintiff for the period covered by the guarantee dated 2-8-1962.

4A. The following issues were raised at the trial:—

1(a). Did the plaintiff duly pay to the defendant No. 2 all amounts in respect of the transactions for the period covered by the Guarantee dated 2-8-1962, as alleged in para 9 of the plaint?

(b) Did the defendant No. 2 fail and neglect to return or discharge the said Guarantee, as alleged in para 10 of the plaint?

2. Is the defendant No. 1 liable to pay to the defendant No. 2 the sum of Rs. 2,06,272.90 p. in terms of its letter dated 29-4-1963 out of Rs. 1,83,500/- held by the defendant No. 1 under the Guarantee dated 2-8-62?

3. Is the defendant No. 1 entitled to recover Rs. 56,740/- out of the aforesaid sum of Rs. 1,83,500/- in terms of the letter dated 27-11-62 written by the plaintiff, as alleged in paras 13 and 15 of the written statement of the defendant No. 1?

4. Is the defendant No. 1 entitled to exercise a lien in respect of its alleged claims of Rs. 76,527.32 against the said sum of Rs. 1,83,500/-, as alleged in para 16 of the written statement of the defendant No. 1?

5. Is the defendant No. 1 entitled to appropriate and/or set off a sum of Rs. 76,527.32 p. as pleaded in para 16 of their written statement?

6. Is the claim of the defendant No. 1 for set off and/or counter-claim and/or adjustment barred by limitation, as stated in the Additional Written Statement of the plaintiff?

7. To what relief, if any, is the plaintiff entitled?

5. During hearing, it was admitted by the defendant No. 2 that the guarantee bond dated 2-8-1962 was not returned. In view of the admission of the defendant No. 2 in its written statement that there was no claim against the plaintiff for the guarantee period, I directed the defendant No. 2 to produce the bond in Court. This order was complied with and the bond is kept in the records of this proceeding. The defendant No. 2 did not contest the suit but watched the proceeding. The plaintiff examined himself and the defendant No. 1 examined four witnesses.

6. The execution of the aforesaid two guarantee bonds in connection with the plaintiff's transactions with the Eastern Railway are admitted facts. The deposit of Rs. 1,83,500/- by the plaintiff by way of margin money against the bank's guarantee in favour of the defendant No. 2 is also admitted by the parties to the suit. It appears from the evidence that on 29-4-1963, the defendant No. 2 made a demand on the defendant bank for Rs. 2,06,272.90 p. under the guarantee dated 2-8-1962, but the plaintiff had disputed this alleged claim. As a result the plaintiff had instituted a suit against the present defendants on 16-5-1963 being suit No. 875 of 1963 for restraining the bank from paying the said sum out of the margin money under the guarantee dated 2-8-1962. The plaintiff, thereafter took out an application in the said suit for injunction and on that application on 1-7-1963 an order was passed after hearing the parties to the said suit and in their presence, that "the United Commercial Bank shall not pay to any of the parties to the suit any amount

lying with the Bank without leaving a sum of Rs. 90,000/- with the Bank" (Ext. C). The order therefore, limited the amount of margin money to the extent of Rs. 90,000/- only and the balance of Rs. 93,500/- out of Rs. 1,83,500/- became free for payment to the parties. None of the parties to the said suit took any step against the order dated 1-7-63 and the order became final and binding. Mr. Deb, the counsel for the plaintiff, however, submitted that this balance Rs. 93,500/- in the hands of the Bank retained its character as the margin money in spite of order dated 1-7-63. In support he cited (1930) 2 Ch. 293 where on the facts of that case it was held:—

"That the deposit being money handed over to the insuring company for a specific purpose, the balance remaining after satisfying the specific purpose continued to be excluded from the course of account between the parties and could not be subject of set off."

7. But the facts of the present case are entirely different. In this case, not only the Court made the balance sum of Rs. 93,500/- free for payment to the parties, but the parties themselves construed the order of 1-7-63 to be so. The plaintiff himself demanded this balance amount from the Bank by his letter dated 7-9-63 and sent another reminder on 3-10-63 on the basis that Rs. 93,500/- became free for refund. The plaintiff maintained this stand during hearing of the suit while suggesting his case in cross examination of the Bank's manager Mr. N. K. Bhattacharjee:—

Q. 143 "I suggest to you that the Court order of 1st July 1963 modified the arrangement between the Bank and the plaintiff in regard to the guarantee to Durgapur Project."

Q. 145 "I suggest to you that in terms of the order dated 1st July 1963 the Bank was given liberty to return Rs. 93,500/- being the balance of rupees 1,83,500/- to the plaintiff."

7A. In the premises aforesaid, the plaintiff should not be allowed to say that Rs. 93,500/- had retained its character as margin money even after passing of the order dated 1-7-1963. The submission of Mr. Deb that Rs. 93,500/- was part of the margin money being contrary to the stand taken by the plain-

tiff himself, cannot be accepted. The Bank, however, did not return the money and alleged that it had claim against the plaintiff to the extent of Rs. 34,523.63 in the cash credit account maintained with the New Market Branch.

8. The plaintiff also had transactions with the Eastern Railway on "weight only" system under an agreement dated 19-11-61. According to the terms of the agreement of "weight only" system, the plaintiff was to pay to the Railway its provisional bills for freight in full regardless whether the plaintiff had received the full quantity of coal or not and irrespective of the fact whether the bills contained any error or overcharge. If there was any shortfall in delivery or if there was any error or overcharge in the bills, the plaintiff was to notify the Eastern Railway about the same which would be subject to correction at the time of adjustment of the accounts between the parties in due course. The period of transaction was from 23-11-1961 to 22-11-1962. The plaintiff was to deposit Rs. 1,00,000/- by way of security. The Railway exempted the plaintiff from furnishing this security and in lieu thereof, on 21-11-1962, the plaintiff executed a bond (hereinafter referred to as the principal bond) in favour of the President of India for continuing to have transactions on "weight only" system on terms and conditions contained therein and the period was extended from 23-11-1962 to 22-11-1963 (Ext. A pages 14-15). The plaintiff was described therein as the privilege holder. This bond was accepted by the President of India. The Bank guarantee dated 27-11-1962 given by the Bank in favour of the President of India was to remain in force for the period of this principal bond. On 3-1-1964, the Eastern Railway made a demand on the defendant Bank for Rs. 57,314.70 in enforcement of the Bank guarantee dated 27-11-1962. Prior to that the Railway had demanded the said sum from the plaintiff himself by its letter dated 5-11-1963 and had threatened the plaintiff that if the said sum of Rs. 57,314/- would remain unpaid, the Railway would enforce the Bank guarantee.

9. The claims of the Railway were on the basis of the four freight bills set out below:—

Bill Nos.	Date	Amount
1. 1/20	10-4-1963	Rs. 22,566.25
2. 1/70	20-4-1963	Rs. 6,843.35
3. 1/23	30-3-1963	Rs. 25,028.90
4. 1/21	10-5-1963	Rs. 2,876.20
		Rs. 57,314.70
(Ext. A page 88)		

10. On 10-1-1964, the defendant Bank informed the plaintiff about the said demand and further intimated that the Bank was going to pay the said sum (Ext. A page 47). By letter dated 31-1-1964, the plaintiff asked the Bank not to pay on the allegation that nothing was due to the Eastern Railway. On the same day viz, 31-1-1964, the defendant Bank, by a letter informed the plaintiff that the Eastern Railway had already been paid and the Bank had appropriated and adjusted the said sum against Rs. 93,500/- by virtue of order dated 1-7-1963 passed in suit No. 875 of 1963 (Ext. A page 51). This letter was actually posted on 5-2-1964 and received by the plaintiff on 6-2-1964. The plaintiff alleged that the Bank had ante dated this letter to circumvent the plaintiff's instruction contained in his letter dated 31-1-1964 prohibiting the Bank from making payment. The plaintiff also made this allegation in its letter 20-2-1964 but the Bank did not reply. Is there any substance in this allegation? No motive has been imputed in the plaint. In his testimony, the plaintiff alleged that the defendant Bank did so in collusion with the Railway. This new story set up at the stage of evidence is liable to be rejected as there was no proper pleading of collusion in the plaint nor any issue had been raised thereon. Moreover, the question of Bank's ante dating the letter for circumventing plaintiff's instruction will only arise, if Bank was under any obligation to comply with plaintiff's instruction contained in his letter of 31-1-1964. Could the Bank on the basis of plaintiffs' letter refuse to pay in violation of the express terms of the Bank guarantee dated 27-11-1962 and that of the plaintiff's counter guarantee? To ascertain this, the principal bond, Bank guarantee and the counter guarantee have to be scrutinised carefully. For the sake of convenience, the relevant

portions of these three documents are set out below:—

Clause 2 of the principal bond :

"Periodical bills (10 days period) will be issued for transactions and these bills are strictly payable in full on presentation whether the wagon contents are taken delivery of or not by us or by our accredited representatives and regardless of errors or overcharge which on being detected or brought to notice will be open to adjustment in due course". (Ex. A pages 14-15).

The Bank guarantee in favour of the President of India dated 27-11-1962 :—

"We the United Commercial Bank Ltd, do hereby undertake to indemnify and keep indemnified the government any loss or damage caused to or suffered by the government by reason of any breach by the said privilege holder of any of the terms or conditions contained in the said principal bond. The United Commercial Bank Ltd, further agree that the guarantee herein contained shall remain in full force and effect during the period of the said principal bond is in force". (Ext. A page 17).

The plaintiff's counter guarantee to the Bank dated 27-11-1962 :—

"We also hereby unconditionally authorise you to pay on demand any claim arising hereunder without making any reference to us and we undertake to pay to you on demand the amount of such claim paid by you together with the expenses incurred in connection therewith which sum if not paid by us on demand may also be recovered by you from the account or accounts maintained by us with you or from securities held or to be held by us with you...." (Ext. A page 16).

11. On proper construction of these three documents, it appears that the plaintiff was liable to pay the freight bills on presentation by the Railway regardless whether he had obtained delivery of coal or not and irrespective of the fact that the bills contained error or overcharge. His remedy was to have the adjustment of the accounts between him and the Railway subsequently for any over payment or error in the bill or non-delivery or short delivery of goods by the Railway. The plaintiff was under absolute obligation to pay the freight bills at the first instance on presentation. If the

plaintiff would commit breach of the terms of payment contained in the principal bond, the Railway or the President of India would be entitled to enforce the Bank guarantee dated 27-11-1962 and in terms of the counter guarantee, the Bank would be unconditionally liable to pay to the Railway its claims on demand without reference to the plaintiff and would in its turn be entitled to be reimbursed by the plaintiff. The plaintiff committed breach of the terms of the principal bond by non-payment of four freight bills set out above. I, therefore, hold on the facts and circumstances of this case, that the Railway had rightly enforced the Bank guarantee and the Bank was not entitled to refuse payment on the basis of the plaintiff's instruction dated 31-1-1964. I further hold that this instruction of the plaintiff to the Bank was in breach of the terms of the counter guarantee dated 27-11-1962 and Bank had rightly ignored the said instruction. The Bank had no right to verify the genuineness or otherwise of Railway's claim before payment nor it could refer the matter to the plaintiff for ascertaining its correctness. In view of the Bank's absolute obligation to pay under the counter guarantee, the question of Bank's ante dating the letter as alleged by the plaintiff did not arise. The Bank had nothing to circumvent and was bound to act in accordance with the express terms of the agreements between the parties. There is some discrepancy regarding the date or payment alleged by the defendant Bank and the actual date of payment to the Railway. But date of payment is immaterial.

12. The plaintiff had disputed the claim of the Railway on the allegation that he had a huge claim against the Railway at that time and therefore the payment made by the Bank to the Railway was wrongful. Let us examine how far the plaintiff has been able to prove that Railway had no claim. In support of his contention that Railway had no claim, the plaintiff relied on certain refunds made by the Railway. It would be noted that the Bank paid the Railway on 6-2-1964 and Railway started giving refund on and from May 1964. As I have stated earlier, Railway's demand for four freight bills mentioned above was on the basis of the express terms of the principal bond whereby the plaintiff's obligation to pay the freight

bills on presentation was absolute. It may be that upon receipt of this amount and upon adjustment of accounts, in terms of the principal bond some amount was found due and refundable to the plaintiff and the same was refunded by the Railway. These refunds do not prove that Railway had no claim against the plaintiff when the claim was made. The plaintiff's obligation to pay did not depend on the actual dues of the Railway but on the basis of the provisional bills as prepared by the Railway. The plaintiff had no right to withhold payment of freight bills on the basis of actual accounting position between the parties. The plaintiff, thereafter, filed a suit against the Railway for Rs. 8000/- being M. Suit No. 81 of 1965 and was satisfied by obtaining a consent decree for Rs. 5263/- passed by the City Civil Court in the said suit. In that suit, the plaintiff did not ask for refund of Rs. 56,740/- alleged to have been recovered by the Railway wrongfully from the Bank. As a matter of fact, the plaintiff never took any action for finalisation of the accounts between the parties or for recovery of Rs. 56,740/- against the Railway. Mr. Deb. plaintiff's counsel submitted that the plaintiff had no cause of action against the Railway. Why the plaintiff should file a suit against them? The Railway did not get any portion of the plaintiff's money. The sum of Rs. 56,740 was paid out of Bank's money by banks' cheque. It is because the Bank had appropriated and adjusted this amount against the plaintiff's margin money, the plaintiff got the cause of action against the Bank to institute this suit. This argument although very interesting has no basis whatsoever. The facts of the case proved that the Railway had demanded the money on the allegation that the plaintiff had committed breach of the terms of the principal bond for which the President of India had enforced the Bank guarantee dated 27-11-1963. It is also on record that after receipt of Rs. 56,740/- from the Bank, the Railway had acknowledged the said payment and had returned both the principal bond and the Bank guarantee duly discharged (Ext. A pages 78-80 & Ext. 6A). The return of these two documents are not disputed by the plaintiff. Therefore, the basis of Railway's demand was the plaintiff's breach of the terms of the principal bond. If accord-

ing to the plaintiff, this allegation was false then certainly the plaintiff had cause of action against the Railway and should have taken some step against it. But by not challenging this allegation, the plaintiff had accepted the position that he was guilty of committing breach of the terms of the principal bond. Under the circumstances the plaintiff should not be allowed to say that the payment made to the Railway by the Bank was wrongful. The plaintiff tried to challenge the genuineness of the Railway's claim in his evidence in the present suit in absence of the Railway. Therefore, these allegations cannot be entertained. The plaintiff failed to prove that the Bank's payment to the Railway was wrongful. The payment of Rs. 56,740/- to the Railway was proved by the Bank's witnesses Mr. D. Ghosh and Mr. Bijoy Krishna Chowdhury as well as by Railway's letters being Ext. A pages 78-80 & Ext. 6A. I have no doubt in my mind that the plaintiff filed the present suit for obtaining two benefits. He already got one benefit by obtaining payment of four freight bills by the Bank to the Railway and the second benefit he is trying to obtain by not reimbursing the Bank in terms of his counter guarantee by alleging that Bank's payment was wrongful. The conduct of the plaintiff is absolutely inequitable. The Bank is certainly entitled to be reimbursed. The only question now is whether Bank was entitled to appropriate or adjust its claims against Rs. 93,500/- or not. One thing is to be noted that the Railway had originally demanded Rs. 57,314/- but it was satisfied in receiving Rs. 56,740/-. Why it was so, has not been explained by any of the parties to the suit.

13. The next question naturally would be, could the Bank adjust or appropriate Rs. 56,740/- against Rs. 93,500? Mr. Rajat Ghose, counsel for the plaintiff, strenuously argued that the entire sum of Rs. 1,83,500/- was deposited with the Bank by way of margin money and/or for a specific purpose. Therefore, the Bank was holding the said sum in trust. Being a trust fund, for a specific purpose, Bank could not adjust its claims against this sum. He made an elaborate argument supported by a number of cases. In his argument however, he did not take into account the effect of the order dated 1-7-1963 on the mar-

gin money. It appears from the judgment delivered on 1-7-1963 in suit No. 875 of 1963 (Krishna Kishore Kar v. Durgapur Project), that Durgapur had submitted that Rs. 90,000/- should be set apart from Rs. 1,83,500/- to meet its claims whereas the plaintiff had submitted that entire amount should be refunded to him. This argument on behalf of the plaintiff could only be made on the basis that the entire Rs. 1,83,500/- became free from being margin money and was refundable to him. On hearing the parties to the said suit the learned Judge directed that the Bank would not be entitled to pay to the parties to the suit the balance money without setting apart Rs. 90,000/- from Rs. 1,83,500/-. I have already pointed out that pursuant to the order dated 1-7-1963, the plaintiff had demanded refund of the balance sum of Rs. 93,500/- from the Bank (Ext. A pages 74 and 36) This demand for refund could only be made by the plaintiff on the basis that this balance sum had lost its character as margin money. On the facts and circumstances of this case, I am unable to accept the submission of Mr. Ghose that Rs. 93,500/- was a trust fund and as such I also refrain from dealing with the cases cited on this point. But in view of the express terms of the counter guarantee that the Bank would first make a demand for reimbursement, could the Bank appropriate its claim for Rs. 56,740 against the balance of Rs. 93,500/- without making a demand? It is admitted by the Bank that no demand was made prior to alleged appropriation or adjustment. On behalf of the plaintiff, it was submitted that without a demand, the Bank would not have any cause of action for adjustment or appropriation and in support thereof reliance was placed on (1918) 2 KB 833 (Bradford Old Bank Ltd, v. Sutcliffe) where it was held :—

"That the plaintiff's claim was not barred by the Statute of Limitations, as no cause of action arose against the surety until demand had been made by the plaintiff and no demand was made till 1912."

14. The counsel for the plaintiff also relied on (1954) 1 All ER 734 (Lloyds Bank Ltd, v. Margolis). In this case the Bank took a legal charge from the defendant Goerge John Lyster by way of security for his overdraft on current account. The charge provided as follows:—

"Hereby covenants with the Bank to pay to them on demand all money and liabilities which now are or at any time hereafter may be due....."

15. It was held that on true construction of the legal charge, the making of the demand was a condition precedent to recovery of the money secured thereby and therefore, time ran from the date of the demand and the claim was not barred. On the basis of the aforesaid two decisions, it was submitted that the alleged appropriation or adjustment was wrongful as no prior demand was made by the defendant Bank and I accept this submission.

16. According to the counsel for the Bank, the Bank did not appropriate or adjust on the basis of the counter guarantee but did so in exercise of its general lien under S. 171 of the Contract Act. The Bank could retain any goods bailed by the customer and/or money in the accounts of the customer with the Bank to make up any loss suffered by the Bank on account of the customer. The Bank, in exercise of this general lien, appropriated or adjusted its claims against Rs. 93,500/-. In support AIR 1956 Punj 118 (Punjab National Bank Ltd. v. Satyapal Virmani) was cited to establish that the word "goods" in S. 171 of the Contract Act includes money. My attention was invited to para 8 of the judgment where it was held :—

"According to the law merchant, the Banker can look to his general lien as a protection against loss on account or loss on loan or overdraft. And money has been held to be a species of goods over which lien may be exercised."

17. The counsel for the Bank also cited AIR 1960 Punj 632 (Punjab National Bank Ltd. v. Arura Mal Durga Das) where it was held (at p. 635) :

"The Statutory law in India does not expressly refer to the Banker's lien in respect of cash deposits.....that Indian Contract Act is not exhaustive of the entire law relating to contract.....Where the statutory provisions do not cover a particular matter, the principles of English Law, in so far as they embody the rules of justice, equity and good conscience may be applied."

18. The next case relied on by the defendant Bank is AIR 1946 Nag 114 (Devendra Kumar Lalchandji v. Gulab-singh Nekhe Singh) where it was held at page 116 :—

"In the absence of specific provisions on the subject, when moneys are held by the Bank in one account and the payer in respect of these moneys owes the Bank on another account, the Banker's lien gives the Bank a charge on all the moneys of the payer in its hands so that they may be transferred to whatever account the Bank chooses to set off or liquidate the debt."

Section 171 of the Contract Act is set out below :—

"Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain as a security for such balance, goods bailed to them, unless there is an express contract to that effect."

19. Mr. Deb, the counsel for the plaintiff, submitted that an express contract between the parties creating a lien or security would exclude operation of the statutory general lien under S. 171 of the Contract Act. In the present case, the plaintiff and the Bank had an express contract by way of counter guarantee providing the method of reimbursement. This contract will exclude application of S. 171 of Contract Act. In support he relied on L. R. (1) P. C. 296 (George Henry Chambers v. Patrick Davidson). It was held in that case that general lien given by law is excluded if lien is created an express written contract.

"Therefore, if a consignee takes an express security, such security, being the stipulation and agreement of the parties, it excludes his general lien".

20. For this principle, we need not look into the English cases as S. 171 of the Contract Act itself clearly lays down that the provisions of this section will apply only in absence of the express contract to the contrary. Therefore, in the present case the defendant Bank cannot exercise any general lien under S. 171 of the Contract Act in view of the existence of the Counter guarantee dated 27-11-1962. I accept this submission on behalf of the plaintiff and hold that the Bank was not entitled to appropriate or adjust its claims under Section 171 of the Contract Act.

21. The Bank further alleged that there was a balance amount of

Rs. 34,523.63 p. outstanding in the plaintiff's cash credit account with the defendant Bank. The plaintiff had pledged fix deposit receipts by way of security against overdraft and had agreed that on maturity, the proceeds of the fixed deposits would be credited in the overdraft account to liquidate plaintiff's liability. In the written statement the defendant Bank alleged that after crediting the proceeds of the fixed deposits, a sum of Rs. 19,787.32 remained due and payable by the plaintiff in the overdraft account which amount was also adjusted against Rs. 93,500/- and the account was closed on 1-2-1964. A statement of account was annexed to the written statement which is Ext. I in the suit. The plaintiff disputed the correctness of this account in his testimony. Bank's witness Suresh Chandra Roy Chowdhury proved the security ledger entries relating to the fixed deposits of the plaintiff as well as the cash credit ledger entries relating to the account of Isis Coal Company. He also proved the correctness of the contents of Ext. I. This witness stated that these books were kept under his supervision and he had personal knowledge regarding the entries. This witness was not at all cross-examined on his evidence of correctness of the entries in the cash credit ledger or Ext. I. It was suggested to him in cross-examination that entries at page 80 of the security ledger were not correct but plaintiff failed to prove incorrectness of any entry at page 80 of the security ledger either in cross-examination of Roy Chowdhury or through his own witness. It is the case of the plaintiff that he never received statement of account from the defendant Bank. But the two branch managers of the new Market Branch, Mr. N. K. Bhattacharjee and Mr. D. Ghosh as well as two of its employees Bijoy Krishna Chowdhury and Suresh Roy Chowdhury all in their respective testimony said that plaintiff's office was very nearer to this branch office and the plaintiff often used to come to check his account and under the instruction of these two branch managers, these two employees used to personally hand over the statements of accounts to him. The usual Banking practice was that against delivery of statements of account personally to the customer no receipt was taken. It appears from the statement of account Ext. I that on or about 5-6-1963, the

plaintiff paid Rs. 11,885.34 by cheque No. 688756 to the Bank for liquidation of his liability in the said overdraft account. This is corroborated by the counter foil of the cheque produced by the plaintiff being Ext. L in the suit. Normally such payment would not be made unless the party paying was aware of the accounting position. Moreover it also appears that the Bank credited the proceeds of the fixed deposits in the cash credit account and duly informed the plaintiff about the same by its letter dated 21-2-1964. By this letter the plaintiff was also informed that after giving credit of the fixed deposits the Bank had adjusted the outstanding dues of Rs. 19,787.32 by appropriating the equivalent amount from Rs. 93,500/- in terms of order dated 1-7-1963 (Ext. A page 51). The plaintiff did not reply to this letter. It appears from the evidence on record that after adjustment of the aforesaid sums the cash credit account was closed by the Bank on 21-2-1964. The present suit was instituted by the plaintiff on 11-8-1966. At the time of filing of the suit the plaintiff was fully aware as to how the Bank had adjusted this Cash Credit account and what was the alleged liability of the plaintiff in this account. But in the present suit, the plaintiff did not challenge these allegations of the defendant Bank nor the adjustment made by it in respect to the same. The plaintiff's alleged liability in the cash credit account, Bank's adjustment by crediting the fixed deposit proceeds as well as setting of the balance outstanding against Rs. 93,500/- all remained unchallenged by the plaintiff in spite of his full knowledge of these facts as far back as on 21-2-1964. If there was any doubt in plaintiff's mind regarding the correctness of this account, the plaintiff would have challenged this account in this present suit because the plaintiff was fully aware of what would be the banks' defence in the present suit. On the facts and circumstances of this case, I have no hesitation to accept the testimony of the Bank's witness Roy Chowdhury that the entries in the cash credit ledger, security ledger and Ext. I are all correct. Now, the question would be, could the Bank adjust the balance of Rs. 19,787.32 in the cash credit account by appropriating the same amount from Rs. 93,500/- which was lying in a separate account?

with the Bank? There was no express contract between the plaintiff and the defendant Bank regarding the manner of adjustment of this outstanding balance in the cash credit account. All the proceeds of the fixed deposits had been duly credited in this account. Therefore the Bank could exercise its general lien under S. 171 of the Contract Act for making up the loss caused by the plaintiff and the Bank had rightly adjusted this claim against Rs. 93,500/- set free by order dated 1-7-1963.

22. The last issue to be decided is whether the Bank's claim for adjustment, set off or appropriation of Rs. 56,740/- was barred by limitation. This issue can be disposed of easily. The Bank did not make any demand in terms of the counter guarantee which was a condition precedent and Bank had no cause of action for appropriation, adjustment or set off. Until today, the Bank's cause of action under counter guarantee has not arisen. The question of limitation therefore, cannot arise. Several cases were cited on the point of limitation which were not relevant on the facts of this case. Regarding the set off and adjustment of Rs. 19,787-32 due on the cash credit account, there could be no question of limitation as the adjustment was made in this mutual open and current account on 21-2-1964 on which date the last entry of crediting the proceeds of the cost fixed deposit was made in terms of the agreement between the parties.

23. The defendant No. 2 had failed and neglected to return the guarantee dated 2-8-1962 duly discharged, in spite of the fact that nothing was due and payable to the defendant No. 2 by the plaintiff for the period of guarantee. Due to this wrongful conduct of the defendant No. 2 it was not possible for the Bank to refund Rs. 90,000/- set apart by order dated 1-7-1963. Without receiving back the bond duly discharged, the refund could not be made to the plaintiff. This bond was returned by the defendant No. 2 after hearing of this suit started. In the premises the amount of Rs. 90,000/- became refundable to the plaintiff by the Bank only after the bond was discharged and returned. Hence the Bank is not liable to pay any interest on this sum. Regarding the balance Rs. 93,500/- the Bank has already appropriated Rs. 19,787.32

out of this sum leaving a balance of Rs. 73,622/-, but the appropriation of Rs. 56,740/- was done contrary to the terms of the counter guarantee dated 27-11-1962. The Bank was not entitled to appropriate this sum in the manner it was done. The Bank is, however, entitled to be reimbursed by the plaintiff on making a demand on the basis of the counter guarantee.

The issues are, therefore decided as follows :—

Issue No 1 (a) — Yes.

Issue No. 1 (b) — Yes.

Issue No. 2 — No.

Issue No. 3 — Yes, after making a demand and on default of the plaintiff to pay.

Issue No. 4 — Yes, but in respect of Rs. 19,787.32 only being the balance amount due in the cash credit account.

Issue No. 5 — Yes, to the extent of Rs. 19,787.32 or has been done and in respect of Rs. 56,740/- only after making a demand on the plaintiff in terms of the counter guarantee and on plaintiff's failure to make the payment.

Issue No. 6 — No.

24. In the premises aforesaid, there will be a decree for Rs. 1,63,622/-, in favour of the plaintiff against the defendant Bank, but this decree will not be drawn up, completed or executable before expiry of four months from date. If in the mean time, the Bank makes a demand in writing on the plaintiff within a month from date, for payment of Rs. 56,740/- in terms of the counter guarantee dated 27-11-1962, and the plaintiff pays the said sum within one month from the date of receipt of the said demand notice, then in that case the defendant Bank will refund the entire sum of Rs. 1,63,622/- to the plaintiff within two months from the receipt of payment of Rs. 56,740/-. In case the plaintiff defaults in making payments as aforesaid within the period mentioned above, then the defendant Bank will be entitled to set off, adjust or retain Rs. 56,740/- out of the said sum of Rs. 1,63,622/- and refund to the plaintiff the balance amount of Rs. 1,06,882/- before expiry of four months from date

and the plaintiff will accept the same in full and final satisfaction of the decretal dues. If, however, the Bank fails to make the demand as aforesaid, in that case also the Bank will refund the entire sum of Rs. 1,63,622/- to the plaintiff within four months from date. If the plaintiff has to execute the decree against the Bank then the Bank will be liable to pay interim interest on the sum recoverable by execution at the rate of 3% per annum and interest on judgment at the rate of 6% per annum. In any event, the defendant Bank will pay the costs of the suit to the plaintiff. The suit against the defendant No. 2 is dismissed without any order as to costs.

Order accordingly

AIR 1982 CALCUTTA 71

SALIL K. ROY CHOWDHURY, J.

In re: M. L. Bose & Co. Pvt. Ltd.,
Petitioner.

Company Petn. No. 415 of 1980. D/-
24-2-1981.

Companies Act (1 of 1956), Ss. 433 (e), 434 — Winding up petition — Inability to pay debts — Company disputing its liability on ground of fraud — Not filing separate suit as earlier directed by Court — Principle of estoppel and res judicata attracted — Winding up petition maintainable. (Evidence Act (1872), S. 115; Civil P. C. (1908), S. 11).

In a winding up petition filed by the petitioning Creditors against the Company due to the failure of the Company to pay interest accrued to them on their fixed deposits with the Company, a consent order was passed in which it was directed that unless the Company files a suit within a certain period to establish its contention, about the fixed deposit as being fraudulent and not binding on the Company, the question of disputing the fixed deposits on any ground whatsoever would be lost, and the Company will be deemed to have accepted the said fixed deposit receipts as valid and the Company in fact failed to file any such suit within the period allowed, pursuant to the leave given by the consent order.

Held that, the Company was deemed to have been estopped by procedure to raise any question regarding the validity of the said fixed deposits and the Company was bound by res judicata as the

consent order was by Court. Further the Company actually paid the interest for some period, which fact showed that the Company had admitted the fixed deposits as being valid. Further held that, a winding up petition was maintainable and Company should be wound up. (Paras 2, 3, 7, 8)

Cases Referred : Chronological - Paras
(1975) CP No. 242 of 1974, D/- 13-5-1975
(Cal), Balananda Brahmachari Seva
Sadan v. M. L. Bose & Co. 7
(1970) CP No. 258 of 1969, D/- 16-1-1970
(Cal) 2, 5, 7, 10

Bhaskar Gupta with P. Chowdhury, for Petitioning Creditor; P. K. Roy with P. K. Mallick and Jayanta Banerji, for the Company.

ORDER :— This is a winding up petition which was presented on 25th September, 1981. On the returnable date notice was directed to be served on the company along with copy of the petition. The company appeared and took direction for filing affidavit to show cause why the winding up petition should not be admitted. The petitioning creditor also filed a reply to the said affidavit. The petitioning creditor is a Deity Sri Sri Biswamata Debi which presented this petition through her Sebait and next friend Salil Kr. Mitra, trustee of the said deity.

2. The claim arises out of a fixed deposit of Rs. 45,000/- made on or about 1st Oct. 1953 evidenced by 45 fixed deposit receipts of Rs. 1,000/- each issued by the company bearing serial numbers 21 to 50. The terms and conditions of the fixed deposit are printed at the back of the said fixed deposit receipts. The fixed deposit was for a period of 21 years from 1st Oct. 1953 and would carry interest at the rate of 5% per annum under the terms and conditions of the said fixed deposit. It appears that the company failed to pay the interest at the agreed rate for certain period which resulted in a notice under S. 434 of the Companies Act issued on behalf of the petitioner dated 17th July, 1969 and finally a winding up petition being C. P. No. 258 of 1969 was filed in this court on the 16th Jan. 1970. The said company petition was disposed of after the company filed an affidavit and the terms of settlement were put in by which the company petition was admitted and the respondent company was directed to pay the arrears of interest accrued on the

said fixed deposit before the filing of the terms and other conditions as laid down in the said order passed by R. M. Datta, J. One of the terms of the said order is as follows:

"Without prejudice to the rights and contentions of the parties the respondent shall be at liberty to file a suit if deemed necessary to establish its contentions within 15 days from the date of the order to be made herein.

In the event of the filing of the said suit within the period as aforesaid, the respondent undertakes to Court to pay unconditionally to the petitioner the annual interest on the said fixed deposit within a month from the accrual thereof and to continue such payment until the suit is finally disposed of.

In the event of the non-filing of the suit within the period as aforesaid, the respondent will be deemed to have admitted the contention of the petitioner in this application and the respondent will be entitled to raise the same dispute specifically."

The said order makes it quite clear that unless the said suit is filed within the time stipulated by the said order dated 16th Jan, 1970 the question of disputing the said fixed deposits on any ground whatsoever will be lost and the company will be deemed to have accepted the said fixed deposit receipts as valid and binding on the company.

It is now an admitted fact that the company has not filed any such suit pursuant to the order of the court and, therefore, it necessarily follows as consequence that the company has admitted the fixed deposits as valid and binding and that order was made as far back as on 16th Jan, 1970.

3. The company must be deemed to have been estopped by procedure to raise any question regarding the validity of the said fixed deposits and the company is bound by the principle of res judicata as the same is by an order of the court. It also appears that the company having failed to pay the interest as per the said order made in C. P. No. 258 of 1969 a contempt petition was filed and a rule was issued by R. M. Datta, J.

4. Subsequently the matter was disposed of on the terms as mentioned in paragraph 16 of the petition by an order dated 3rd Dec, 1976 by R. M. Datta, J. In terms of the said order, the company

has paid the arrears of interest after deducting the income-tax at source and the company went on paying interest for the year 1384 B. S. by a letter dated 3rd July, 1978. Another contempt application was filed and Rule Nisi was issued on the 18th Dec, 1979 but the said application was dismissed by R. M. Datta, J. on the ground that the same was barred by limitation under the Contempt of Courts Act, 1971.

5. In due course the fixed deposit receipt matured on the 30th Sept, 78 and the claim of the petitioning creditor together with accrued interest amounted to Rs. 45,000/- for principal of the fixed deposit which matured on the 30th Sept, 1978 together with accrued interest upto 30th April, 1978 totalling to Rs. 48,281.25 p. (sic). The petitioning creditor caused a statutory notice under S. 434 to be issued through its advocate's letter dated 14th May, 1980. The company, through its advocate's letter dated 23rd May, 1980, tried to raise the same question for which they were given leave to file a suit by the said order of R. M. Datta, J. passed in the previous Company Petition No. 258 of 1969 on the 16th Jan, 1970 alleging that the said fixed deposit receipt has been given mala fide and fraudulently by the uncle and cousin of the present managing director of the company and no amount in fact reached the till of the company against the fixed deposit receipt. Thereafter the present petition was filed and the same question which was raised in the previous application was raised again. The whole question is whether the company can in law or in fact raise the question for which liberty was given to the company by the said order of R. M. Datta, J. referred to above the relevant portion of which has been quoted previously.

6. Mr. Bhaskar Gupta appearing with Mr. P. Chowdhury for the petitioning creditor submitted that after the fixed deposit matured on the terms of the said fixed deposit it became payable to the fixed deposit holder which appears in the face of the said fixed deposit. The photostat copy is annexed to the winding up petition and there is no defence to the claim of the petitioning creditor and the company is not and cannot raise any dispute in respect of the same. Mr. Gupta also submitted that reference to another matter in which similar defence was taken and the petitioning creditor was relegated to a suit and in

the suit the city civil court has set aside the fixed deposit receipt cannot be of any assistance to the company or constitute any defence either in fact or in law. The said case which is relied on by the company arising out of a winding up petition in which the petitioning creditor was relegated to a suit, cannot be binding on the petitioning creditor or affect in any way the admitted position as to the facts of this case and the law applicable hereto. Here the company was given liberty to file a suit within 15 days of the order as hereinbefore stated and in default of filing, the company must be deemed to be admitting the claim of the petitioning creditor under the said fixed deposit and they have lost the said opportunity and any claim to be made by the company must be deemed to be barred and the question of the company raising any defence is far from being bona fide or in good faith and it must be held that the company was trying to raise the said defence mala fide and with a view to weave a cobweb and throw cloud on the undisputed claim of the petitioning creditor which the company must be deemed to have admitted pursuant to the previous order of this Court.

7. Mr. P. K. Roy appearing with Mr. P. K. Mallick and Mr. Jayanta Banerji submitted that the said fixed deposits are fraudulent and not binding on the company and the same group of persons and their uncles and cousins have brought it into existence and no money came into the till of the company. These questions were the questions which were raised in the previous winding up petition being C. P. No. 258 of 1969 which resulted in the order dated 16th Jan. 1970. Reliance was placed on the other winding up petition which was directed to be taken off the file by me by an order dated 13th May 1975 in C. P. No. 242 of 1974 (Balananda Brahmachari Seva Sadan v. M. L. Bose & Co.) where the petitioning creditor was relegated to a suit and the company petition was directed to be taken off the file. It is being submitted that a suit was filed in the City Civil Court and the same has been dismissed. In my view, that has got nothing to do with the facts of this case where the petitioning creditor's claim is deemed to be admitted pursuant to the consent order dated 16th Jan. 1970 by the company. The relevant portion of the order I have

already quoted and the company is estopped by procedure and admission that there is no defence to the claim of the petitioning creditor in respect of the said fixed deposit which must be deemed to be admitted by the company. In fact, the company has not filed any suit pursuant to the leave given by the said order dated 16th Jan. 1970 and, as such, the company by its conduct and deed is estopped from raising any dispute about the said fixed deposit receipt which must be deemed to have been admitted by the company pursuant to the consent order.

8. Moreover, it appears on the face of it, that no suit by the company is maintainable as the same is barred by limitation at this stage. The question is the same and the cause of action, if any, arose long time back as recorded in the said order dated 16th Jan. 1970 and it is also an admitted position that the company has not filed any suit pursuant to the leave given to the company and, consequently, the petitioning creditor's claim under the said fixed deposit must be deemed to have been admitted. The company's contention, if any, in respect of the challenge thrown to the said fixed deposit now is also barred by the principle of res judicata by the said order dated 16th Jan. 1970. Further it appears that the company has paid interest on the said amount up to the year 1384 B. S., and, therefore, the company has admitted the fixed deposit being valid and, as such, payment of interest makes it clear that the question of the validity of the said fixed deposit is abandoned and cannot be raised by the company once again in this proceeding. Nobody can take advantage of his own default and further one cannot raise a question indirectly which cannot be raised directly.

9. Mr. P. K. Roy, in his usual forensic ability, tried to contend that the company is not raising the question by way of sword but as a shield. But having regard to the said clear order by consent dated 16th Jan. 1970 the said defence is no longer open to the company as the company, under the Evidence Act, is deemed to have admitted the fixed deposit amount in terms of the said fixed deposit receipt which has matured on the 30th Sept. 1978. There is no question of sword or shield but it is a pure question of admitted facts and evidence

which is binding on the company and the company is estopped from raising that question once again by creating confusion and suspicion in the mind of the Court. It is a clear case for which the company is liable and it has got no relevancy in the facts of the other case which stands on a different footing and that cannot throw any light on the present winding up petition in any way whatsoever.

10. After careful consideration of the facts of this case I cannot but hold that the winding up petition is not an abuse of the process of the Court. On the other hand, the company is trying to play fast and loose and blow hot and cold with this Court after committing several contempts of the previous order and being bound by the said order dated 16th Jan. 1970 passed in C. P. No. 258 of 1969 is estopped from raising any question challenging the validity of the said fixed deposit receipt which is the subject matter of the present winding up petition. It must be held that the company is unable to pay its debt and the company has not raised any bona fide defence either in law or in fact and the dispute sought to be raised has no substance or merit whatsoever and the company seems to be highly dishonest and trying to violate the Court's order flagrantly and trying to raise a question which is not only barred by limitation but also barred by the principle of res judicata and also estoppel and waiver. It is a clear case where the company is unable to pay its debt and is a public danger and should be wound up as early as possible. In that view of the matter, I am making the following order:—

11. The winding up petition is admitted. The same to be advertised once in the Statesman, once in the Basumati and once in the Calcutta Gazette and the matter to appear in the list on 27th April 1981.

Stay asked for is refused.

Petition admitted.

AIR 1982 CALCUTTA 74
MURARI MOHAN DUTT AND
AJIT KUMAR SARKAR, JJ.

Bihar State Electricity Board and others,
Appellants v. Patna Electric Supply Co. Ltd.
and another, Respondents.

A. F. O. O. No. 16 of 1980, D/- 20-7-1981.

HY/LY/D746/81/MBR

Electricity Act (9 of 1910), Ss. 6, 7-A (as they stood before and after amendment by Bihar Ordinance No. 50 of 1974) — Right of licensee to get price of undertaking — When accrues — Option to purchase undertaking exercised under S. 6 before its amendment — Provisions of amended S. 7-A will not apply — Licensee would be entitled to market value of undertaking under unamended S. 7-A. (Constitution of India, Arts. 19 (1) (f), 31 (2); Electricity (Bihar Amendment) Act (7 of 1976), Ss. 2 (ii), 3).

A notice was issued, in the present case, by the Bihar State Electricity Board under Section 6 of the Electricity Act, 1910 exercising its option to purchase the undertaking of the licensee company. Before the licensee had delivered the undertaking, the Bihar Ordinance No. 50 of 1974 was promulgated by which Ss. 6 and 7-A of the Act were substituted. S. 7-A as substituted provided for the compensation of book value of the undertaking instead of market value for the purchase of the undertaking. After the promulgation of the Ordinance, possession of the undertaking was taken by the Board. Thereafter the provisions of Ss. 6 and 7-A as substituted were validated and made applicable with retrospective effect by virtue of Ss. 2 (ii) and 3 of the Electricity (Bihar Amendment) Act (7 of 1976). The question for consideration was as to when the right to get price of the undertaking accrued to the licensee company.

Held that, (i) as the option to purchase the undertaking was exercised under the unamended S. 6, the provisions of the substituted S. 7-A providing for payment of book value would not apply; (ii) Ss. 2 (ii) and 3 of the Bihar Act 7 of 1976 were ultra vires Art. 31 (2) of the Constitution and; (iii) the doctrine of eclipse was not applicable to the present case. Therefore, the right of the licensee company to receive the market value of the undertaking under S. 7-A before it was substituted remained unaffected. However, so far as the prospective application of the substituted provisions was concerned, they were valid and effective.

(Paras 26, 27)

At the time the option was exercised by the Board under S. 7-A, the licensee company was entitled to the market value of the undertaking. There was, therefore, an implied contract between the licensee and the Board that it would pay to the licensee the market price in the event it purchased the undertaking. The said Ordinance and the Bihar Act 15 of 1975 having substituted Section 6, the reference of that section in the substituted S. 7-A must obviously be to the

substituted section. The option having been exercised under the unamended S. 6, the provision of the substituted S. 7-A was inapplicable. That was the reason why Bihar Act, 7 of 1976 had to be enacted. AIR 1963 SC 464, Rel. on. (Paras 15, 18)

The right to receive the market value of the undertaking is a debt or a chose in action and is property within the meaning of Article 19 (1) (f) and Art. 31 (2) of the Constitution. Such property can be acquired by the State but it must conform to the provisions of Art. 31 (2). In the present case, the licensee company, acquired the right to receive the market value of the undertaking under S. 7-A before it was amended. By Ss. 2 (ii) and 3 of the Bihar Act, 7 of 1976, the said right was taken away with retrospective effect and the licensee company was only entitled to receive the book value of the undertaking. Therefore, a portion of the property of the licensee was sought to be acquired by the Bihar Act 7 of 1976 by providing for payment of book value which was less than the market value. The provision for the payment of book value cannot be regarded as the provision for payment of compensation for the purported acquisition of the property of the licensee company. The purported acquisition of part of the debt or chose in action by Ss. 2 (ii) and 3 with retrospective effect was without any public purpose, and also without providing for payment of compensation. In the circumstances, Ss. 2 (ii) and 3 are ultra vires Art. 31 (2) of the Constitution. AIR 1978 SC 803, Disting. and Rel. on.

(Paras 20, 21, 22)

With regard to the applicability of the doctrine of eclipse, we may proceed on the assumption that the doctrine is also applicable to post-Constitutional law. The constitutional limitations under Art. 31 (2) were operative when the Bihar Act 7 of 1976 was enacted. It is quite immaterial that Art. 31 was deleted by the Constitution (44th Amendment) Act, 1978. The deletion of Art. 31 not being retrospective, any law passed before such deletion must stand the test of the provision of Art. 31 (2). The doctrine of eclipse, therefore, has no manner of application in the instant case on the ground of deletion of Art. 31 from the Constitution, such deletion being prospective and not retrospective. AIR 1981 SC 271; AIR 1980 SC 1955 and AIR 1980 SC 1682, Rel. on.

(Paras 24, 25)

Cases Referred :	Chronological	Paras
AIR 1981 SC 271 : (1981) 2 SCC 362		24
AIR 1980 SC 1682 : (1981) 1 SCJ 53		24

AIR 1980 SC 1955 : 1980 All LJ 950 : (1980) 4 SCC 136	24
AIR 1978 SC 803 : 1978 Lab IC 612 : (1978) 2 SCC 50	20, 22
AIR 1974 SC 1300 : 1974 Lab IC 841 : (1974) 2 SCJ 211	23
AIR 1972 SC 425 : (1972) 1 SCR 1053	23
AIR 1969 SC 239 : (1969) 1 SCA 288	15
AIR 1963 SC 464 : (1963) 1 SCJ 627	15
AIR 1963 SC 1019 : (1963) 2 SCA 169	23
AIR 1959 SC 149 : 1959 SCJ 1207	23
AIR 1959 SC 648 : 1959 SCA 377	23
AIR 1958 SC 468 : 1958 SCA 492	23
AIR 1955 SC 123 : 1955 Cri LJ 215 : 1955 SCA 1	23
AIR 1955 SC 781 : 1956 SCA 1	23
AIR 1954 SC 728 : 1955 All LJ 38 : 1954 SCA 1218	23

S. K. Acharya, Advocate-General, Bhaskar Gupta, for Appellants; R. M. Bajoria, S. K. Bagaria, A. N. Mukherjee, Soumitra Pal, B. S. Bagchi, S. C. Niyogi, Soumen Bose, Shyamal Sen, for Respondents.

M. M. DUTT, J.:— The appellant, the Bihar State Electricity Board has, in this appeal, challenged the propriety of the judgment of Sabyasachi Mukharji, J. whereby the learned Judge made the Rule Nisi issued on the application under Art. 226 of the Constitution of the respondents Nos. 1 and 2, the Patna Electric Supply Company and one of its directors, absolute.

2. On Feb. 6, 1924, a licence was granted by the Government of Bihar to Octavius Steel & Co. Ltd. for the supply of electrical energy. The said licence was transferred in favour of the respondent No. 1, the Patna Electric Supply Co. Ltd. On Jan. 5, 1973, the Bihar State Electricity Board served a notice upon the company under sub-sec. (1) of S. 6 of the Electricity Act, 1910 (hereinafter referred to as the Act), requiring the company to sell the undertaking to the Bihar State Electricity Board on the expiry of the period of 50 years from the commencement of the licence, that is, at 12 O'clock in the night between the 5th and 6th Feb., 1974 and further to deliver possession of the undertaking on the expiration of the above period of 50 years pending the determination and payment of the purchase price.

3. At this stage, it is necessary to refer to some of the provisions of the Act and the amendments made thereto in order to appreciate the respective cases of the parties.

4. Section 6 (1) of the Act provides as follows :

"6 (1). Where a licence has been granted to any person, not being a local authority, the State Electricity Board shall,—

(a) in the case of a licence granted before the commencement of the Indian Electricity (Amendment) Act, 1959, on the expiration of each such period as is specified in the licence; and

(b) in the case of a licence granted on or after the commencement of the said Act, on the expiration of such period not exceeding twenty years and of every such subsequent period, not exceeding ten years, as shall be specified in this behalf in the licence; have the option of purchasing the undertaking and such option shall be exercised by the State Electricity Board serving upon the licensee a notice in writing of not less than one year requiring the licensee to sell the undertaking to it at the expiry of the relevant period referred to in this sub-section."

Sub-sections (2), (3), (4) and (5) of Sec. 6 inter alia provide that the State Electricity Board will be entitled to exercise the option of purchasing the undertaking if the State Government or any local authority constituted for an area within which the whole of the area of supply is included refused or elected not to purchase the undertaking. Sub-sections (6) and (7) provide as follows:

"(6). Where a notice exercising the option of purchasing the undertaking has been served upon the licensee under this section, the licensee shall deliver the undertaking to the State Electricity Board, the State Government or the local authority, as the case may be, on the expiration of the relevant period referred to in sub-section (1) pending the determination and payment of the purchase price.

(7). Where an undertaking is purchased under this section, the purchaser shall pay to the licensee the purchase price determined in accordance with the provisions of sub-section (4) of S. 7-A."

Section 7 of the Act inter alia provides for the vesting of the undertaking in the purchaser upon the completion of the sale or on the date on which the undertaking is delivered to the intending purchaser whichever is earlier. Sub-section (1) of S. 7-A is as follows:

"7-A. Where an undertaking of a licensee, not being a local authority, is sold under sub-section (1) of S. 5, the purchase price of the undertaking shall be the market value of the undertaking at the time of purchase or where the undertaking has been delivered before the purchase under sub-section (3) of that section, at the time of the delivery of the undertaking and if there is any difference or dispute regarding such purchase price, the same shall be determined by arbitration."

Sub-section (2) of S. 7-A provides for the computation of the market value of an undertaking. Under sub-section (4), where an undertaking of a licensee is purchased under S. 6, the purchase price shall be the value thereof as determined in accordance with the provisions of sub-sections (1) and (2).

5. Under the notice dated Jan. 5, 1973 issued by the Bihar State Electricity Board exercising its option to purchase the undertaking of the company, the company was required to deliver possession of the undertaking to the Bihar State Electricity Board at 12 O'clock in the night between the 5th and 6th Feb., 1974 pending determination and payment of the purchase price. Before the company had delivered the undertaking as required under the said notice, on Feb. 2, 1974, the Governor of Bihar promulgated an Ordinance being Bihar Ordinance No. 50 of 1974 amending certain provisions of the Act in its application to the State of Bihar. By Section 3 of the Ordinance, S. 6 of the Act was substituted. The material change that was effected by the substituted Section 6 of the Act was that contained in sub-sec.(1) thereof, namely, instead of the service of one year's notice, service of a notice in writing of not less than six months upon the licensee requiring him to sell the undertaking to it on the expiry of the relevant period referred to in sub-section (1), was provided for.

6. By S. 5 of the Ordinance, S. 7-A of the Act was substituted. Sub-section (1) of Section 7-A as substituted is as follows:

"7-A (1). Where an undertaking of a licensee is sold under sub-section (1) of Section 5 or purchased under S. 6, the amount payable for the undertaking shall be the book value of the undertaking at the time of purchase or where the undertaking has been delivered before the purchase under sub-section (3) of S. 5, at the time of delivery of the undertaking."

Sub-section (2) of the substituted S. 7-A provides for the computation of the book value of the undertaking. Sub-section (3) of the substituted S. 7-A provides for the payment of a solatium of 10 per cent of the book value as determined under sub-sections (1) and (2) for the purchase of the undertaking.

7. Thus it appears that by virtue of the amendment made by the Bihar Ordinance 50 of 1974 in the provisions of Ss. 6 and 7-A of the Act, the licensee will not be entitled to receive the market value of the undertaking in the event of the undertaking being purchased by the State Government, the

local authority or the Bihar State Electricity Board, as the case may be, but the licensee will only be entitled to get the book value of the undertaking to be computed in the manner provided in sub-section (2) of the substituted S. 7-A. After the promulgation of the Bihar Ordinance 50 of 1974 on Feb. 2, 1974, possession of the undertaking was taken by the Bihar State Electricity Board from the company on Feb. 5/6, 1974 and, in view of the provision of S. 7 of the Act, the undertaking vested in the Bihar State Electricity Board.

8. As the Bihar Assembly was not in session two further Ordinances being Bihar Ordinance No. 83 of 1974 and Bihar Ordinance No. 123 of 1974 were promulgated on similar terms as the Bihar Ordinance No. 50 of 1974. Thereafter, on Jan. 15, 1975, Electricity (Bihar Amendment) Act, 1974 (Bihar Act 15 of 1975) was passed replacing Bihar Ordinance No. 123 of 1974.

9. The company and its director, the respondents Nos. 1 and 2 in this appeal, filed a writ petition before this Court *inter alia* praying for a writ in the nature of mandamus commanding the appellants to pay the purchase price of the undertaking in accordance with the provision of S. 7-A of the Act as it stood before it was amended by the Ordinances and/or by the said Amendment Act of 1974. Further, the said respondents prayed for a declaration that the Ordinances and the said Amendment Act of 1974 did not apply to the respondents, and that the Ordinances and the said Amendment Act were unconstitutional, void and of no effect.

10. During the pendency of the writ petition, the Bihar Legislature passed another Act, namely, Indian Electricity (Bihar Amendment) Act, 1975 (Bihar Act 7 of 1976). By this Act, the provisions of Ss. 6 and 7-A as substituted by the said Ordinances and replaced by the Bihar Act 15 of 1975 have been validated and made applicable with retrospective effect. Sections 2 (ii) and 3 of Bihar Act 7 of 1976 are set out below:

"2. In Section 6 of the Indian Electricity Act, 1910 (Act IX of 1910) as substituted by the Indian Electricity (Bihar Amendment) Act, 1974 (Bihar Act XV of 1975) —

(ii) after sub-section (5), the following sub-section shall be added, namely:—

"(6). Where a notice exercising option of purchasing the undertaking has been served upon the licensee before the commencement of the Indian Electricity (Bihar Amendment) Act, 1974 (Bihar Act XV of 1975) and the undertaking has been purchased thereafter the amount payable to the licensee on ac-

count of the purchase of the undertaking shall be determined in accordance with the provisions of S. 7-A of the Indian Electricity Act, 1910 as substituted by the Indian Electricity (Bihar Amendment) Act, 1974 (Bihar Act XV of 1975) as if the last mentioned Act was then in force, and it will be deemed to have been always in force."

3. Validation — Notwithstanding anything contained in any judgment, decree or order of any Court, every delivery of an undertaking effected by a licensee to the Bihar State Electricity Board, the Government of Bihar or local authority as the case may be, after the 2nd day of Feb., 1974 and before the commencement of this Act, shall be deemed to have been exercised or effected, as the case may be, under S. 6 of the Indian Electricity Act, 1910 (Act XV of 1910) as amended by Bihar Act XV of 1975 and this Act, as if the said S. 6 so amended was in force at material times when the delivery was effected and accordingly every delivery of the undertaking so effected and all things done or actions taken in consequence of such delivery of the undertaking shall be, and shall be deemed always to have been valid and shall not be called in question in any Court or Tribunal or before any other authority merely on the ground that Sec. 6 of the Bihar Act XV of 1975 did not provide for payment of any interest on the amount payable for the period from the date of delivery of the undertaking to the date or dates of its payment."

11. The only question that came up for consideration before the learned Judge at the hearing of the Rule was, whether the respondents Nos. 1 and 2 were entitled to compensation on the basis of S. 6 read with S. 7-A of the Act or on the basis as provided by the Bihar Ordinance 123 of 1974 read with the provisions of the Bihar Act 15 of 1975. In that connection, the learned Judge had also to consider whether the provision of S. 7-A as substituted by the said Bihar Ordinances and the provisions of the Bihar Act 15 of 1975 were constitutionally valid or not.

12. The learned Judge, after considering the facts and circumstances of the case and the submissions made on behalf of either party held that the Bihar Ordinance 50 of 1974 in so far as it altered the basis of compensation to be paid under S. 7-A of the Act was void and unenforceable. The appellant was directed to pay to the respondent No. 1 the purchase price of the said undertaking in accordance with the provision of S. 7-A of the Act as it stood at the rel-

evant time, ignoring the provision of the Bihar Ordinance 50 of 1974 and the subsequent Ordinances as well as the provisions of the Bihar Act 15 of 1975. Hence this appeal.

13. Mr. S. K. Acharya, the learned Advocate-General assisted by Mr. Bhaskar Gupta has appeared before us on behalf of the appellant, the Bihar State Electricity Board. It is submitted on behalf of the appellant that the transaction between the appellant and the respondent company was that of sale and purchase. The right of the licensee to get the purchase money did not accrue before the purchase had taken place. The purchase of the undertaking having been effected after the amendment of the Act by the Bihar Ordinance 50 of 1974, the licensee was entitled only to the purchase price to be determined in accordance with the provision of S. 7-A as substituted by S. 5 of the said Ordinance or the subsequent Ordinances including the Bihar Ordinance No. 123 of 1974 which was replaced by the Indian Electricity (Bihar Amendment) Act, 1974 (Bihar Act 15 of 1975). Our attention has been drawn to sub-sec. (1) of S. 7-A of the Act which inter alia provides that the purchase price of the undertaking shall be the market value of the undertaking at the time of purchase or where the undertaking has been delivered before the purchase at the time of the delivery of the undertaking. It is contended that as both the delivery and purchase of the undertaking had taken place after the Bihar Ordinance 50 of 1974 was promulgated, the respondent company will be entitled to the purchase price to be computed in the manner laid down in Section 7-A as substituted by the said Ordinance. Further, it is submitted on behalf of the appellant that the right of the respondent company to get the price could not arise anterior to the appellant's right to get the property, nor did, the right to get the purchase price to be computed in certain manner accrue during the notice period. It is, accordingly, contended that the provision of S. 7-A as substituted by the Bihar Ordinance 50 of 1974 and ultimately enacted in the said Bihar Act 15 of 1975 would apply.

14. On the other hand, it is contended by Mr. Bajoria, learned Counsel appearing on behalf of the respondents that the moment the option is exercised, the contract comes into being under which the market value as on the date the undertaking is taken possession of is to be paid. It is submitted by him that the Bihar Ordinance 50 of 1974 which was promulgated on Feb. 2, 1974 did not apply to the respondent company, for the said Ordinance was applicable only to cases where

option was exercised under S. 6 as substituted by the said Ordinance.

15. The question that arises for our consideration is when the right to get the price accrues. The contract of sale and purchase is contained in the licence itself. Under the terms of the licence, an option has been given to the authority concerned to purchase the undertaking of a licensee on the expiration of the term of the licence. In *Fazilka Electric Supply Co. Ltd. v. Commr. of Income-tax*, AIR 1963 SC 464, it has been observed by the Supreme Court (at p. 468):

"There was an undertaking on the part of the applicant for the license to sell the undertaking to the local authority or Government upon certain terms set out in the licence, and the time at which the option was to be exercised and the price which was to be paid for the property were specified. There was consideration for the contract as the license was granted on those terms. Therefore, all the elements necessary for a contract were present, and the sale in pursuance thereof was not a compulsory purchase or acquisition
... .."

It follows from the said observation of the Supreme Court that under the terms of the contract as embodied in the licence the price which is to be paid in the event of the undertaking being purchased by the local authority or Government is fixed. At the time the option was exercised by the appellant under S. 7-A of the Act, the respondent company was entitled to the market value of the undertaking to be determined in accordance with the provisions of sub-sec. (2) of S. 7-A. There was, therefore, an implied contract between the respondent company and the appellant that the appellant would pay to the respondent company the market price of the undertaking in the event it purchased the undertaking. The option of purchase was exercised by the appellant before the amendment of S. 6 and S. 7-A of the Act by the Bihar Ordinance 50 of 1974. The appellant is, therefore, liable to pay to the respondent company the market value of the undertaking in terms of the unamended provision of S. 7-A. On behalf of the appellant, however, a later decision of the Supreme Court in *Gujarat Electricity Board v. Shantilal R. Desai*, AIR 1969 SC 239 was relied upon. In that case, one of the questions that came up for consideration before the Supreme Court was whether on election to purchase the undertaking followed up by a notice to the licensee in pursuance of that election within the period mentioned in S. 7 (4) of the Act before it was amended in 1951, the authority must

again exercise its option to purchase on the expiration of the period of licence. In that connection, Hegde, J. observed as follows (at p. 243):

"We are not able to find any good reason for reading into S. 7 a requirement that after a notice under S. 7 (4) is issued the authority must again exercise its option to purchase on the expiration of the period of licence. It is no doubt true that the right to purchase the undertaking accrues only at the expiration of the period of licence but for exercising that right, the authority must make its election within the period prescribed in S. 7 (4) and issue a notice as required by that sub-section"

16. Much reliance has been placed on behalf of the appellant on the observation of the Supreme Court that the right to purchase the undertaking accrues only at the expiration of the period of licence. It is contended that as the right accrues after the expiration of the period of licence which is also the expiration of the period of notice under S. 6 of the Act in the instant case, the licensee has no right to claim the market value of the undertaking on the ground that it is impliedly fixed under the terms of the contract embodied in the licence that is to say, on the basis of the provision of S. 7-A before it was substituted by the Bihar Ordinance 50 of 1974. It has already been noticed in what context the said observation has been made by the Supreme Court. Be that as it may, prior to the said observation, there are other observations by the Supreme Court which do not support the contention of the appellant. It is observed that the exercise of option to purchase as well as electing to purchase is one integral process and not two independent steps, and that once the concerned authority exercises its option and communicates the same to the licensee, the same is binding on the authority as well as the licensee. In other words, when the option is exercised the licensee is bound to sell and the concerned authority is bound to purchase the undertaking. It is difficult to accept the contention that this binding effect on either party will be without the fixation of the purchase price or the consideration for the transaction. As soon as this stage is reached after the exercise of option to purchase by the service of a notice as mentioned in S. 6 of the Act, the concerned authority has to purchase the undertaking on payment of the market value of the undertaking to be determined in accordance with the provision of S. 7-A of the Act. The above observation of the Supreme Court on which much reliance has been placed by the

learned Counsel of the appellant is of no help.

17. In this connection, we may notice the other contention of Mr. Bajoria, learned Counsel for the respondents. His contention is that S. 7-A as substituted by the Bihar Ordinance 50 of 1974 will apply only to cases where option to purchase has been exercised under S. 6 of the Act as substituted by the said Ordinances. It is submitted by him that S. 7-A (1) as substituted by the Bihar Ordinance 50 of 1974 and the two other subsequent Ordinances and the replacement of the same by the Indian Electricity (Bihar Amendment) Act, 1974 (Bihar Act 15 of 1975) *inter alia* refers to the purchase of the undertaking under S. 6. It is contended that the reference to S. 6 is undoubtedly to S. 6 as substituted by the Ordinance. In other words, it is submitted by him that S. 7-A as substituted by the said Bihar Ordinances and the Bihar Act 15 of 1974 providing for the payment of book value of the undertaking instead of the market value will apply only where a notice under the substituted S. 6, such notice being of not less than six months, is served upon the licensee. In the instant case, however, one year's notice was served upon the respondent company under S. 6 before it was substituted by the said Bihar Ordinances and the Bihar Act 15 of 1974 and, as such, the substituted S. 7-A will have no application.

18. It has been already stated that during the pendency of the Rule Nisi, Indian Electricity (Bihar Amendment) Act 1975 (Bihar Act 7 of 1976) was enacted. Sections 2 (ii) and 3 of Bihar Act 7 of 1976 purported to validate and apply the provisions of S. 6 and S. 7-A as amended by the Bihar Act 15 of 1975 with retrospective effect. The contention made on behalf of the respondents as to non-applicability of the provision of S. 7-A as substituted by the said Bihar Ordinances and the Bihar Act 15 of 1975 without taking into consideration the later Act, namely, the Bihar Act 7 of 1976, seems to have some force. The said Ordinances and the Bihar Act 15 of 1975 having substituted S. 6, the reference of that section in the substituted S. 7-A must obviously be to the substituted section. The option having been exercised under the unamended S. 6 of the Act, the provision of the substituted S. 7-A was inapplicable. That was the reason why Bihar Act 7 of 1976 had to be enacted. It is, however, conceded by Mr. Bajoria that by virtue of Bihar Act 7 of 1976, the provisions of the substituted Ss. 6 and 7-A would apply. The learned Counsel however, submits that Ss. 2 (ii) and 3 of the Bihar Act 7 of 1976 are *ultra vires* Art. 31 (2) of the

Constitution. The contention as elaborated by him is that after the exercise of option by the Bihar State Electricity Board, the respondent company had acquired a right to get the market value of the undertaking in terms of S. 7-A of the Act. Sections 2 (ii) and 3 of the Bihar Act 7 of 1976 purport to acquire part of the said right of the respondent company, which is property, without making any provision for compensation for such acquisition and, accordingly, they are ultra vires the provision of Art. 31 (2) read with Art. 13 (2) of the Constitution.

19. On the other hand, it is contended on behalf of the appellant that even assuming that there has been acquisition of the right of the respondent company to get the market value of the undertaking, the Ordinances and the Bihar Act 15 of 1975 having provided for the payment of compensation for such acquisition, namely, the book value of the undertaking, they are quite legal and valid. In any event, it is submitted by the learned Counsel, after the deletion of Art. 31 of the Constitution by the Constitution 44th Amendment Act, the question of payment of compensation does not arise. The learned Counsel for the appellant invokes the doctrine of eclipse and submits that S. 7-A as substituted by the Bihar Ordinances and the Bihar Act 15 of 1975 remained in a moribund or dormant state or eclipsed and, consequently, unenforceable against citizens so long as Art. 31 (2) was there. But after the deletion of that Article, the substituted S. 7-A became valid and enforceable.

20. The right to receive the market value of the undertaking is a debt or a chose in action and is property within the meaning of Art. 19 (1) (f) and Art. 31 (2) of the Constitution. Reference in this connection may be made to the decision of the Supreme Court in *Madan Mohan Pathak v. Union of India*, AIR 1978 SC 803. In that case, it has been observed by Bhagwati, J. that "property within the meaning of Art. 19 (1) (f) and Cl. (2) of Art. 31 comprises every form of property, tangible or intangible, including debts and choses in action, such as unpaid accumulation of wages, pension, cash grant and constitutionally protected Privy Purse". In view of the said decision of the Supreme Court, it follows that such property can be acquired by the State but it must conform to the provision of Art. 31 (2) of the Constitution, namely, the law acquiring such property must be for a public purpose and must provide for compensation for the property so acquired; such law cannot be called in question in any Court on the ground that the

compensation provided by that law is not adequate.

21. The contention of the appellant is that the provision for payment of book value in the Ordinances and the Bihar Act 15 of 1975 is a provision for payment of compensation for the acquisition of the property of the respondent company, that is to say, its right to get the market value. We are unable to accept the contention. The respondent company, as observed earlier, had acquired the right to receive the market value of the undertaking under S. 7-A of the Act before it was amended. By Ss. 2 (ii) and 3 of the Bihar Act 7 of 1976, the said right of the respondent company to get the market value was taken away with retrospective effect and the respondent company was only entitled to receive the book value of the undertaking. Therefore, a portion of the property of the respondent company is sought to be acquired by the Bihar Act 7 of 1976 by providing for payment of book value which is less than the market value. The provision for the payment of book value cannot, in our opinion, be regarded as the provision for payment of compensation for the purported acquisition of the property of the respondent company.

22. Counsel for the appellant has drawn our attention to another observation of Bhagwati, J. in *Pathak's case* (AIR 1978 SC 803) (supra). Bhagwati, J. observed: "Where money is given as compensation for taking of money, the theory of forced loan may apply, but it is difficult to see how it can be applicable where chose in action is taken and money representing its value, which in a large majority of cases would be less than the amount recoverable under it, is given as compensation". Relying on the said observation, it is contended on behalf of the appellant that in the instant case also a chose in action is taken and the amount of compensation, that is, the book value of the undertaking is given. It is submitted that the amount of compensation in the shape of book value may be less than the market price of the undertaking, but in view of the provision of Art. 31 (2) of the Constitution, the provisions of Ss. 2 (ii) and 3 validating and applying the substituted S. 7-A with retrospective effect cannot be called in question on the ground of inadequacy of compensation. We are afraid, the said observation of Bhagwati, J. relied on by the learned Counsel for the appellant is not applicable to the facts of the instant case. That observation was made in the context of acquisition by the State of debts and choses in action owing by poor people to rich money lenders and not acquisition of such debts or choses in action due and owing by the citizens to

the State. It has been pointed out by Bhagwati, J. that in the former case, there is no question of augmenting the revenue of the State, but in the latter, if the State acquires such debts and choses in action due and owing by people to the State, it would be a case of augmenting the revenue of the State or reducing State expenditure and that would clearly not be a public purpose and the legislation would plainly be violative of the constitutional guarantee embodied in Art. 31 (2) of the Constitution. Pathak's case (supra) is an authority for the proposition that the State cannot acquire any debt or chose in action due to it from citizens, for that would be only for the purpose of augmenting the State revenue or reducing the State expenditure which will not be a public purpose and, as such, void under Art. 31 (2). The purported acquisition of part of the debt or chose in action by Ss. 2 (ii) and 3 of the Bihar Act 7 of 1976 with retrospective effect is, therefore, without any public purpose. Sections 2 (ii) and 3 also do not provide for payment of compensation. In the circumstances, it must be held that Ss. 2 (ii) and 3 of the Bihar Act 7 of 1976 are ultra vires Art. 31 (2) of the Constitution.

23. Now we may consider the question of applicability of the doctrine of eclipse to the instant case. It is contended on behalf of the appellant that it may be that the substituted S. 7-A which was made retrospective in operation by Ss. 2 (ii) and 3 of the Bihar Act 7 of 1976 remained ineffective and unenforceable against the respondent-company so long as Art. 31 (2) of the Constitution was there, but after the deletion of Art. 31, the bar of constitutional limitations is removed and the substituted S. 7-A read with Ss. 2 (ii) and 3 became valid and enforceable in spite of the fact that it sought to acquire a part of the property of the respondent-company, namely, its right to get the market value of the undertaking, without providing for payment of compensation. In support of his contention that the doctrine of eclipse is applicable not only to pre-Constitutional laws but also to post-Constitutional laws, the learned Counsel for the appellant has placed reliance on the following decisions of the Supreme Court: Bhikaji Narain Dhakras v. State of Madhya Pradesh, AIR 1955 SC 781; M. P. V. Sundaramier & Co. v. State of Andhra Pradesh, AIR 1958 SC 468; L. Jagannath v. Authorised Officer, L. R. Madurai, AIR 1972 SC 425 and The State of Gujarat v. Shri Ambica Mills Ltd., AIR 1974 SC 1300. On the other hand, Mr. Bajoria, learned Counsel

for the respondents has relied on some other decisions of the Supreme Court in support of his contention that the doctrine of eclipse is not applicable to post-Constitutional laws. These decisions are: Saghir Ahmad v. State of U. P., AIR 1954 SC 728; Behram Khurshid Pasikaka v. State of Bombay, AIR 1955 SC 123; Basheshar Nath v. Commr. of Income-tax, Delhi and Rajasthan, AIR 1959 SC 149; Deep Chand v. State of U. P., AIR 1959 SC 648 and Mahendra Lal Jaini v. State of U. P., AIR 1963 SC 1019.

24. It appears from the above decisions of the Supreme Court that there is a divergence of opinion as to the applicability of the doctrine of eclipse to post-Constitutional laws. We do not, however, propose to enter into the conflict, but we may proceed on the assumption that the doctrine is also applicable to post-Constitutional laws. It is true that by S. 2 (ii) and S. 3 of the Bihar Act 7 of 1976 the substituted provisions of Ss. 6 and 7-A have been validated and made applicable with retrospective effect. But there is a serious difficulty in applying the doctrine of eclipse to the instant case with retrospective effect. The constitutional limitations under Art. 31 (2) were operative when the Bihar Act 7 of 1976 was enacted. It is quite immaterial that Art. 31 has been deleted from Part III of the Constitution by the Constitution (44th Amendment) Act, 1978 with effect from June 20, 1979. The deletion of Art. 31 not being retrospective, any law passed before such deletion must stand the test of the provision of Art. 31 (2). In this connection, we may refer to the decision of the Supreme Court in Waman Rao v. Union of India, AIR 1981 SC 271. In that case, Chandrachud, C. J. observed as follows (at p. 278):

"By S. 7 of the Constitution (Forty-fourth Amendment) Act, 1978 the reference to Article 31 was deleted from the concluding portion of Art. 31-A (1) with effect from June 20, 1979, as a consequence of the deletion by S. 2 of the 44th Amendment of Cl. (f) of Art. 19 (1) which gave to the citizens the right to acquire, hold and dispose of property. The deletion of the right to property from the array of fundamental rights will not deprive the petitioners of the arguments which were available to them prior to the coming into force of the 44th Amendment, since the impugned Acts were passed before June 20, 1979 on which date Art. 19 (1) (f) was deleted."

Reference may also be made to the decision of the Supreme Court in Ishwari Khetan

Sugar Mills (P.) Ltd. v. State of U. P., AIR 1980 SC 1955 where Desai, J. who delivered the majority judgment observed (at p. 1971):

"And now to the oft beaten track of legislation being void as being in contravention of Art. 31 (2) as it stood at the relevant time. The impugned legislation was put on the statute book on Aug. 27, 1971. Therefore, Article 31 (2) as it stood on the relevant date may be noticed. The Article as amended by Constitution (Twentyfifth Amendment) Act, 1971, will, therefore, not be attracted."

In **Tara Prasad Singh v. Union of India**, AIR 1980 SC 1682, the Supreme Court had to consider the constitutional validity of the Coal Mines (Nationalisation) Amendment Act, 1976. In that connection, Chandrachud C. J. speaking for the Court observed "We are not concerned with the amendment introduced by the 44th Amendment Act which deleted the reference to Art. 31, since that Amendment Act came into force prospectively with effect from June 20, 1979."

25. In the instant case, the Bihar Act 7 of 1976 was passed before June 20, 1979 on which date Art. 31 (2) was deleted from the Constitution and, accordingly, in view of the above decisions of the Supreme Court, the validity of the said Act can be assailed on the ground that it is violative of Art. 31 (2) of the Constitution. It has been already held by us that S. 2 (ii) and S. 3 of the Bihar Act 7 of 1976 having sought to apply the provisions of Ss. 6 and 7-A as substituted by the Bihar Act 15 of 1975 with retrospective effect depriving the respondent-company of its right to get the market value of the undertaking, which is property within the meaning of Articles 19 (1) (f) and 31 (2) of the Constitution, without any public purpose and without any provision for compensation are violative of Article 31 (2) of the Constitution and are void. The doctrine of eclipse has no manner of application in the instant case on the ground of deletion of Art. 31 from the Constitution, such deletion being prospective and not retrospective.

26. The position, therefore, is that the Bihar State Electricity Board having exercised its option to purchase the undertaking of the respondent-company under the unamended S. 6 of the Act, S. 7-A as substituted by the said Bihar Ordinances and ultimately by the Bihar Act 15 of 1975 will not apply. Sections 2 (ii) and 3 of the Bihar Act 7 of 1976 which made the substituted provisions of Ss. 6 and 7-A applicable to the exercise of option under the unamended provision of

S. 6 of the Act being ultra vires Art. 31 (2) of the Constitution and void, and the doctrine of eclipse not being applicable, the right of the respondent-company to receive the market value of the undertaking under S. 7-A of the Act before it was substituted remains unaffected.

27. It is, however, made clear that so far as the prospective application of the substituted provisions of the said Ordinances as replaced by the Bihar Act 15 of 1975 is concerned, they are valid and effective. In other words, after the said provisions were substituted by the Bihar Ordinance 50 of 1974 any notice given under the substituted S. 6 exercising option by the concerned authority for the purchase of an undertaking, the licensee would only be entitled to the book value of the undertaking to be determined in accordance with the provisions of the substituted S. 7-A. But, as held already where, as in the instant case, the option was exercised under S. 6 before it was amended by the said Bihar Ordinance 50 of 1974, the provisions of the substituted S. 7-A providing for the payment of book value would not apply. In such a case, the licensee would be entitled to market value of the undertaking under S. 7-A of the Act.

28. Before we part with this appeal, we may notice the contention of Mr. Somendra Chandra Bose, learned Counsel appearing on behalf of the added respondent, the Bank of India, which claims to be the creditor of the respondent-company. It is contended that in view of the provision of S. 37 (1) of the Electricity (Supply) Act, 1948, the debt due to the added respondent is attached to the purchase money payable to the respondent-company who is liable to pay the debt of the added respondent out of such purchase money. We do not think that in this appeal we are called upon to consider the claim of the added respondent. All that we say is that we have not said anything in this judgment which may prejudice the right, if any, of the added respondent to realise the debt due to it from the purchase price payable to the respondent-company, in accordance with law.

29. In the circumstances and for the reasons aforesaid, this appeal is dismissed. In view, however, of the facts and circumstances of the case, there will be no order for costs.

A. K. SARKAR, J.:— I agree.

Appeal dismissed.

AIR 1982 CALCUTTA 83**MANASNATH ROY, J.**

Smt. Krishna Kamalini Debeya, Petitioner v. Junior Land Reforms Officer, Khandagosh and others, Respondents.

Civil Rule No. 4983 (W) of 1977, D/-30-3-1981.

West Bengal Land Reforms Act (10 of 1956), Ss. 14K (c) and 14-J — Right of maintenance of parents of Raiyat cannot be equated with right of separate ceiling. (Hindu Adoptions and Maintenance Act (78 of 1956), S. 20).

The right of the parents of the Raiyat to be maintained by him or his heir, on his death, has no relation to separate ceilings to be given to them and such obligations, as mentioned in Act 78 of 1956, cannot be equated with the right of having separate ceilings by the parents of the Raiyat. (Para 21)

Under S. 20 of Hindu Adoptions and Maintenance Act 78 of 1956, a Hindu has been saddled with the burden to maintain some persons or another at some stage of his or her life. Apart from the obligation of a husband to maintain his wife, he must maintain his children till the age of minority, the daughter till marriage, and thereafter, if she becomes a widow, apart from maintaining the old and infirm parents, if they are unable to maintain themselves, out of their own earnings or other properties. So, to maintain the old and infirm parents is a qualified obligation under Hindu Law and every Hindu male was under a legal obligation to maintain his aged parents and such liability was not dependent on the possession of property by the son. No burden has been placed by statute, on the property inherited by an individual and the liability under the said 1956 Act continues to be a personal one, but may be enforced against the estate in the hands of the heirs and such liability will be proportional to the estate inherited. (Para 18)

Section 14K (c) of Act 10 of 1956 has defined 'family' and has included therein persons whom a Raiyat, was obliged to maintain under the said Act 78 of 1956 or in law. But, such definition has not included, rather, has excluded the old and infirm parents, who, in terms of the said Act 78 of 1956 were and are required to be maintained by a Raiyat, while alive and such right could be

enforced against the estate in the hands of the heirs, apart from the fact that such liability or obligation, would also be preferential to the estate inherited. Such being the position, the widowed mother of the deceased Raiyat as in this case, was required to be maintained by the widow of the Raiyat, from out of the properties, which she has inherited or would inherit, on the death of her husband, the erstwhile Raiyat. The right of maintenance, as in the provisions of the said Act 78 of 1956 cannot thus be equated with the right of separate ceiling or holding the same. If old and infirm parents, were meant to be maintained or entitled to get a separate ceiling area, then the legislature would not have left them in consideration of the ceiling area of a 'family,' more particularly when, the other heirs or members, who were and are required to be maintained, have been included. AIR 1981 SC 522, Foll. (Para 19)

The non obstante clause as in S. 14J, would mean to be operating to set aside as no longer valid, anything contained in Ss. 18 to 21 of the said Act 78 of 1956, as otherwise, the same would be inconsistent with the said Act. The non obstante clause in S. 14J should prevail, despite anything contrary in any other provision. (Para 21)

Cases Referred: Chronological Paras

AIR 1981 SC 522; (1980) 4 SCR 716;
(1980) 3 SCR 1209 10, 14, 19
AIR 1966 SC 1987; 1966 All LJ 778;
(1967) 1 SCA 209 16
(1966) 1 QB 83; (1965) 1 All ER 941;
(1965) 2 WLR 1235, Goodfellow v. Johnson 15
AIR 1965 SC 871; 1965 (2) Cri LJ 11;
(1965) 2 SCJ 115 13
AIR 1965 SC 1349; (1965) 2 SCJ 638 20
(1965) 1 QB 1; (1963) 2 All ER 263;
(1963) 3 WLR 75, Brown v. Roberts 15
AIR 1962 SC 779; (1962) 2 SCA 375 13
AIR 1958 SC 56; 1958 Cri LJ 228;
(1959) 2 SCA 221 16
AIR 1958 Mad 403; 51 Mad LW 291 13
AIR 1956 SC 105; (1955) 2 SCR 977;
1956 SCJ 134 11
AIR 1955 SC 376; 1955 SCA 440 12, 16
AIR 1955 SC 830; 1956 SCA 424 13
AIR 1953 Nag 237; 1953 Nag LJ 376 13
AIR 1951 SC 115; 1951 SCJ 238 11
AIR 1950 SC 165; 1950 SCJ 437 13
AIR 1949 All 345; 1949 All LJ 77; 50
Cri LJ 542; 1949 All WR (HC) 76 12

AIR 1936 Bom 138: ILR (1936) 60 Bom 455: 38 Bom LR 77 18

AIR 1928 PC 2: (1928) 26 All LJ 385: 47 Cal LJ 171 13

(1914) AC 785: 111 LT 343: 30 TLR 476, Attorney General v. Milne 13 (1836) 2 M and W 191 Beack v. Smith 13

Ashoka Kumar Sen Gupta and S. P. Mitra, for Petitioner; K. M. Yusuf, for Respondents,

ORDER:— The present petitioners in the Rule, which was obtained on 28th July 1977, with the corresponding interim order for maintaining of status quo, are the heirs of the original petitioners and were substituted by an order dated 29th Jan. 1981, as the original petitioner died on 28th Nov. 1980, leaving them, as her heirs and legal representatives,

2. In the Rule, an order of vesting under the provisions of West Bengal Land Reforms Act 1955 (hereinafter referred to as the said Act), has been challenged,

3. It is the case of the petitioners that the family of the original petitioner Smt. Krishna Kamalini Debeya, since deceased, consisted of herself and her mother-in-law, Smt. Nanibala Debeya, besides five members of the family of her brother Shri Gopi Nath Goswami, one foster daughter, two whole-time servants and one whole-time maid-servant. The members of the said brother's family have been stated to include the brother, his wife, their two daughters and a son,

4. Admittedly, the husband of the erstwhile petitioner, Smt. Krishna Kamalini Debeya, died in or about 1942 B. S., leaving behind the mother, the widow and two unmarried daughters, who have since been given in marriage and have been substituted in the manner as mentioned hereinbefore, in place and stead of the original petitioner. It is the case of the petitioners that the original petitioner was holding and possessing 14.95 acres of lands, including agricultural and non-agricultural, apart from danga lands and lands comprised of homestead and orchard, as per the finally published Record of Rights under S. 44 (2) of the West Bengal Estates Acquisition Act 1954. Such holdings, according to petitioners, were within the ceiling limit under the said Act. It has also been stated that those lands were and are out of the D. V. C.

command at present and as such, the question of irrigation by canal water would not arise. It has been stated that a notice dated 30th Dec. 1974, from the Sub-divisional Land Reforms Officer, Sadar, Burdwan and Revenue Officer, under Chap. IIB of the said Act, purported to be issued in connection with case No. 17, Khandaghosh 1974, directing the petitioner to furnish a return in Form 7A, and such return was filed. Thereafter, time was prayed for by the erstwhile petitioner, through her letter dated 12th Jan. 1975, stating inter alia amongst other relevant facts and also intimating the authorities concerned, that she along with her mother-in-law never possessed landed properties in excess of the ceiling limits as prescribed under the law. The petitioners have stated that in response to such answer, no further notice was served in connection with the connected case No. 17 but a memo dated 25th June 1976, was received from the Settlement Officer. Khandoghose, being Respondent No. 3, directing to show cause by 5th of July 1978, as to why suitable measures should not be taken, as per the provisions of Sec. 14T (4) of the said Act and the lands in excess of the family ceiling, as may be determined after due enquiry, should not be declared vested in the State and taken possession of by or in the manner as prescribed. It is the case of the petitioners that in compliance with the said memo, a list of total lands in the possession of the erstwhile petitioner and the brother Shri Gopi Nath Goswami and so also disclosing the names of the members of the family, were submitted and thereafter, the original petitioner came to learn from the Junior Land Reforms Officer concerned being Respondent No. 1, that several plots of lands were vested in the State of West Bengal, out of her total lands. The petitioners have stated that for such vesting, no notice was ever duly and properly served and as such, an objection, through a petition dated 18th Oct. 1976, to the Charge Officer, Settlement Charge Office, Burdwan, being Respondent No. 2, was filed,

5. It has been claimed that thereafter, it was learned that again, another ex parte order of vesting was passed by the Settlement Officer concerned, without giving any opportunities to the petitioners, to exercise option in respect of the lands to be retained and

without giving any opportunities of being heard. Such order has been claimed to have been made, ignoring the actual facts and without any enquiry as to the members of the family. As such, it has been stated that the erstwhile petitioner, filed another application, praying for exercise of option for the lands to be retained in her possession and she, on or about 28th Apr. 1977, received a memo of that date, directing her to depute a representative in the Circle Office at Khandoghosh on 29th Apr. 1977. These facts, the petitioners have stated, would prove that the concerned order was not issued by the Revenue Officer under Chap. IIB of the said Act. It has been stated that on 29th Apr. 1977, the representative, as directed, was sent but the officer concerned did not consider the documents as produced, but acted on his own motion. The petitioners have further stated that from a reference to a communication dated 19th Oct. 1976, from the Sub-divisional Officer Right Bank Irrigation Sub-division, Sheriha, Burdwan, it would appear that all the mouzas of Jaitinpur, Salon, Pandua and Taldanga were out of D. V. C. Command at that time and as such, the question of irrigation by canal water would not arise. This communication was addressed to Shri Gopi Nath Goswami. It has been stated that thereafter, the Junior Land Reforms Officer, Respondent No. 1, came to the village and threatened the erstwhile original petitioner, not to cultivate the lands, so purported to be vested, without giving any list of the vested lands and further threatened her that those lands would be distributed very soon. It has been claimed that such order of vesting of the lands in question, was bad in law and against all principles of natural justice, inasmuch as the order of vesting was passed ex parte and without hearing the objections as filed and the documents as produced. It has also been claimed that the Settlement Circle Officer concerned, acted illegally and arbitrarily, in not taking the erstwhile petitioner's mother-in-law, as a member of her family and further acted illegally and arbitrarily, in passing the order of vesting of the erstwhile petitioner's lands, inasmuch as the said order was made without any enquiry as to the members of the family. It has also been claimed that the said officer, further acted illegally and arbitrarily, in tak-

ing into account all the lands as irrigated, in contravention of the provisions as contained in the said Act.

6. It has further been stated that the erstwhile petitioner took every step to get the copy of the ex parte order of vesting, but she could not get the same, as the officials concerned refused to entertain any application for such copy. However, an unofficial copy has been annexed in Annexure-H and the petitioners have stated that such copy of the vested lands was procured by them with great strain. The erstwhile petitioner was admittedly, found to be the only and sole surviving member of the family and the findings by the Settlement Circle Officer concerned, have been claimed by the petitioners, to be arbitrary and illegal, apart from being contrary to law. It should be noted here that although the erstwhile petitioner, initially claimed the members of the family to be eight, but at the time of hearing, Mr. Sen Gupta, in his usual fairness contended that the family would not be composed of eight, but the same should have been treated as consisting of two viz., the erstwhile petitioner and the mother-in-law.

7. The affidavit-in-opposition, which is dated 3rd Oct 1977, has been filed on behalf of Respondent No. 3, by Shri Monish Chandra Chowdhury and it has been stated there, that the lands in question might be out of the D. V. C. command, but they are irrigated by deep tubewell and such fact was also claimed to be confirmed by one Shri Subhoj Chandra Mukherjee, son-in-law of Gopi Nath Goswami, who incidentally was the brother of the petitioner. It has been claimed that the Settlement Circle Officer, Khandoghosh, duly asked the original petitioner to appear at the hearing on 5th July 1976 and Sarbashree Subol Chandra Mukherjee and Gopi Nath Goswami, attended the hearing and submitted a statement of the total quantum of lands, plot by plot, noting as to which plots get irrigation facilities and which under the deep tubewell system. It has also been stated that those representatives also filed a statement of family members numbering two, and as such, claimed that no land as stated in the statement, stood vested. The deponent has stated further that according to the report of the Halka Officer, Sasangu, the erstwhile petitioner's

family was consisting of one. It has also been stated that the Settlement Circle Officer concerned, conducted a local enquiry and on such enquiry, the statements of the erstwhile petitioner, about the members of her family, proved to be false and as such, the said officer, vested the lands which were in excess of the ceiling, providing for one member and allowed retention of lands to her in accordance with law. It has further been stated that on the basis of the erstwhile petitioner's petition dated 26th Mar. 1977, the officer as mentioned above, fixed the case for review on 29th Apr. 1977. It is the case of the answering Respondent that even after due and proper notice, none appeared on the date of the hearing of the review case and as such, the said review matter was also decided ex parte, allowing the erstwhile petitioner, to retain all ceiling lands to which she was entitled, out of the plots specifically mentioned for retention of lands in her petition dated 26th Mar. 1977. It has been claimed that Gopi Nath Goswami appeared on 4th May 1977 and not on 29th Apr. 1977 as claimed, and he was also allowed to choose the lands on behalf of the original petitioner and thereafter, the vested land statements, already sent to the J. L. R. O. Khandoghosh, was corrected as per the option. In view of the aforesaid facts, the Respondents have claimed that there is no illegality or any irregularity or any violation of principles of natural justice, for which any interference at this stage, should or need be made.

8. The affidavit-in-reply to the affidavit-in-opposition as mentioned hereinbefore, was dated 26th Feb. 1981 and the deponent of the same was Shri Subol Chandra Mukherjee and the said deponent practically denied the material allegations contained in the affidavit-in-opposition and he reiterated the statements as contained in the petition. Apart from denying the material allegations as contained in the affidavit-in-opposition, the deponent has further required the Respondents to prove their allegations as contained in the affidavit-in-opposition.

9. Mr. Sen Gupta, claimed and contended firstly, that in view of the communication in Annexure "G" to the petition, which shows and establishes that the question of irrigation by canal

water, in respect of the lands in question did not arise, the claims of the answering respondents that the lands are getting water through deep tubewell, should not be allowed to be agitated or canvassed. He, on a reference to Ss. 14K and N of the said Act, contended that the erstwhile petitioner would have been entitled to 6.17 acres of lands. He of course, stated that he could not follow how and under what calculation, 7.05 acres of land was allowed to be retained. The calculations as mentioned above, were put forward by Mr. Sen Gupta, taking the lands as in irrigated areas. He then claimed, that even if the lands are considered to be in non-irrigated area, then the petitioners would be entitled to 8.64 acres. The petitioners were allowed to retain 7.05 acres and Mr. Sen Gupta claimed that such retention which was allowed, was not according to the choice as furnished. At this stage, Mr. Yusuf stated that since, even after due notice, the erstwhile petitioner had not taken any steps to represent her case at the review stage, so the choice of lands had to be made by the officer concerned ex parte. But, Mr. Yusuf, in his usual fairness, stated that if such opportunities are asked for by the petitioners and also granted by this Court, then the Respondents concerned would be prepared to re-hear the case of the petitioners now and allow them to retain lands up to 7.05 acres according to their choice.

10. It was secondly, contended by Mr. Sen Gupta that the officer concerned, was wrong in holding the family of the erstwhile petitioner to be one and not consisting of two and his elimination of the widow mother-in-law, for considering the members of the family, was improper. It was claimed and contended by Mr. Sen Gupta that since under S. 20 of the Hindu Adoptions and Maintenance Act, 1956 which is to (and is referred to hereinafter as the said 1956 Act) the following effect: Maintenance of children and aged parents:— (1) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.

(3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property,

Explanation :— In this section "parent" includes a childless step-mother;

the husband of the petitioner No. 1, had an obligation to maintain his aged or infirm parents, so, even if the word parents are not mentioned in S. 14K of the said Act, but the members of the family, for computing the ceiling area, they or any of them, if alive should also be considered as a member of the family and such obligation to maintain those aged and infirm parents, was cast on the erstwhile petitioner viz. the widow of their son and as such, the family in the instant case, should have been composed, not only of the widow but also of the widow mother-in-law and as such, the same should have been directed to be consisting of two. Mr. Sen Gupta further contended that if the family was allowed to be consisting of two, then the ceiling area as granted, would have been more. In this connection, S. 14K (c) which lays down that "family" in relation to a Raiyat shall be deemed to consist of (1) himself and his wife, minor son, unmarried daughter, if any, (2) his unmarried adult son, if any, who does not hold any land as a Raiyat, (3) his married adult son, if any, where neither such adult son nor the wife nor any minor son or unmarried daughter of such adult son holds any land as a Raiyat, (4) the widow of his predeceased son, if any, where neither such widow nor any minor son or unmarried daughter of such widow holds any lands as a Raiyat, (5) minor son or unmarried daughter, if any, of his predeceased son, where the widow of the said predeceased son is dead and any minor son or unmarried daughter of such predeceased son does not hold any land as Raiyat, but shall not include any other person, with the Explanation and proviso thereunder, will have to be considered. Admittedly, the relations as mentioned under Sec. 14K (c) have not included the parents and in this case widowed mother of the Raiyat. Thus, the question to be answered is, as to whether

the widowed mother of the deceased Raiyat, should be considered as the member of the family, on the basis of the requirements of Sec. 20 of the Hindu Adoptions and Maintenance Act. Under that section, every Hindu has been burdened with the maintenance of some person or another at some stage of his or her life and under the said section of the Hindu Adoptions and Maintenance Act, it would mean when property passes without any distinction, liabilities which are concomitants to it, must also pass. Under that section, apart from the liabilities of a husband to maintain his wife, a person must maintain his children, till the age of minority, whether such children are born by grace or nature, he or she must maintain his or her daughter till marriage and when the married daughter becomes a widow, the liability revives. The said section also requires that he or she as mentioned therein must maintain the aged and the infirm parents, if such parents are unable to maintain themselves out of their own earnings or other property. The said Sec. 20 as mentioned, also casts a liability on the son and the daughter, to maintain their aged and infirm parents, who are unable to maintain themselves out of their own earnings or other properties. Under the old Hindu Law, every male Hindu was under a legal obligation to maintain his aged parents and such liability was not dependent on the possession of property by the son. The dependants have also been defined in Sec. 21 of the Hindu Adoptions and Maintenance Act, 1956. While on this question, the provisions of Sec. 14J of the said Act, which lays down that provisions of Chap. IIB shall have effect notwithstanding (anything) to the contrary contained elsewhere in the said Act or in any other law for the time being in force, will have to be considered. Before that, it must also be remembered that those provisions in Chapter IIB have been found to be intra vires by the Supreme Court in the case of Sasanka Sekhar Maity v. Union of India (1980] 4 SCR 716; (AIR 1981 SC 522).

11. Section 14J, as mentioned hereinbefore, contains that the provisions of Chap. IIB, shall have effect notwithstanding anything to the contrary contained elsewhere in the said Act or in any other law for the time being in

force. The words "notwithstanding anything contained in any other law for the time being in force," have been determined in the case of *Brij Raj Krishna v. S. K. Shaw*, AIR 1951 SC 115, to prevent reliance on any other law to the contrary. It has also been observed in the case of *Raj Bahadur Kanwar Rajnath v. Shri Pramod C. Bhatt* (1955) 2 SCR 977 : (AIR 1956 SC 105) that the provisions are obviously intended to repel a possible contention that Sec. 12 in that case, does not by implication repeal statutes, conferring rights on lessees and cannot prevail as against them and have been inserted *ex abundanti cautela*. In that case, it has of course been observed further that those words cannot be construed as cutting down the plain meaning of the operative portion of the section. The word "notwithstanding" means "without prejudice."

12. Mr. Sen Gupta, of course relied on the determinations in the case of *Jugal Kishore Saraf v. Raw Cotton Company Ltd.*, AIR 1955 SC 376, wherein, it has been observed that the cardinal rule of construction of statutes is to read the statute literally. The words used by the legislature will have their ordinary, natural and grammatical meaning. If, however, such a reading, leads to absurdity and the words are susceptible to another meaning, the Court may adopt the same. But, if no such alternative construction is possible, the Court must adopt ordinarily the rule of literal interpretation. Thus, it was submitted by Mr. Sen Gupta that when Sec. 20 of the Hindu Adoptions and Maintenance Act, has cast an obligation to maintain the infirm parents who could not maintain themselves out of their own earnings or other properties, so even in spite of the provisions of Sec. 14J of the said Act, it was the obligation in this case on the Raiyat, since deceased, and thereafter, the erstwhile petitioner, Smt. Krishna Kamalini Debey, to maintain the widowed mother of the Raiyat.

13. While on non obstante clause, it should first be ascertained what the enacting part of the section provides on a fair construction of the words used, according to their natural and ordinary meaning and the non obstante clause is to be understood as operating to set aside as no longer valid anything con-

tained in relevant existing law which is inconsistent with the new enactment. The enacting part of the statute, must, where it is clear, be taken to control the non obstante clause as observed in the case of *Thangia v. Hanuman Bank Ltd.*, AIR 1958 Mad 403, that where both cannot be read harmoniously, for even apart from such clause, a later law abrogates earlier laws, clearly inconsistent with it. The words of statute, as observed in the case of *Attorney General v. Milne* (1914) A. C. 765, must *prima facie*, be given their ordinary meaning or literal meaning. The Courts in proper cases, can call before it persons to show what the meaning of a particular word should be in a specialised document, but the Courts have no such power in interpreting the statute. Hence the legislature usually annexes an interpretation clause and in other cases General Clauses Acts, to supply the Court with a meaning of the words in a statute. If there is one rule of construction for statutes and other documents, it is that, nobody should imply anything in them, which is inconsistent with the words expressly used. In terms of the determinations in the case of *New Piecegoods Bazar Co. Ltd. v. Commr. of Income-tax* AIR 1950 SC 165, the primary duty of the Court, in interpreting a statute is to give effect to the intention of the legislature as expressed in the words used by it, and no outside consideration can be called in it, to find out the intention. In terms of the determinations in the case of *State v. B. K. Mondal* AIR 1962 SC 779, which was made on a reliance on the determinations in the case of *Ramanandi v. Kalawati*, AIR 1928 PC 2, where there is a positive enactment of the Indian Legislature, the proper course is to examine the language of that statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law or of the English law, upon which it may be founded. So, in terms of the determinations of the Supreme Court in the case of *Tirath Singh v. Bachittar Singh*, AIR 1955 SC 830, it is only when the language of a statute, in its ordinary meaning and grammatical construction, leads to manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction

may be put upon it, which modifies the meaning of the words and even the structure of the sentence. On the basis of the observations in the case of *Kanwar Singh v. Delhi Administration*, AIR 1965 SC 871, the Courts can depart from dictionary meaning of the word and give it a meaning which will advance the remedy and suppress the mischief. It further provided that the Courts do not have to act on conjecture or surmises. A construction should be adopted in accordance with the policy and the object of the statute. What is sometimes called the Golden Rule, appears to be modification of the rule of literal interpretation. Thus, in the case of *Beacky v. Smith* [1836] 2 M and W 191, such rule has been observed to be very useful one in the construction of a statute. It has also been observed in the case, that adherence to the ordinary meaning of the words used, and to the grammatical construction, should be made, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case, the language may be modified, so as to avoid such inconvenience, but no further. As mentioned, earlier statutes, like documents must be read as a whole and all the parts made consistent with one another, if possible, and a construction to avoid absurdity, should be adopted by the Courts, whenever possible. It should also be noted that a non obstante clause is used in a provision to indicate that, that provision should prevail despite anything to the contrary in any other provision. In this matter, reference may be made to the determinations of the Nagpur High Court, in the case of *Vasant Rao Mangroo v. Election Commission of India* AIR 1953 Nag 237.

14. In the case of *Sasanka Sekhar Maity v. Union of India* (AIR 1981 SC 522) (supra), it has been observed that the definition of "family" in S. 14K (c), is more realistic than the definition of the terms in similar laws, for imposition of ceiling on agricultural holdings enacted in other States. It has also been observed that the definition is much wider, and far more generous and humane, because it takes into consideration the existence of a widowed and divorced daughter. It has further been observed that the legislature on a cor-

rect perspective, has enlarged the definition of a family to the maximum possible extent, and provides for as many as nine members. It has further been observed in that case, that normally, the father of a raiyat would be entitled to a separate ceiling area of his own determined under Sec. 14M. On a reference to such determinations, Mr. Sengupta contended that the Supreme Court has not ruled out the possibilities of the case of a family, consisting of two members viz, the widow and the widowed mother of the Raiyat, rather, on implications of the findings, have accepted that such exceptional cases, however few in number, may be possible viz. the widowed mother of the Raiyat, whom the Raiyat, under the law as mentioned above, was obliged to maintain, should be maintained by the widow of the Raiyat, as on the death of the Raiyat, the obligation to maintain his widowed mother and that too out of the estate, devolved on the widow. It was also contended that if such construction is not given, then the position may be awkward and embarrassing, both for the widow and widowed mother of the Raiyat, as the widowed mother, can bring proceedings against the widow of the Raiyat, for fulfilment of the obligations under Sec. 20 and Sec. 21 of the said 1956 Act and at the same time, she may also be refused to be maintained by the widow of the Raiyat out of the estate and as such to have the obligations, as involved or cast upon, to be frustrated. Mr. Sengupta also contended that thus on reasonable interpretation, the word "himself" as used in the section, should be held to be including the old and infirm parents and as in this case, the widowed mother,

15. While on the question of interpretation and construction of the section, Mr. Sengupta submitted that the construction must not only be agreeable to justice and reason, but the construction as given or made, should try to avoid possibility of any injustice, apart from contending that the construction must not be absurd or doing away with the obligation, which was fastened on the Raiyat in this case and if possible, every endeavour should be made to avoid any loss to any innocent person or to protect such person, from any illegality. In support of his submissions

as mentioned above and to augment them, Mr. Sengupta referred to relevant passages in Maxwell on the Interpretation of Statutes (Twelfth Edition). It is true that such construction to a statute or the terms of the same, should be endeavoured to be granted, which would be agreeable to justice and reason and there is a presumption against doing something, which would be inconvenient and unreasonable, apart from the fact, that such construction should be sought to be avoided, which would bring about unreasonable and inconvenient results. It is also true that possible injustice, on the basis of interpretation, should also be sought to be avoided. That apart, every endeavour is to be done, to see that no absurdity results, on the basis of the interpretation or meaning as made or given to a statute or the words used therein and there is also a presumption that while interpreting a section or its terms, the obligations as devolved on the basis of other statutes or enactments, must not be interfered with and as mentioned hereinbefore, in terms of the determinations in the case of *Brown v. Roberts* (1955) 1 QB 1, so also of those in *Goodfellow v. Johnson*, (1966) 1 QB 83, that whenever possible, the words of an Act, should be construed, so as not to involve innocent persons in illegality. Mr. Sengupta claimed that if interpretations contrary to the above and as contended by him, are given, that would expose the widow of the Raiyat in illegality, as if she refuses to maintain the widowed mother of the Raiyat, she may bring appropriate action against her, contending that the refusal by her to maintain the widowed mother of the Raiyat viz. her mother-in-law, was illegal, as the said action would be contrary to law.

16. In support of his submission on the rules of interpretation of statutes and the words or phrases used therein, Mr. Sengupta further referred to the determinations in the case of *Jugal Kishore Saraf v. Raw Cotton Co. Ltd.*, (AIR 1955 SC 376) (supra), and more particularly to the determinations that the cardinal rule of construction of statutes is to read the statute literally, that is, by giving, to the words used by the legislature, their ordinary, natural and grammatical meaning. It has also been observed that if, however, such a reading leads to absurdity and the words are susceptible to another meaning, the

Court may adopt the same. But, if no such alternative construction is possible, the Court must adopt the ordinary rule of literal interpretation. Then, Mr. Sengupta referred to the determinations in the case of *Chandra Mohan v. State of Uttar Pradesh* AIR 1966 SC 1987, and more precisely to the observations that the fundamental rule of interpretation is the same, whether one construes the provisions of the Constitution or an Act of Parliament viz. that the Court will have to find out the expressed intention from the words of the Constitution or the Act, as the case may be. But, if, however, two constructions are possible, then the Court must adopt that, which will ensure smooth and harmonious working of the Constitution and eschew the order, which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law, nugatory. Lastly, reliance was placed by Mr. Sengupta on the determinations in the case of *Ramaswamy Nadar v. State of Madras*, AIR 1958 SC 56 and particularly to the observations that if, in construing the section, the Court has to supply some words in order to make the meaning of the statute clear, it will naturally prefer the construction, which is more in consonance with reason and justice.

17. There cannot be any doubt or dispute regarding the canons of construction of a statute or the terms of the same, the particulars whereof have been referred to hereinbefore by Mr. Sengupta. But, one thing is certain that with the object of achieving such reasonable constructions or effect, the provisions of a statute or the terms of the same, should not be made or felt to be unreasonable. The said Act, was incorporated in 1955 and Chap. IIB, was incorporated with retrospective effect from 15th Feb. 1971 and such incorporation, as indicated hereinbefore, has been found to be in order and authorised. The said 1956 Act, received the assent of the President on 21st Dec. 1956 and the same has codified the existing law for adoption and maintenance among Hindus. In terms of the determinations in *Rex v. Nain Sukhi Das*, AIR 1949 All 345, every legislation is to be interpreted in a way, so that the aims and object of the same, are promoted and preserved. A Hindu is under a moral and legal duty, to maintain

certain relations in certain circumstances and the main circumstances being the denial to that relation, the right to inherit or the right to partake, but not to separately enjoy the property of the family. What exactly constitutes maintenance under Hindu Law is difficult to define, it is certain that the right to residence, expenses of marriage and that of funeral expenses, fall under the category of maintenance. "Maintenance" has been defined under Sec. 3 (b) of the said 1956 Act and embraces within the ambit, provisions for food, clothing, residence, education, medical attendance and treatment and in the case of an unmarried daughter, the reasonable expenses of her marriage. Sec. 4 of the said 1956 Act lays down the overriding effect upon Hindu Law and maintenance is a personal obligation and on the death of the person to be maintained, the obligation is no longer attached to the estate, unless a charge has been created specifically by agreement, will or decree of a competent Court.

18. Under-Sec. 20 of the said 1956 Act, a Hindu has been saddled with the burden to maintain some persons or another at some stage of his or her life. Apart from the obligation of a husband to maintain his wife, he must maintain his children till the age of minority, the daughter till marriage, and thereafter, if she becomes a widow, apart from maintaining the old and infirm parents, if they are unable to maintain themselves, out of their own earnings or other properties. So, to maintain the old and infirm parents is a qualified obligation under Hindu Law and every Hindu male was under a legal obligation to maintain his aged parents and such liability was not dependent on the possession of property, as observed in the case of *Appibai v. Khimji* ILR (1936) 60 Bom 455: (AIR 1936 Bom 138), by the son. The class of dependants under the said 1956 Act have been defined in section 21. The word dependant, has been used in Sections 18 to 20 of the said 1956 Act. The circumstances in which dependants are required to be maintained, have been enumerated in section 22 of the said 1956 Act. It should be noted that no burden has been placed by statute, on the property inherited by an individual and the liability under the said 1956 Act continues to be a personal one, but may be enforced against the estate in the

hands of the heirs and such liability will be proportional to the estate inherited. The terms of Sec. 22 will apply only to cases where property passes by intestate succession and not when it passes through a will or by survivorship in a joint Mitakshara family.

19. It should further and also be noted, that S. 14K (c) has defined 'family' and has included therein persons whom a Raiyat, was obliged to maintain under the said 1956 Act or in law. But, such definition has not included, rather, has excluded the old and infirm parents, who, in terms of the said 1956 Act, were and are required to be maintained by a Raiyat, while alive, and such right could be enforced against the estate in the hands of the heirs, apart from the fact that such liability or obligation, would also be preferential to the estate inherited. Such being the position, the widowed mother of the deceased Raiyat as in this case, was required to be maintained by the widow of the Raiyat, from out of the properties, which she has inherited or would inherit, on the death of her husband, the erstwhile Raiyat. The right of maintenance, as in the provisions of the said 1956 Act, cannot thus be equated with the right of separate ceiling or holding the same. If old and infirm parents, were meant to be maintained or entitled to get a separate ceiling area, then the legislature would not have left them in consideration of the ceiling area of a 'family,' more particularly when, the other heirs or members, who were and are required to be maintained, have been included. The definition of 'Family' under the said Act and in terms of the determination in the case of *Sasanka Sekhar Maity v. Union of India* (AIR 1981 SC 522) (supra) has been found to be more realistic than the definition of the terms in similar laws, for imposition of ceiling on agricultural holdings enacted in other States and such definition, in the words of the Supreme Court is much wider, and far more generous and humane and the legislature has, on correct perspective, enlarged the definition of 'Family' to the maximum possible extent.

20. The obligation under S. 20 of the said 1956 Act, of a person to maintain the aged and infirm parents amongst others, arises only when they are unable to maintain themselves, out of their own income or properties and to that

extent, the obligation ceases to be personal. The Supreme Court, in the case of *Kamalammal v. Venkatalakshmi Ammal*, AIR 1965 SC 1349, has observed, that the liability to maintain may arise either from the existence of a particular relationship, independent of possession of property viz. the liability to maintain the wife, minor sons, unmarried daughters and aged parents or it may arise on possession of property e.g. the liability to maintain a disqualified heir. The obligation to maintain the relations as mentioned above, is personal and legal in character and no doubt arises from the very existence of the relationship between the parties. The obligation to maintain parents and an unmarried daughter extends, in so far as any one of the latter is unable to maintain himself or herself, out of his or her own earnings or other property. There is no evidence available in this case that the widowed mother of the deceased Raiyat was not in a position to maintain herself either of her earnings or the property.

21. In view of the above, and the specific ouster of old and infirm parents, from the purview of the 'Family' as under S. 14K (c) of the said Act, read with the intention of the Legislature viz. the non obstante clause in S. 14J, I am of the view, that the constructions as sought to be put forward by Mr. Sengupta, cannot be accepted. The non obstante clause as in Sec. 14J, would mean, here in this case, to be operating to set aside as no longer valid, anything contained in Ss. 18 to 21 of the said 1956 Act, as otherwise, the same would be inconsistent with the said Act. The non obstante clause in S. 14J, in my view, should prevail, despite anything contrary in any other provision. Thus, the arguments advanced by Mr. Sengupta that even in spite of the provisions of S. 14J and specific definition of "Family" as in 14K (c) and even though such definition does not include or speak of parents, they should be maintained by the Raiyat or his heir and as such the parents of the deceased Raiyat, would be entitled to separate ceiling, should fail. I hold as such, as in my view, the right of the parents of the Raiyat to be maintained by him or his heir, on his death, has no relation to separate ceilings to be given to them and such obligations, as mentioned in the said 1956 Act, cannot be equated with the

right of having separate ceilings by the parents of the Raiyat.

22. At this stage, Mr. Sengupta contended that if the lands are in irrigated area, then, under the provisions of the said Act, the petitioner would not be entitled to get 7.90 acres and as such he failed to understand, why such retention of ceiling was allowed. He then contended that if the lands are treated to be in non-irrigated area, then also the appropriate ceiling would be 8.64 and perhaps the lands were considered to be in non-irrigated area. Mr. Sengupta, thus contended that when, taking the lands to be in non-irrigated area, the petitioner was allowed the retention of 7.90 acres and the petitioner, in law would be entitled to 8.64 acres, so in all fairness, the Respondents concerned, should be directed to allow the petitioner the balance of .74 acres (8.64-7.90) and that too in terms of a choice to be exercised by her. Mr. Yusuf, in his usual fairness contended, that such claim of the petitioner, as made now, may be considered, if directed by the Court. The submissions as made by Mr. Sengupta, appeared to me, to be reasonable and considering the fair stand as taken by Mr. Yusuf, even though, I discharge the Rule, I direct the Respondents now to consider the ceiling area of the petitioner, on treating the lands in non-irrigated area if they really are after giving her the due and necessary option, in accordance with law.

23. The Rule is thus discharged as above. There will be no order as to costs.

Rule discharged.

AIR 1982 CALCUTTA 92

ANIL KUMAR SEN AND
B. C. CHAKRABARTI, JJ.

State Bank of India, Petitioner v.
Netai Ch. Porel, Opposite Party.

C. O. No. 591 of 1981, D/- 5-5-1981.

Succession Act (39 of 1925), Sec. 370 — Debt — Ornaments kept in safe deposit locker in the Bank — Not being a debt or a security within meaning of Sec. 370, succession certificate cannot be granted, AIR 1962 Pat 220 and AIR 1963 All 46 Dist.; AIR 1937 Cal 314. Relied on. (Para 6)

GY/KY/D153/81/MRD/RSK

Cases Referred: Chronological Paras
 AIR 1963 All 46: 1962 All LJ 1004:
 1962 All WR (HC) 777 3
 AIR 1962 Pat 220: 1961 BLJR 864 5
 AIR 1937 Cal 314: 41 Cal WN 524 6

M. M. Ghosh, P. K. Mookherjee and Dipankar Chakrabarty, for Petitioner; Harendra Nath Halder, for Opposite Party.

B. C. CHAKRABARTI, J.:— This is revisional application at the instance of the petitioner, State Bank of India and is directed against an order dated Dec. 3, 1980 passed in Act 39, Case No. 414/78 of the Court of the District Delegate at Alipore.

2. Facts are simple and may be stated thus,

3. One Juthikabala Porel wife of the opposite party No. 1 kept certain ornaments and jewellery in a Safe-Deposit Locker of the State Bank of India at its main branch, Calcutta. She having died, her husband the opposite party herein applied for succession certificate in respect of the said goods which was registered as Act 39, Case No. 414/78. After the filing of the said application a question was raised by the Court as to whether the prayer for grant of succession certificate in respect of the said goods was maintainable. After hearing the learned Advocate for the opposite party the petitioner in that case, the learned District Delegate by his order dated June 12, 1978 held, on the authority of the decision in the case of Dina Nath v. Balakrishna, AIR 1963 All 46, that the liability to refund the ornaments was a debt and as such the application for the grant of succession certificate in respect of the same was maintainable. The petitioner was accordingly directed to file the requisite stamp duty. Subsequently on Feb. 18, 1980 the succession certificate was granted. Thereupon the petitioner herein, the State Bank of India filed an application for reconsideration of the order dated June 12, 1978. This application was disposed of by the order impugned. It was held that the question regarding maintainability of the application for succession certificate was thoroughly considered by the order dated June 12, 1978 and on the basis thereof the succession certificate was granted by the Court on Feb. 18, 80. The learned Judge held that the application of the State Bank of India was misconceived in so far as the order for grant

was required to be revoked before the order dated June 12, 1978 could be reconsidered. The application was accordingly rejected.

4. The petitioner being aggrieved has moved the present revisional application which has been heard on notice to and upon contest by the opposite party.

5. Mr. Ghosh appearing in support of the revisional application contended that the ornaments which were kept in deposit in the Safe-Deposit-Locker of the State Bank were neither a debt nor a security within the meaning of the provisions of Sec. 370 of the Indian Succession Act and as such no succession certificate could be asked for or granted in respect of the said goods. The expression 'security' has been explained in sub-sec. (2) of Sec. 370 but the expression 'debt' has neither been explained nor defined. It is however nobody's case that the ornaments in question fall within the category of security within the meaning of Sec. 370. The question therefore is whether it is a debt or not. In support of the contention that it is not a debt, Mr. Ghosh relied on a decision in the case of Shyam Sundari Devi v. Sarti Devi, AIR 1962 Pat 220. The facts of that case however were different. There the deceased had pledged with a bank certain ornaments by way of security for the debt (loan?) which the Bank had advanced. It was held that succession certificate could not be granted and asked for in respect of the ornaments since it was not a debt due from the Bank. In that case the Bank had advanced a loan to the deceased and the ornaments were pledged with the Bank merely as a security for the repayment of the same. In the circumstances the Bank could not be said to be a debtor in respect of the articles. On the contrary the deceased was a debtor to the Bank. Therefore, this decision does not seem to be directly touching the point involved in the case before us.

6. The decision relied on by the learned Judge as also by the opposite party before us is also not to the point. There a lady died during the Kumbhamela tragedy and the ornaments found on her body were taken possession of by the District Authorities. On an application for the grant of succession certificate in respect of the same it was held that the refund of the ornaments be-

came an obligation on the authorities to hand over the same or the value thereof to the rightful claimant and that for such a liability an application for succession certificate could be asked for and granted. We are, however, unable to agree to such a broad proposition that any liability owing from one person to another whether in cash or in kind, secured or unsecured, whether ascertained or ascertainable, arising out of any obligation, is a debt. In the particular case however the facts also were different in so far as it was not the deceased who had kept the ornaments with the District Authorities but that the District Authorities themselves collected the ornaments on their own and as such incurred the liability to refund the same to the rightful claimant. This aspect of the matter distinguishes the case from the facts of the case before us. Here the deceased Juthikabala had herself deposited the articles with this Bank for safe custody; she had the option to go and collect it at any time she liked. The Bank was merely a custodian of the same. In ordinary parlance debt means a sum certain due from one person called the debtor to another called the creditor. In Stroud's Judicial Dictionary a debt is defined as a sum payable in respect of a liquidated money demand recoverable by action. One of the essentials of a debt is an ascertained amount or readily calculable amount. In that sense the State Bank of India in this case could not be said to stand in the position of a debtor nor could Juthikabala be called a creditor in respect of the ornaments. But that apart the more important distinguishing point is that unlike in cases of debt, the Bank had no right of disposition of any kind in respect of those ornaments. The Bank stood in the position of a bailee or a trustee to whom though possession was entrusted, there was no intention of transferring the ownership. It is settled law that debt is not trust and any and every liability irrespective of its true legal character does not become a debt. Since succession certificate can be granted only in respect of debts and securities and not for any other kind of property, we are of the opinion that in this case succession certificate could not be granted. In this connection reference may be made to the decision in the case of Assam Bengal Rly. Co. v. Atul Chandra (1937) 41 CWN 524: (AIR 1937 Cal

314). The application for grant of the same was not therefore maintainable.

7. Mr. Halder in opposing the revisional application contended that the State Bank had asked for reconsideration of the order dt. June 12, 1978 but since following that order succession certificate was actually granted on Feb. 18, 1980, the prayer of the State Bank was not entertainable until the grant itself was revoked. It was argued that since the State Bank had not made a prayer for revocation of the grant this application had been rightly rejected. We are unable to accept the contention. The impugned order itself indicates that the learned Judge had granted the succession certificate on the basis of the order dated June 12, 1978. The grant was merely consequential to that order. Therefore if that order is found to be bad in law the consequential order passed on the basis thereof must necessarily fail. We find that succession certificate could not be asked for in the facts of this case. The order dated June 12, 1978 was therefore erroneous and is liable to be set aside. The consequential order made on the basis of that order must also therefore fail. Consequently the order for grant of succession certificate founded upon the order dated June 12, 1978 cannot stand.

8. The revisional application accordingly succeeds. The impugned order dated Dec. 3, 1980 is set aside. The order dated June 12, 1978 holding that the application for grant of succession certificate was maintainable is found to be erroneous and the order for grant of succession certificate founded on that order is also set aside.

9. There will be no order for costs.

ANIL K. SEN, J.:— I agree.

Revision allowed.

AIR 1982 CALCUTTA 94

SABYASACHI MUKHARJI AND
C. K. BANERJI, JJ.

Piyush Kanti Guha v. West Bengal Pharmaceutical & Phytochemical Development Corporation Ltd. and others.

Appeal No. Nil of 1981, Company Appn. No. 93 of 1981 and Company Petn. No. 169 of 1981, D/- 7-8-1981.

Civil P. C. (5 of 1908), S. 10 — Companies Act (1956), Ss. 397, 398 — Stay

IY/LY/E297/81/AGM/MVJ

of proceedings — Civil suit filed before company petition — Company petition sought to be stayed — Court finding relief sought for in both cases distinctly different — Stay of company petition cannot be granted.

Where the main relief sought for in the company petition was on the ground of oppression and framing of a scheme and appointment of directors which was distinctly different from the relief asked for in the civil suit restraining some directors nominated by the government from functioning, it was held that stay of the proceedings in the company petition could not be granted under S. 10. AIR 1978 SC 375, (1980) 50 Com Cas 771 (Cal) and 1978 Tax LR 2292 (All) Referred. (Paras 3, 4)

Cases Referred: Chronological Paras

(1980) 50 Com Cas 771 (Cal)	3
AIR 1978 SC 375 : 1978 Tax LR 1745 :	
(1978) 1 SCJ 423	3
1978 Tax LR 2292 (All)	3

Sushil Biswas, Radhapa Banerji and Satyajit Banerji, for Appellant; Anindya Mitra and S. C. Ukil, for Respondents.

ORDER :— This is an application asking for admission of an appeal preferred from the order of Roy Chowdhury, J. refusing to stay proceedings under Ss. 397 and 398 of the Companies Act, 1956 being Company Petition No. 169 of 1981, Company Application No. 93 of 1981. The appellant's case is that the Suit No. 209 of 1981 had been filed prior to the institution of the company petition. The appellant further contends that the matters in controversy are in substance the same and though the parties are not identical the real issue between the parties is the same and the High Court has jurisdiction in both the matters and it would be incorrect, according to the appellant, that the Company Court has exclusive jurisdiction under S. 10 of the Civil P. C. In view of the fact that the suit had been instituted prior to the institution of the company petition it is submitted that the suit should have been stayed.

2. Without going into the abstract question whether the civil court in any particular situation hearing a suit under Code of Civil Procedure can exercise the powers which are exercisable by the Company Court under Ss. 397 and 398 of the Companies Act, 1956 it appears to us that in this case the causes of action in essence, in two matters, are differ-

ent. There is a case of oppression against the minorities and mismanagement by the Guhas. Looked at from that point of view it appears to us that in this case it would be incorrect to say that the controversy in both the matters is in essence the same.

3. Leaving aside the question that the parties are different we are inclined to the view that S. 397 is a special code by itself as observed by the Supreme Court in the case of Cosmosteels Pvt. Ltd. v. Jairam Das Gupta, AIR 1978 SC 375. This view has also been expressed by the Division Bench of this Court in the case of Debijhora Tea Co. Ltd. v. Barendra Krishna Bhowmick, (1980) 50 Com Cas 771. The learned advocate for the appellant, however, drew our attention to the observations of the Division Bench of the Allahabad High Court in the case of Smt. Patna Devi v. Harihar Prasad Naik, 1978 Tax LR 2292 where the Division Bench of the Allahabad High Court was of the view that the civil court could take cognisance of the matter because it possessed jurisdiction to do so under S. 9 of the C. P. C. and not because of anything contained in the Companies Act. The Division Bench was further of the view that it would not be correct to say that the party concerned should first seek his remedy from the Company Court under Ss. 155, 397 and 398 of the Act and then he could file a suit only if the Company Court refused to grant any relief. In an appropriate case where the suit is cognisable under S. 9 C. P. C. simply because some of the allegations in that suit also attract the provisions of S. 397 or 398 or S. 155 of the Companies Act, 1956 it may not be obligatory on the party to await an adjudication by the Company Court to institute a proceeding under the Civil P. C. But if a particular type of relief sought for can only be given in an appropriate proceeding under Ss. 397 and 398 which, as we have mentioned before, are code by themselves as held by the Supreme Court then it is not possible to circumvent that procedure by instituting proceedings in a civil court. The facts in the context of which the Division Bench of the Allahabad Court made the aforesaid observations are entirely different. Quite apart from any of these theoretical questions we have examined the reliefs that have been asked for in the 397 application in

the instant case. The main relief seems to be on the ground of oppression and framing of a scheme and appointment of directors which is distinctly different from the relief asked for in the suit restraining some directors nominated by the Government from functioning.

4. In this view of the matter *prima facie* we are satisfied that the learned Trial Judge was right in not granting stay under S. 10 of the Civil P. C. In the premises, we are of the opinion that we cannot stay the operation of the order of the learned Trial Judge until the disposal of the appeal. Save the order that we have already made, that is to say, admitting the memorandum of appeal there will be no further order on this application. Save to that extent all interim orders are vacated.

5. Appeal from the orders dated 27th July, 1981 and 15th July, 1981 is to be consolidated and one set of Paper Book cyclostyled or typewritten in both the appeals is to be filed within one month from date. Notice of appeal is waived. Settlement of index is dispensed with. All papers used in the Court below including the order appealed from and the order admitting the appeal will be included in the Paper Book. In case certified copies of the orders are not available within the time aforesaid, liberty is given to the appellant to file a supplementary Paper Book to include the certified copies of the orders. Department to issue certified copies of the orders expeditiously.

6. Costs of this application will be costs in the appeal.

Order accordingly.

AIR 1982 CALCUTTA 96

SALIL KUMAR ROY CHOWDHURY, J.
Indian Dairy Corporation, Plaintiff
v. M/s. Lasco, Defendant.

Suit No. 67 of 1980, D/- 31-7-1981.

Arbitration Act (10 of 1940). S. 20 — Application to file in court arbitration agreement — Court should not pass order for filing of the agreement, in case of strained relationship between the parties and when arbitrator cannot be impartial.

An arbitration agreement which is admitted by the parties ordinarily should be held to be binding between

the parties and the Court also at the first instance would be inclined to give effect to the said arbitration agreement provided there is a congenial atmosphere prevailing evidencing good relation between the parties. As a whole the idea of arbitration is cheapness, speed and to maintain the cordial relation between the two parties on the transaction, but if the Court finds from the facts of a particular case that enforcement of arbitration clause will lead to injustice and the arbitrator cannot be impartial and expected to exercise the fundamental principles of justice, fair-play and good-conscience, the Court will hesitate to give effect to the said arbitration clause. (Paras 5, 8, 9, 11, 12)

Cases Referred: Chronological Paras

AIR 1981 Mad 121 5

AIR 1962 SC 406 : (1962) 1 SCJ 620 10

AIR 1937 Oudh 436 : 170 Ind Cas 490 11

AIR 1935 All 886 : 1935 All LJ 998 11

Sankar Ghosh with Dr. Tapas Banerjee and S. P. Majumder, for Plaintiff; S. B. Mukherjee with Shib Das Banerjee, for Defendant.

ORDER : This is an application under S. 20 of the Arbitration Act, 1940, for filing the arbitration agreement dated 18th/23rd of Oct., 1979 and for order of reference of the dispute to the Arbitrator in terms of the arbitration agreement and consequential reliefs.

2. By a letter dated 18th/23rd of Oct, 1979, the plaintiff/petitioner appointed the defendant/respondent purely on a temporary basis for a period of three months as the Clearing Agent at Calcutta for clearance of imported cargo improvement and local transportation jobs and other related items of works as set out in the said letter and also in paragraph 3 and sub-paragraphs thereof in the petition. Pursuant to the said agreement the defendant/respondent and the plaintiff/petitioner started acting as only Clearing Agent of the Calcutta Port on and from 1st of Nov. 1979, till 15th of Dec. 1980 as the terms were extended from time to time. During the period the defendant/respondent acted as the Clearing Agent of the plaintiff/petitioner and handled cargo, namely, skimmed milk powder and rubber oil consigned to the plaintiff/petitioner by different vessels as mentioned in paragraph 7. It is alleged that in course of clearing of the said consignment, the said cargo suf-

ferred and/or incurred demurrage and on that account the plaintiff/petitioner is alleged to have paid a sum of Rs. 1,87,000/-. Therefore, it is alleged that the plaintiff/petitioner has suffered the said loss and demurrage due to the lack of proper care and steps and proper clearance not being effected by the defendant/respondent. It is also alleged that the plaintiff/petitioner with the defendant/respondent did not submit quarterly statement of claims lodged, settled or pending and therefore, the plaintiff/petitioner is not in a position to know what steps the defendant/respondent has taken in respect of claim, refund, compensation or the insurance value of the lost cargo with the Calcutta Port Trust, Steamer Agent and Under-Writers. The plaintiff/petitioner is claiming a sum of Rs. 5,46,520/- insured value of which is Rs. 8,46,520. The defendant/respondent is alleged to have not informed the plaintiff/petitioner what steps they have taken and whether any claim has been lodged with the Insurance Company. After various correspondence disputes and differences are alleged to have arisen between the parties and the same has been summarised in paragraph 22 and various sub-paragraphs thereof in the petition and having regard to the arbitration clause in the said agreement between the parties which is set out in paragraph 21 of the petition being the following terms :

"In the event of any question dispute or difference arising under these conditions or any special conditions of contract or in connection with this contract (except as to any matter the decision of which is especially provided for by these or the special conditions) the same shall be referred to sole arbitration of an officer to be appointed by the Managing Director of the Corporation."

"There will be no objection to appointment of a person as arbitrator on the ground that he had to deal with the matter or had expressed views on all or any of the matters in dispute or difference. The award of the arbitrator shall be final and binding on the parties to this contract."

3. The present application was filed on the 24th of July 1980, and in the application under S. 20, the plaintiff/petitioner also made an application under

S. 41 of the Arbitration Act, 1940 in which an ad interim order was made appointing a Receiver to realise the amount sum or sums on account of refund from the Calcutta Port Authority or other Authorities as mentioned in prayer (a) of the said petition under S. 41.

4. In course of hearing it transpires that during the pendency of the present application the plaintiff/petitioner has already realised diverse sums of monies from the Insurance Co. directly which form part of the alleged claim against the defendant/respondent in this application and also took delivery of the goods alleged to be short landed at Calcutta Port which appears to have been landed at Bombay and, therefore, the total claim made in the present application against the defendant/respondent by the plaintiff/petitioner has been reduced by about Rs. 5,00,000/-. In that view of the matter I directed the parties to file supplementary affidavits on the 12th of June, 1981 and pursuant to that affidavits were filed from which it is admitted that the plaintiff/petitioner has collected diverse sums of money from the Insurance Company as the beneficiary under the insurance policy for which claim was lodged against the defendant/respondent in this application as one of the disputes to be referred to arbitration and also taken delivery of goods from Bombay Port which were alleged to be short landed at Calcutta Port and it was landed in Bombay which was taken delivery by the plaintiff/petitioner. It is admitted by the plaintiff/petitioner in the affidavit of one Mekhat Parameshwar Gopalkrishna Kurup affirmed on the 18th of June, 1981, and also further affidavit of the said deponent affirmed on the 19th of June, 1981, that the plaintiff/petitioner admitted that various amounts has been received from the Under-Writers by cheques as set out in the said affidavit and also it is admitted that the major portion of the short landed goods which appear to have been landed by the Steamer Agent at Bombay has been received by the plaintiff/petitioner and taken delivery from the Steamer Agent at Bombay and in this process a major portion of the claim appears to have been realised during the pendency of the present application in spite of the

fact that the Receiver has been appointed in the application under S. 41 of the Arbitration Act, 1940 pending the S. 20 application, to collect the said amount and it further appears that the plaintiff/petitioner's attitude is such as they have that they are entitled to receive the said payments without informing the Court or the Receiver or the defendant/respondent in any way whatsoever during the pendency of this application with a view to intimate this Court about the fact which the defendant/respondent alleged that the plaintiff/petitioner has realised the claims from the Insurance Company and also taken delivery of the goods which are alleged to have been short landed at Calcutta Port in respect of which alleged claims are raised against the plaintiff/petitioner.

5. Mr. Sankar Ghosh, appearing with Dr. Tapas Banerjee and Mr. S. P. Majumder, submitted that the amounts and the goods which has been realised and recovered by the plaintiff/petitioner during the pendency of this application would be given credit in respect of the claim of the plaintiff/petitioner against the defendant/respondent and as such, the claim will be reduced in the reference accordingly and for the balance the disputes should be referred to arbitration in terms of the arbitration agreement to the sole arbitration of Managing Director or any Officer to be appointed by him in terms of the arbitration clause in the agreement. Mr. Ghosh submitted that there cannot be any objection regarding the appointment of the Managing Director or any other Officer to be appointed by him as Arbitrator in terms of the arbitration agreement as the parties have agreed to it and, therefore, all the conditions under S. 20 of the Arbitration Act, 1940 being satisfied, that is, no suit is pending, no steps have been taken by the plaintiff/petitioner under Chapter II of the Arbitration Act, 1940, and the disputes are covered by the arbitration clause and no sufficient cause has been shown by the defendant/respondent and, therefore, the order should be made as prayed for. He further submitted that there is no allegation against the Managing Director but against some other Officers being the said Kurup the deponent, who has affirmed the petition and reply and also the supplementary affidavit. Mr. Ghosh cited a Division Bench decision of the Madras High Court in Ama Corporation, Madras v.

Food Corporation of India, AIR 1981 Mad 121 where it was held that in an application under S. 20 the machinery prescribed in the arbitration agreement for appointment of an Arbitrator must be adhered to and appointment of an Arbitrator by Court otherwise than what is prescribed in the arbitration agreement is not according to the terms of the arbitration agreement and, therefore, such an order is not sustainable. The said decision is a well-settled principle. Nobody can dispute the same. But here the question is not appointment of some other Arbitrators than the Arbitrator appointed under the arbitration agreement. The question is whether sufficient cause has been shown by the defendant/respondent in the facts and circumstances of this case having regard to the conduct of the plaintiff/petitioner earlier and also during the pendency of this application in this Court by realising insurance due and receiving goods from the Shipping Agent in respect of the alleged claim against the plaintiff/petitioner in spite of the fact that they got a Receiver appointed for that purpose in the application under S. 41 pending the S. 20 application. Further, there is a question whether having regard to the strained relationship between the parties, it is proper to force the defendant/respondent to arbitration in terms of the arbitration agreement who will be no one else than the Managing Director or an Officer to be appointed by him under the employment of the plaintiff/petitioner who has acted in most high-handed manner in this proceeding by realising the amounts directly from the Insurance Company and taking delivery of the goods alleged to be short landed during the pendency of this application in spite of the appointment of a Receiver obtained by them for the same purpose without intimating the Receiver or the Court at all at any time. It is only when the defendant/respondent brought to the notice of the Court and the supplementary affidavits were directed to be filed, those facts came to light and were admitted by the plaintiff-petitioner that they have collected nearly Rs. 5,00,000/- which form very substantial portion of the alleged claim against the plaintiff/petitioner which are the disputes to be referred to arbitration. It is true that an arbitration agreement which is admitted by the parties set out before

ordinarily should be held to be binding between the parties and the Court also at the first instance would be inclined to give effect to the said arbitration agreement provided there is a congenial atmosphere prevailing evidencing good relation between the parties. As a whole the idea of arbitration is cheapness, speed and to maintain the cordial relation between the two parties on the transaction, but if the Court finds from the facts of a particular case as, in my view, which is apparent from the conduct of the plaintiff/petitioner that enforcement of arbitration clause will lead to injustice and the arbitrator cannot be impartial and expected to exercise the fundamental principles of justice, fairplay and good-conscience, the Court will hesitate to give effect to the said arbitration clause.

6. In this case Mr. S. B. Mukharjee, appearing with Mr. Shibdas Banerjee, for the defendant/respondent, has rightly submitted that the defendant/respondent in violation of the Court's order made in the application of the plaintiff-petitioner under S. 41 of the Arbitration Act 1940 appointed a Receiver to collect all the amounts from the Insurance Company, Shipping Agent and the Customs Authority as the case may be. But now admittedly the plaintiff/petitioner has collected nearly Rs. 5,00,000/- without the leave of the Court or intimating the Receiver in any way whatsoever. In these circumstances, the conduct and attitude of the defendant/respondent is such that having regard to the relationship as evidenced from the correspondence placed before me and annexed to the pleadings it is quite apparent that apprehension of bias of the Arbitrator who is no one else than the Managing Director of the plaintiff-petitioner or any Officer to be appointed by him under the Arbitration Clause. Those are sufficient causes as Mr. Mukherjee rightly submitted shown by the defendant/respondent why the matter should not be referred to the Arbitrator under the arbitration clause.

7. In reply, Dr. Tapas Banerjee submitted that all the conditions under Section 20 are fulfilled and an order should be made. He also submitted that all the conducts of the plaintiff/petitioner are justified as they are to collect the amount as beneficiary under the Insurance Policy and they have done

so and the claim against the defendant/respondent will be reduced to that extent. So, also the explanation about the collection of shortlanded materials from the Bombay Port about which a claim was raised as a dispute in the said S. 20 application. The value of the said goods would be deducted from the claim in the reference against the defendant/respondent, and as such, there is no difficulty in continuing the balance claim of the plaintiff-petitioner against the defendant/respondent in the reference. Whatever the Receiver appointed under S. 41 has already collected Rs. 44,000/- from the Shipping Company as a claim should be refunded to the Insurance Company who has been substituted in place of the plaintiff/petitioner for whom defendants/respondents were acting as Clearing Agents to raise a claim has already received from the Insurance Company in respect of the said claim. In these circumstances, the plaintiff/petitioner submitted that an order should be made as prayed for in this application and the claim of the plaintiff/petitioner would be reduced by the amount already received which is admitted to be about Rs. 4,82,980/-. Therefore, it is admitted that a substantial portion of the claim has already been realised during the pendency of the present application by the plaintiff/petitioner without any notice to the Court or with its leave or informing the Receiver about the same. It is only at the instance of the defendant/respondent the facts were disclosed to this Court and thereafter, direction for filing supplementary affidavits were given and after taking several adjournments the plaintiff/petitioner admitted realisation of the amount by themselves directly and they justified the same as their right to do so under the Insurance Policy and under the Contract of Shipment. But that does not relieve the defendant/respondent from their liability to the plaintiff/petitioner as claimed in the petition under S. 20 save and except the claim would be reduced by the amount collected by the plaintiff/petitioner during the pendency of the application or earlier.

8. Considering the matter very carefully and also the correspondence between the parties it is quite apparent that the plaintiff/petitioners' conduct is most high-handed and not conducive to a reference to arbitration as in the prevailing circumstances and strained re-

lationship where mutual faith and confidence has been lost and acrimonious allegations against each other are hurled in the correspondence between the parties and particularly against Mr. Kurup. It will not be just and proper to refer the disputes between the parties to arbitration as prayed for by the plaintiff/petitioner in the S. 20 application. As I am satisfied that in the peculiar and particular facts of this case there is sufficient cause shown by the defendant/respondent as to why relief should not be granted under S. 20 and the matter should not be referred to arbitration.

9. In this case the Arbitrator also, in my view, cannot be expected to be a impartial one and there is reasonable apprehension in the mind of the plaintiff/petitioner in the facts and circumstances of this case after acrimonious correspondence between the parties and after proceedings are started in this Court and the utter callousness on the part of the plaintiff/petitioner to appraise the realisations made by them directly overreaching the Court's order and superseding the Receiver's function whose appointment was obtained by the plaintiff/petitioner themselves in the S. 41 application and in fact, the Receiver has already collected a sum of Rs. 44,000/- from the Shipping Agent as damages in respect of a particular shipment, whereas in respect of that claim the plaintiff/petitioner has collected the amount from the Insurance Company. In these circumstances, I hold that there are sufficient causes why the matter should not be referred to arbitration.

10. Now, as to what is sufficient cause under S. 20 (4) a guideline has been laid down by the Supreme Court in the decision of Abdul Kadir Samsuddin Bubera v. Madhav Prabhakar Oak, AIR 1962 SC 406 where Wanchoo, J. observed at page 410, paragraph 12, as follows :

"Sub-section (4) of S. 20 lays down that where no sufficient cause is shown, the Court shall order the agreement to be filed and make an order of reference to the Arbitrator. It is therefore open to a Court under this sub-section, where sufficient cause is shown not to order the agreement to be filed and not to make a reference to the Arbitrator. The words of this sub-section leave a wide discretion in the Court to consider whether an order for filing the agreement should be

made and a reference made accordingly. It is neither necessary nor desirable to lay down general terms what would be sufficient cause which would entitle a Court to refuse to order the agreement to be filed and thus refuse to make an order of reference. The Court will have to decide on the facts of each case where sufficient cause has been made out for not ordering the agreement to be filed and not making the order of reference."

11. Therefore, it is for the Court to decide in the peculiar facts of a particular case whether it should exercise its discretion in favour of making an order of reference or not as I have already indicated that this is not a matter which should be referred to arbitration and there is sufficient cause which appears to the Court as pointed out by the defendant/respondent. Firstly, the conduct of the plaintiff/petitioner is such which is not conducive to a fair and impartial arbitration by one of its Officers and secondly, the Arbitrator appointed or to be appointed under the arbitration clause is an employee of the plaintiff/petitioner who in the facts and circumstances of this case cannot be expected to be fair and impartial although the plaintiff/petitioner has framed the arbitration clause in the agreement in such a manner to which the defendant/respondent had to agree that no objection on the ground that the Arbitrator is an employee of the plaintiff/petitioner can be raised because, in my view, in the facts and circumstances of this case taking present day attitude of ordinary persons and human conduct it cannot be expected that an employee of the plaintiff/petitioner, if he acts as an Arbitrator, can have an impartial mind and exercise fundamental principles of justice and equity so far as the defendants/respondents are concerned. The words 'sufficient cause' under S. 20 (4) of the Arbitration Act, 1940, also occurred in paragraph 17 (4) of the Second Schedule of the Code of Civil Procedure, 1908, which has been repealed by the Arbitration Act, 1940, and is *pari materia* came up for consideration before a Division Bench of the Oudh High Court in the case of Giridharilal v. Gobardhandas, AIR 1937 Oudh 436 at p. 437 which is an observation as follows :—

"Sub-paragraphs 3 and 4 clearly show that the Court had discretion to order

the agreement to be filed or not as the circumstances may require. The learned Counsel for the appellant contended that 'sufficient cause' within the meaning of sub-paragraph 4 means grounds such as are mentioned in paragraph 14, namely the award having left undetermined any of the matters referred to arbitration, or determining any matter not so referred, the award being indefinite and incapable of execution, and there being an objection to the legality of the award apparent on the face of it. We see no reason whatever to put such a restricted meaning on the words 'sufficient cause' occurring in sub-para. 4 and we are of opinion that these words cover all the grounds of justice, equity and good conscience on which a Court thinks an agreement should not be ordered to be filed. In 1935 All LJ 998: (AIR 1935 All 886) it was held that the Court can order an agreement to refer to arbitration to be filed under Para 17 (4), Sch. 2 Civil P. C., only where no sufficient cause is shown to the contrary, and in 143 I. C. 635, the Court of the Judicial Commissioner of Sind held that the words "sufficient cause" are not to be confined within the narrow compass of fraud, coercion and undue influence, and that there are other causes besides these which may be sufficient for the reversal of an order under Sch. 2, Para 17, Civil P. C."

12. In my view, the Supreme Court decision and the Oudh decision make it quite clear that the Court has wide discretion which should be exercised judicially in the facts and circumstances of a particular case and not capriciously or arbitrarily and the facts may vary from case to case and it is for the Court to decide whether it should be just and proper or according to the principles of equity and good conscience to order reference to arbitration or not under Section 20 (4) of the Arbitration Act, 1940.

13. Under the English Arbitration Act, 1950, the revocation of authority of an Arbitrator in a case similar to the present one it is provided in Sec. 24 (1) as follows:—

"Power of Court to give relief where arbitrator is not impartial or the dispute involves question of fraud;

24. (1) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to an arbitrator named

or designated in the agreement, and after a dispute has arisen any party applies, on the ground that the Arbitrator so named or designated is not or may not be impartial, for leave to revoke the authority of the Arbitrator or for an injunction to restrain any other party or the Arbitrator from proceeding with the arbitration, it shall not be a ground for refusing the application that the said party at the time when he made the agreement knew, or ought to have known, that the arbitrator, by reason of his relation towards any other party to the agreement or of his connection with the subject referred, might not be capable of impartiality

(2)-(3)....."

14. Although there is no analogous provision in our Arbitration Act, but, in my view, the principles can be applied if there is an apprehension of bias having regard to the strained relationship between the parties, the Arbitrator will be no one else than an employee of the plaintiff/petitioner. It will not be just, proper or fair to appoint such an Arbitrator and that constitutes a sufficient cause under Sec. 20 (4) of the Arbitration Act, 1940, for exercise of the Court's discretion in dismissing the application and the parties to be relegated to a suit and not to arbitration.

15. In the result, I dismiss the application under Sec. 20 of the Arbitration Act, 1940.

Application dismissed.

AIR 1982 CALCUTTA 101

B. C. RAY J.

Sree Jain Swetamber Terapanthi Vidyalaya and another, Petitioners v. The State of W. B. and others, Respondents,

C. R. No. 4984 (W) of 1977, D/- 29-7-1981.

(A) Constitution of India, Arts. 26, 29, 30 — Religious minority — Jain Swetamber Terapanthi Sect constitutes religious minority — Institution established and run by such sect is entitled to benefits under Art. 30. (W. B. Board of Secondary Education Act (5 of 1963) Sec. 45 — Management of Recognized Non-Govt. Institutions (Aided and Unaided) Rules, 1969, R. 8.)

JY/KY/E598/81/MVJ

The members professing Jain faith and belonging to the Jain Swetamber Terapanthi Sect constitute a religious minority in India, particularly in West Bengal. It professes a faith different from the Hindu religious faith. Therefore, the institution established by Sree Jain Swetamber Terapanthi Vidyalaya Society in West Bengal is entitled to benefits of Art. 30 (1) of Constitution. (Para 21)

Considering the decision in AIR 1972 S. C. 2119 and also of the specific mention of Jains both in the Hindu Law as well as in the various Acts such as Hindu Marriage Act, Hindu Adoptions and Maintenance Act, Hindu Succession Act etc, it would be clear that Jain Swetamber Terapanthi Sect professes a faith different from Hindu Religion. The members of Jain sect do form minority in comparison to the total population of India as well as of West Bengal. The Jain Swetamber Sect is therefore a religious minority in the State of West Bengal and as such it is entitled to the benefit conferred by Arts. 29 and 30 of the Constitution, AIR 1972 SC 2119; AIR 1954 SC 282 and AIR 1958 SC 956, Foll. (Para 18)

In the instant case this institution has been established by the society solely with the funds contributed by the members of that religious minority community viz. Jain Swetamber Terapanthi Sect primarily for the purpose of promoting their culture and religious tenets and imparting the same to the pupils belonging to their community. Therefore this institution is entitled to the benefit of Art. 30 (1) of the Constitution. The impugned order rejecting the prayer for Special Constitution as regards the constitution and/or reconstitution of the Managing Committee of this school is therefore wholly illegal and bad. Further R. 8 of the Rules framed for Management of Recognised Non-Government Institutions (Aided or Unaided), 1969 is not applicable to this institution in as much as it purports to interfere with the fundamental freedom guaranteed to the religious minority, i. e., the Jain Swetamber Terapanthi Sect to administer their educational institutions according to their choice, AIR 1979 SC 52 Foll. (Para 21)

(B) W. B. Board of Secondary Education Act (5 of 1963) Sec. 19 — Management of Recognised Non-Government

Institutions (Aided and Unaided) Rules 1969, R. 8 — Special Constitution of Committee of institution — Approval by Board — Matter cannot be referred to Recognition Committee — Refusal to approve on basis of Report of Recognition Committee is illegal.

Rule 8 does not require the Board to take the opinion and/or report of the Recognition Committee on the question of Constitution of Special Committee. Moreover, Sec. 19 of the Act, clearly specifies the powers and functions of the Recognition Committee. Sub-sec. (3) of the Section provides that the Recognition Committee shall advise the Board on all matters concerning recognition of institution and no recognition to any institution shall be accorded by the Board except on the recommendation of the Recognition Committee. Therefore, the Recognition Committee which is a statutory body has not been empowered to exercise any power of considering and giving any opinion on the question of the Special Constitution of a Committee of an institution. Therefore, the resolution adopted by the W. B. Board of Secondary Education at its meeting wherein the report of the Recognition Committee was considered and the prayer for Special Constitution in respect of Sree Jain Swetamber Terapanthi Vidyalaya was rejected is not a proper and valid order as the order is vitiated by taking into consideration the report of the Recognition Committee and determining matter on its basis. It is now well settled that statutory powers are to be exercised by the statutory bodies in the manner as provided in the statute or statutory Rules and Regulations framed thereunder. 1915 A. C. 120 Disting. (Para 22)

Cases Referred: Chronological Paras

AIR 1979 SC 52	21
AIR 1974 SC 1389: (1974) 2 SCJ 381	15
AIR 1972 SC 2119: (1972) 2 SCJ 168: 1972 Tax LR 2400	15, 18
AIR 1971 SC 1731	9, 19
AIR 1969 SC 465: (1969) 1 SCJ 700 15	
AIR 1968 SC 662: (1968) 2 SCJ 299 20	
AIR 1963 SC 540: (1963) 2 SCA 394 14	
AIR 1958 SC 956: 1959 SCJ 321	11, 13, 18
AIR 1954 SC 282: 1954 SCR 1005: 1954 SCJ 335	13, 18
AIR 1921 PC 77: 25 Cal WN 273: 1920 Mad WN 627	9, 16

1915 AC 120: 111 LT 905: 84 LJKB 72,
Local Govt. Board v. Arlidge 10, 23
(1904) ILR 31 Cal 11: 31 Ind App 249
(PC) 9, 15

Mr. Rabindra Nath Mitra, K. Ganguli, L. C. Bihani and Miss S. Mukherjee, for Petitioners; A. P. Chatterjee Standing Counsel and Paritosh Mukherjee, for Administrator, P. Chatterjee, for the Board and S. Pal, with Asit Sen-gupta, for Respondents,

ORDER :— The petitioner No. 1, Sree Jain Swetamber Terapanthi Vidyalaya, a society registered under the West Bengal Societies Registration Act, 1860, and the petitioner No. 2, Assistant Secretary of the said society have made this Writ application challenging the validity of the orders passed by the West Bengal Board of Secondary Education dated 19th Mar, 1977 and 25th July, 1977 respectively holding that the Election of members of the Managing Committee from the Guardians' Constituency was not valid and directing the appointment of an Ad hoc Committee or an Administrator to run the administration of this School as well as to complete re-constitution of the Managing Committee in accordance with the Rules and also by the later order rejecting the prayer for Special Constitution as regards the reconstitution of the Managing Committee of this school.

2. The salient facts of the case as appeared from the Writ application is that the petitioner No. 1 is a society registered under the West Bengal Societies Registration Act, 1860 and the purpose of the society as appears from its memorandum and Articles of Association is to take over, maintain, manage, regulate, conduct, guide, help, locate, remove, improve and develop the present existing educational institution known as Sree Jain Swetamber Terapanthi Vidyalaya; to impart, free of charge or otherwise secular, moral, physical, commercial and religious education according to the tenets of Jain Swetamber Tarapanthi Community in particular and to the boys and girls of other community in general. It was also provided therein that all properties of the Vidyalaya both moveable and immoveable including its funds shall be held by the Board of Trustee in the name of the Vidyalaya and they shall hold the said properties and funds, sub-

ject to the Rules and Regulations of the Vidyalaya and Trustees of any settlement endowment or donation shall hold the same subject to the terms thereof. The Executive Committee was vested with powers and duties of appointment of teachers, professors and other officers and employees of the said institution on such terms and conditions as they may think fit and proper and the Executive Committee is also empowered to suspend or dismiss or grant leave to any of the teachers, professors, officers or other employees of the Vidyalaya. It has been stated that the petitioner No. 1 i. e., the society has been all along managing and running three schools, viz., (1) Sree Jain Swetamber Terapanthi Vidyalaya (Boys' High School), (2) Sree Jain Swetamber Terapanthi Vidyalaya (Girls' High School) and (3) Sree Jain Swetamber Terapanthi Vidyalaya (Primary Section). The petitioner No. 1 it has been stated, is the financing, founder and the Managing Body having full control and power over the funds, properties and other assets of all the three Schools. It has also been stated that this society was formed in the year of 1916 for preservation of its culture, heritage, religion, philosophy, ethics, etc., and for imparting moral, physical, commercial and religious education according to the tenets of Jain Swetamber Terapanthi Religion to the children belonging to the said community and also to other boys reading in the said School. The term of the Managing Committee expired sometime on 31st Dec, 1974. The Secretary, Managing Committee of the said institution convened a meeting of the Managing Committee for preparation of the Election Programme for reconstitution of the Managing Committee. The provisional voters' list and inclusion and substitution applications of guardians etc. were finalised according to the said programme at a meeting of the Managing Committee held on 21st Sept. 1974. The Election Officer was also appointed in the meeting of the Managing Committee, and the Election Officer also accepted his appointment and agreed to hold the Election. The election from the teachers' category was completed on 4th Oct. 1974 and election from the categories of Founder, Donor, Medical Practitioner and the Persons interested in education was also completed by

the Election Officer on 9th Oct. 1974. The election of the Guardians' Category was scheduled to be held on 13th Oct. 1974, but owing to the filing of a suit being Title Suit No. 1484 of 1974 and an interim order made therein, the said election could not be held on the date fixed. The interim order, was, however, vacated on 19-3-1975 and thereafter election from the Guardians' category was held on 15-4-1975. The same was duly intimated to the respondent No. 3, President, West Bengal Board of Secondary Education and it was also notified on the Notice Board of said institution. No objection was raised to the holding of such election from any quarter. After completion of election the same was duly communicated to the Director of Public Instruction and District Inspector of Schools. But unfortunately no departmental nominee was placed nor any communication was received from the District Inspector of Schools (S. E.) or from the Director of Public Instruction in this matter. In the meantime an Ad hoc Committee was appointed by the West Bengal Board of Secondary Education for running the administration of this institution on 9th Feb. 1976. Against that an application was moved before this Court and after hearing the parties the Court directed to appoint a Supervisor to supervise the election of the Managing Committee to be held within a period of six months. Against that an appeal being F. M. A. No. 491 of 1976 was preferred. The appeal was disposed of with this direction that the appellants will hand over the copies of the documents relating to the holding of election to the learned Advocate appearing for the Board and the President of the Board will consider the papers and also papers which he received from the office of Director of Public Instruction as well as from the District Inspector of Schools and will pass appropriate orders. The President after considering those papers as well as the papers which were supplied by the petitioners held that election held on 15-4-1975 was not valid. It was also held that there should be a fresh election of Guardians' representative according to the Rules and procedure laid down by the Board. The term of the Managing Committee appointed on 7th Feb. 1976 was also over, and in order to avoid an administrative vacuum the Board would

take an appropriate step to appoint an Administrator or an Ad hoc Committee with direction to complete reconstitution of Managing Committee according to the Rules. This order was made by the Board on 19th Mar. 1977 and this has been annexed as Annexure 'A' to the petition. Against this order the petitioner moved an application in the Writ jurisdiction and obtained Civil Rule No. 2361 (w) of 1977 and an order of interim injunction restraining the respondents from appointing an Administrator or an Ad hoc Committee in this institution and also from interfering with the functions of the petitioners in respect of administration and management of this institution for a week. This interim order, however, was converted into an order of maintaining status quo in respect of management and administration of the School and the respondents were directed to consider the application of the petitioners for Special Constitution within a period of two months from the date. On 25th July, 1977 the Secretary of the West Bengal Board of Secondary Education intimated the petitioners that the application for Special Constitution was considered by the Board and the same was rejected in respect of this institution. This has been annexed as Annexure 'C' to the petition. The above two orders have been challenged in this Writ application on the ground inter alia that this institution is run by Jain Swetamber Terapanthi Vidyalaya which is a religious and linguistic minority and as such they are entitled to maintain and manage their institution without any interference from the Board in respect of the constitution of the Managing Committee of the School. In other words, it has been submitted that this institution is entitled to get the benefit of Arts. 29 and 30 of the Constitution of India, which provide that a religious community being minority has right to establish and administer educational institutions according to their own choice. It has also been submitted that no reasonable opportunity of hearing was given before rejecting their application for Special Constitution, and therefore, it is violative of the principles of natural justice. The instant Rule was issued and an interim order of maintaining status quo for a period of fourteen days were made from 22nd

Sept. 1977. The said interim order was subsequently vacated.

3. An affidavit-in-opposition has been filed on behalf of Respondents Nos. 2, 3 and 4 sworn by Sri Anil Chandra Biswas, Secretary, West Bengal Board of Secondary Education. It has been stated that the Board took the decision at its meeting dated July 21, 1977 after considering the views of the Director of Secondary Education contained in their memo dated June 14, 1977, to the following effect:—

(a) Sri Jain Swetamber Terapanthi Vidyalaya is said to have been started in 1916.

(b) That an Association named "Sri Jain Swetamber Terapanthi Vidyalaya" is said to have been formed and registered in 1937.

(c) The Association appears to have been formed and registered nearly two decades after the School was started.

(d) The jurisdiction and control of the said Association over the High School is subject to further probe.

(e) The name of the Association as "Sri Jain Swetamber Terapanthi Vidyalaya" is also intriguing.

(f) The affairs of the High School in recent times had been in bad shape in consideration of which the Board appointed an Ad hoc Committee to manage the institution.

4. It was further decided that the Directorate recommended that in order to bring normalcy to the institution and tone up discipline and academic standard the prayer for Special Constitution should be rejected.

5. In para 9 of the said affidavit-in-opposition it has also been averred that from the records of the school as well as from the Souvenir published in 1973 six persons were mentioned as the founders. It has also been stated that the name of the society was not recognised by the West Bengal Board of Secondary Education as the "Founder" of the school, and the object of the society, it was stated, was for taking over management and not to sponsor or start the Jain Swetamber Terapanthi Vidyalaya. It has also been stated in para 10 of the said affidavit-in-opposition that the petitioners in the writ petition are society and Society and the Managing Committee are two distinct entities. As such

the writ application at the instance of the society is not maintainable, in law, as the Managing Committee has been superseded earlier, and the same had become defunct long ago having no valid existence. In para 13 of the said affidavit-in-opposition it has been denied that the institution was started according to the tenets of the Jain Swetamber Terapanthi Religion. It has also been averred in para 16 of the affidavit-in-opposition that it is disputed that the petitioners belong to Jain Swetamber Terapanthi Community, which is a religious and linguistic minority community within the meaning of Arts. 26, 29 and 30 of the Constitution of India. In para 23 it has been stated that in considering the application for Special Constitution the Board had to take into consideration the recommendation of the Director of Secondary Education under R. 8 (2) of the Rules of 1969. It has been further stated that the Recognition Committee being a committee of the Board took a tentative decision in this matter as per settled practice and custom of the Board and the final decision had been taken by the West Bengal Board of Secondary Education in its meeting held on July 21, 1977.

6. A supplementary affidavit has been filed on behalf of the petitioners. In para 2 it has been stated that Jain community is divided into two sects, viz., Swetamber community and Digamber community. The petitioners are followers of Swetamber community which is the follower of Lord Mahavira. The Jain community has its own culture, heritage, philosophy and religion. It has its own language, namely Prakrita Language in which its canonical works are written though at present the Prakrita Language is not a spoken language. The Jain community is a religious minority community in India. According to the Census, 1971, the members of the Jain Community formed 0.47% of the total population of India. It has been stated in para 5 of the said supplementary affidavit that Sree Jain Swetamber Terapanthi Vidyalaya (Registered Society) was established in the year of 1916 and at that time 81 families of Jain Swetamber Terapanthi religious and linguistic minority community donated to the tune of Rs. 94,167/- and a Trust Fund was created with the aforesaid donations with the object of establishing a Vidyalaya.

The institution was established to run, manage, establish and administer and to finance the Jain Swetamber Terapanthi, Vidyalaya i.e., the institution for the purpose of imparting the religious education, heritage, philosophy and culture to the children of the members of the said religious community and this institution was established by the said society which was at that time un-registered. The school is being run, managed and administered by Sree Jain Swetamber Terapanthi Vidyalaya, the society and it is the only educational institution of the Jain community. The society which was already in existence being found as early as in 1916 and which established the school also in 1916 was registered under the Societies Registration Act, 1860 in the year 1936-37. 81 families of the community who donated for the Trust Fund for the establishment as well as administration of the said Vidyalaya were made life members of Sree Jain Swetamber Terapanthi Vidyalaya (Regd. Society) under Cl. 4 of the Memorandum of Association. It has also been stated that after the registration of the society in 1937 on an application for recognition made by the society this school got its first affiliation from the Calcutta University vide its letter No. 16169/PRO. 923 dated June 17, 1940. The said recognition continued up to the year 1943. The school due to the outbreak of the second World War was closed. Thereafter the society purchased the land at premises Nos. 3 and 4, Portuguese Church Street, Calcutta comprising of an area of 28 Cottah of land in accordance with the resolutions dated 23-4-45, 28-2-46 and 20-12-48 at a consideration of the Rs. 6,00,000/- in the year 1949. After spending about Rs. 1 lakh in respect of repairing, construction and for furniture and fixtures etc. for the purpose of its educational, religious and social activities as well as for the other purpose of the school, the said school was restarted from Mar. 30 1950, by Sri Jain Swetamber Terapanthi Vidyalaya (Regd. Society) at the said premises and since then the said institution is being run in an atmosphere of religious surroundings and teachings of the Jain religion which is one of the subjects of the school's curriculum. On Dec. 13, 1950, the petitioner No. 1 society applied for renewal of affiliation to the Registrar, University of Calcutta.

On Jan. 1, 1952 the West Bengal Board of Secondary Education by his letter dated 13th Dec. 1951, through its Secretary intimated the Secretary of the petitioner No. 1 that the President granted provisional recognition to the school for one year with effect from 1st Jan. 1952 subject to fulfilment of certain conditions. A Managing Committee thereafter was constituted according to the Rules of the School Code, 1961. The election of the members of the Managing Committee was not held according to the Rules of Management framed under the Act. But it was completed by nomination by the Executive Committee of the petitioner No. 1 and the petitioner No. 1 requested the Board of Secondary Education to approve the same. The Board allowed the unapproved Managing Committee to function as a Caretaker Committee till the reconstituted Managing Committee is approved by the Board. It has also been stated that the society is running the administration of the school and it has been always giving the financial aid and assistance to the members of the teaching and non-teaching staff and also for other purposes of the school as the Founder of the said school. It has also been stated that all the furniture and fixtures and all other assets of all these four schools which are being run in the said premises have been provided by Sri Jain Swetamber Terapanthi Vidyalaya (Regd. Society), the petitioner No. 1, and the same belongs to it. It has been further stated that R. 8 of the Rules of Management of Recognised Non-government Institutions (Aided and Unaided) is violative of Art. 14 of the Constitution of India inasmuch as there is no clear guideline suggesting in which case the Special Constitution would be sanctioned and in which case it would not. No affidavit in counter have been made controverting the statement of allegations made in supplementary affidavit.

7. Mr. Rabindra Nath Mitra, learned Advocate, appearing on behalf of the petitioner has submitted that the Jain Swetamber Terapanthi Vidyalaya i.e. the High School for Boys and Girls has been established and administered by the Jain Swetamber Terapanthi Vidyalaya, a society registered under the Societies Registration Act for the purpose of imparting the religious education, heritage and culture of Swetamber com-

munity which is a religious minority community having a special script, Prakrita of its own. It has been stated by Mr. Mitra that this institution is further entitled to the benefit of Arts. 26, 29 and 30 of the Constitution. R. 8 of the Rules framed under the West Bengal Board of Secondary Education Act, 1969 for Management of Recognised Non-government Institutions (Aided and Unaided) are not applicable to the reconstitution of the Managing Committee of this instant institution. Several decisions have been cited at the Bar on this point. It has been submitted further that the institution was not founded by the six members of the Jain community as has been stated in affidavit-in-opposition. This will appear from the Souvenir published in 1973 and also from the past records of this school. It has been submitted on the other hand, that it would appear clearly from the Souvenir as well as from the Register of life members maintained by the school that 81 persons belonging to Swetamber Jain community donated a sum of Rs. 94,187/- for the purpose of establishment of this institution, i.e. Sree Jain Swetamber Terapanthi Vidyalaya. It has also been submitted that the petitioner No. 1 is a society registered under the Societies Registration Act and it has been empowered to take over, maintain, manage and regulate the existing educational institution known as Sree Jain Swetamber Terapanthi Vidyalaya and also to impart secular, commercial and religious education according to the tenets of the Jain Swetamber Terapanthi Religion to the Boys and Girls of the said community and also to the Boys and Girls of the other community in general. It has further been submitted that the institution was established and run by the society which was at first an unregistered society and was subsequently registered under the Societies Registration Act.

8. It has been submitted by Mr. Mitra that the order passed by the West Bengal Board of Secondary Education at its meeting held on July 21, 1977 rejecting the prayer for Special Constitution in respect of this institution is wholly illegal, arbitrary and unwarranted inasmuch as the Board simply endorsed the report of the Recognition Committee of the West Bengal Board of Secondary Education without con-

dering the same and coming to its independent decision. It has been submitted that to grant or not to grant Special Constitution is exclusively within the power of the Board and it is for the Board to decide the same at its meeting. The Board cannot send the matter to the Recognition Committee for its consideration and cannot merely accept the report of the Recognition Committee without giving into its own decision on this matter. It has been also submitted that the Recognition Committee is not empowered under the West Bengal Board of Secondary Education Act to consider the matter relating to the grants of Special Constitution for reconstitution of the Managing Committee and the impugned order is wholly illegal and without jurisdiction. The consideration of the said report by the Board vitiated the impugned order as contained in the letter of the Secretary dated July 25, 1977. It has been further submitted by Mr. Mitra that the Rules framed under the West Bengal Board of Secondary Education Act, 1963 for Management of Recognised Non-government Institutions (Aided and Unaided) Rules, 1969 shall not affect the power of the State Government to frame Rules for composition, powers and functions of the Managing Committee of an institution to which the provisions of Art. 26 or Art. 30 of the Constitution apply. The instant institution being established and administered by the religious minority is immune from the application of the provisions of these Rules and as such the provision is to be made by the Government for the constitution, powers and functions of the Managing Committee of this institution. Therefore, the rejection of the application for Special Constitution by the Board under R. 8 sub-rule (2) of the said Rules is also illegal and unwarranted being in contravention of the above Rule.

9. Mr. A. P. Chatterjee, learned Standing Counsel, appearing on behalf of the respondents Nos. 2, 3 and 4 has submitted firstly that in order to come within the provisions of Arts. 26, 29 and 30 it is incumbent on the part of the petitioners to prove that this institution was established and it is being administered by a minority sect either based on religion or on language. Mr. Chatterjee has submitted that this institution was founded by six persons whose names ap-

pear from old records of this school as well as from the Souvenir published in 1973, and the Jain Swetamber Terapanthi Vidyalaya, the petitioner No. 1, which is a society was registered under the Societies Registration Act some time in 1936-37 and from its Memorandum and Articles of Association, it appears that the society has been formed to run and administer the said institution which has been established already. Mr. Chatterjee, therefore submitted that Art. 30 is not applicable inasmuch as the institution was not established by the members of the minority sect or in other words, by the petitioner No. 1 — a registered society, for the purpose of promoting the religious and cultural tenets of this Jain Swetamber Community. In connection with this submission Mr. Chatterjee has also submitted that Jain Swetamber sect which is one of the sects within Hindu Religion cannot be termed a religious minority particularly in State of West Bengal where members of the Hindu Religion are admittedly a majority community. It has also been submitted by Mr. Chatterjee that Jain religion is a part of the Hindu Religion and Prakrita script which is claimed as the separate script of this sect is denied by Mr. Chatterjee the learned Standing Counsel. He has submitted that Prakrita is not the spoken language of the members of this community and it cannot be said to be the script of this community. It has also been submitted that several languages such as Sanskrit, Bengali etc. derived many expressions from this script. Therefore, it has been submitted by Mr. Chatterjee that this Jain Swetamber Community cannot be said to have a separate language or script of their own. In support of his submission Mr. Chatterjee strongly relied on the decision reported in AIR 1971 SC 1731 as well as 25 Cal WN 273 : (AIR 1921 PC 77) and (1904) ILR 31 Cal 11 (PC).

10. Mr. Chatterjee has also submitted that the decision of the Board in refusing to grant Special Constitution as regards the formation of the Managing Committee of this institution cannot be assailed on the ground that the Board considered the report of the Recognition Committee. The Recognition Committee which is formed under Section 18 of the West Bengal Board of Secondary Education Act, 1963 has been

empowered to advise the Board on all the matters concerning the recognition of institution. The Board being a statutory body and an administrative authority as distinct from a Tribunal or a judicial body in the matter of considering an application for grant of Special Constitution it takes the opinion of the Recognition Committee in this matter for the purpose of giving a proper and fair decision of this matter, the said decision or determination of the Board cannot be said to be vitiated on that ground. It is entirely within the discretion of the Board how to exercise its discretionary power in this regard. Mr. Chatterjee has referred in this connection to the decisions of Local Govt. Board v. Arlidge (1915 AC 120).

11. As regard the first submission that the institution being established by the petitioner No. 1 for promotion of the religious tenets and culture of the Jain Swetamber Community, is entitled to the benefit of Arts. 29 and 30 of the Constitution of India, it is necessary to consider the scope of Arts. 29 and 30 of the Constitution of India which guarantee cultural and educational rights of the citizens belonging to a particular sect having a distinct language, script and culture of its own as well as minorities either based on religion or language to establish and administer educational institutions of their choice. This question has been clearly decided by the Supreme Court in re: Kerala Education Bill 1957, AIR 1958 SC 956 at p. 976 para 20 S. R. Das, C. J. who spoke for the Supreme Court observed as follows:

"The text and the marginal notes of both the articles show that their purpose is to confer those fundamental rights on certain sections of the community which constitute minority communities. Under Cl. (1) of Art. 29 any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own has the rights to conserve the same. It is obvious that a minority community can effectively conserve its language, script or culture by and through educational institutions and, therefore, the right to establish and maintain educational institutions of its choice is a necessary concomitant to the right to conserve its distinctive language, script or culture and that is what is conferred on all minorities by Arti-

cle 30 (1) which has hereinbefore been quoted in full. This right, however, is subject to Cl. (2) of Art. 29 which provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

It has also been held in the said case that to constitute a minority community in order to claim the fundamental rights guaranteed by Arts. 29 (1) & 30 (1) of the Constitution persons belonging to that community must numerically be a minority in the particular region or State in which the educational institution is or intended to be situated. It is to be considered first whether persons belonging to the Jain Swetamber faith do form numerically a minority compared to the total population of this State. It has been stated on oath in para 19 of the petition that Jain Swetamber Terapanthi sect, is a religious and linguistic minority. In the supplementary affidavit sworn on behalf of the petitioners on 22nd Apr. 1981 it has been averred in para 4 of that affidavit that the Jain Community is a religious minority community in India and according to the Census of 1971, the members of this community formed only 0.47%. There is no counter to the supplementary affidavit and this statement has not been controverted by the respondents Nos. 2 to 4. Moreover, the averments made in para 19 of the petition have also not been specifically traversed. The deponent in the affidavit-in-opposition merely disputed this statement made in para 19 of the petition. Therefore, in view of this state of pleadings, in my opinion, the members professing Jain faith and belonging to the Jain Swetamber Terapanthi sect do constitute a religious minority in India, particularly in West Bengal where this educational institution is situated. The next question interlinked with this is whether this Jain religion is a part of the Hindu Religion and as such the members belonging to the said religion cannot be called as belonging to a religious minority. Mr. Chatterjee, the learned Standing Counsel, has argued with a great force that Jain Religion is one of the branches of Hindu Religion and essentially and in fact it constitutes a part of the Hindu Religion. Therefore

according to Mr. Chatterjee the members professing such faith cannot be termed as belonging to a sect different from the members of the Hindu Religion within the meaning of Arts. 29 and 30 of the Constitution of India. This argument has been tried to be repelled by Mr. R. N. Mitra by submitting that Jain Swetamber sect is different from the Hindu Religion and for this reason the Jains have been mentioned separately in the various Acts, such as Hindu Succession Act, 1956, Hindu Minority and Guardianship Act, 1956, Hindu Adoptions and Maintenance Act, 1956. According to Mr. Mitra the member belonging to the Jain sect profess a faith different from the Hindu Religion and as such they are entitled to the protection of Arts. 26, 29 and 30 of the Constitution of India as it is one of the religious minorities in the State of West Bengal.

12. Article 26 of the Constitution of India guarantees the fundamental right to every religious denomination or any section thereof to establish and maintain institution for religious purpose as well as to manage its own affairs in the matter of religion.

13. The word "denomination" has been defined in the Webster's Seventh New College Dictionary as a religious organisation, a general name for a category. The word "Sect" has been defined in the Webster's Seventh New College Dictionary, as a class or order, a separate group adhering to a distinctive doctrine. In 1954 SCR 1005 at pp. 1028-1029 : (AIR 1954 SC 282 at p. 291) the Commr., Hindu Religious Endowment, Madras v. Sree Lakshmindra Thirtha Swamiar, it was held that under Art. 26 (b) of the Constitution a religious denomination or organisation including a math enjoys complete autonomy in the matter of deciding what rights and ceremonies are essential according to the tenets of the religion they hold and no doubt the authority has no jurisdiction to interfere with their decision in such matters. Art. 29 guaranteed the fundamental right of any section of a citizen residing in the territory of India having a distinct language, script or culture of its own to conserve the same — only limitation being that in case of an educational institution maintained by such section and receiving aid out of the State Fund it cannot deny admission to its institution on grounds of religion race, caste

or language. Similarly, Art. 30 ensures that all minority communities either based on religion or on language shall have the right to establish and administer educational institution of their choice. The scope of these above two Articles were considered in AIR 1958 SC 956 and it was held that the right of a minority community to establish and maintain educational institution of its choice is a necessary concomitant to the right to conserve its distinct language, script or culture, and this is conferred by Art. 30 (1). This is subject to cl. (2) of Art. 29. It has also been held that this benefit is not restricted only to the educational institution established by the religious or linguistic minority or students belonging to them. Such institution may also admit students of other community, and there being no limitation as to the subjects to be taught in such an educational institution, this institution may impart secular education also.

14. In AIR 1963 SC 540 Sidhrajibhai Sabbai v. State of Gujarat, Shah, J. who spoke for the Supreme Court observed as follows:—"The right established by Art. 30 (1) is a fundamental right declared in terms absolute. Unlike fundamental freedom guaranteed by Art. 19, it is not subject to reasonable restrictions. It is intended to be a real right for the protection of minorities in the matter of setting up of educational institution of their own choice, the right is intended to be effective and is not to be whittled down by so called regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole. If every order which while maintaining the formal character of a minority institution destroys the power of administration is held justifiable, because it is in the public or national interest though not in its interest as an educational institution, the right guaranteed by Art. 30 (1) will be but a "teasing illusion," "a promise of unreality."

15. Similar view was taken in AIR 1969 SC 465 at p. 469 para 8, W. Proost v. State of Bihar, AIR 1974 SC 1389, The Ahmedabad St. Xaviers College Society v. State of Gujarat. Therefore, to avail of the benefit of Arts. 26, 29 and 30 it is necessary to establish that the Jain Swetamber Terapanthi Sect is

a minority sect professing a faith different from the Hindu religious faith. In AIR 1972 SC 2119 Wealth Tax Commr. v. Champa Kumari at p. 2124 para 11 the Supreme Court observed that the question whether the Jains are a sect of Hindus or Hindu dissenters are not required to be decided in this case. Even if the religions are different, what is common is that all those who are to be governed by the provisions of these enactments are included in the 'Hindu'. In the statutes such as Hindu Marriage Act, Hindu Succession Act, Hindu Minority and Guardianship Act, Hindu Adoptions and Maintenance Act, 1956 Jains were mentioned specifically and as such they are to be governed by the provisions of these enactments as the Hindus. The statutes thus accord legislative recognition to the fact that even though Jains may not be Hindus by religion they are to be governed by the same laws as the Hindus. In this view of the matter the expression 'Hindu undivided family' will certainly include the 'Jain undivided family'. "Therefore this decision clearly lays down that Jains may not be Hindus by religion. Para 6 cl. (iv) of the Hindu Law provides that the Hindu Law applies to Jains, Buddhist, Sikhs etc. in India. Therefore Jains have been specifically mentioned in the Hindu Law for the purpose of application of Hindu Law to them. In (1904) ILR 31 Cal 11 Bhagwan Koer v. J. C. Bose it has been held by the Privy Council that a Sikh is a Hindu within the meaning of the word Hindu as used in S. 2 of Probate and Administration Act (V) of 1881. It has also been held that as to Jains in India Hindu Law applies generally to their case in the absence of custom varying that law.

16. The Privy Council has observed in the case of Sheokuarbai v. Jeoraj, 25 Cal WN 273: (AIR 1921 PC 77) that the Jains are of Hindu origin, they are Hindu dissenters, although they do not practise the Sradhs or ceremony for the dead which is at the base of the religious theory of adoption, the Jains have so generally adopted the Hindu Law that the Hindu rules of adoption are applied to them in the absence of some contrary usage.

17. It has been submitted relying on this observation by Mr. Chatterjee, learned Standing Counsel, that Jains are Hindus and as such they cannot be

regarded as a sect different from Hindu Religion for the purpose of the application of Art. 30 of the Constitution.

18. In my opinion considering the decision in AIR 1972 SC 2119 and also of the specific mention of Jains both in the Hindu Law as well as in the various Acts such as Hindu Marriage Act, Hindu Adoptions and Maintenance Act, Hindu Succession Act etc. Jain Svetamber Terapanthi Sect professes a faith different from Hindu Religion. In this connection I am fortified with the pronouncement of the Supreme Court referred earlier in 1954 S C R 1005 : (AIR 1954 S C 282) as well as the definition given to the word 'Denomination' and 'Sect' as used in Art. 26 of the Constitution and Art. 29 of the Constitution of India. The members of Jain Sect as appears from the statements made in the petition as well as in the supplementary affidavit do form minority in comparison to the total population of India as well as of West Bengal and according to the decision of the Supreme Court in AIR 1958 SC 956 at p. 977 para 21 that the minority is to be determined by reference to the entire population of that State. The Jain Svetamber Sect is therefore a religious minority in the State of West Bengal and as such it is entitled to the benefit conferred by Arts. 29 and 30 of the Constitution of India.

19. The argument of Mr. Chatterjee, the learned Standing Counsel, that the Jain Svetamber Community is a part of the Hindu religion and members of the Hindu religion constitute the majority community in the State of West Bengal and so the members of the Jain Svetamber Sect is not a religious minority is devoid of any merit. The decision in AIR 1971 SC 1731, D. A. V. College, Bhatinda v. State of Punjab does not support the submissions made by Mr. Chatterjee. In this case the question arose whether the D. A. V. College which was founded by the D. A. V. College Trust and run by a society registered under the Societies Registration Act and as association comprised of Arya Samajis are entitled to the benefit of Arts. 26, 29 and 30 of the Constitution as the members of the Arya Samaj is a religious and linguistic minority having 'Devnagri, script in running this college according to their choice and the circular issued by the Punjab University that Punjabi "will" be the sole medium of

instruction and examination for the Pre-University even for science group with effect from the Academic Session 1970-71" is invalid and inapplicable so far as this college is concerned. It was held that it is not necessary to go into the question of whether it is a separate religious denomination for the purpose of Art. 26 (1) (a) or a linguistic minority for the purpose of Art. 30 (1) because if it is established that the Arya Samaj had a distinct script of their own and they were a religious minority, the Arya Samajis are entitled to invoke the protection of Arts. 29 (1) and 30 (1). It was held that the Arya Samajis who are a part of the Hindu Community in Punjab are a religious minority and that they had a distinct script of their own, the Devnagri which entitled them to invoke the guarantees under the aforesaid provisions of the Constitution.

20. The next question that requires consideration is whether the Jain Svetamber Terapanthi Vidyalaya has been established by the members of the minority community belonging to the said sect, or in other words by the petitioner No. 1, the registered society. It has now been established by a decision of the Supreme Court in AIR 1968 SC 662 that to have the benefit of Art. 30 (1) of the Constitution the institution must be established and administered by the religious or linguistic minority. It has been submitted that this institution was established some time in 1916 and the registered society, i.e., the petitioner No. 1 was registered under the Societies Registration Act, in 1936-37 to run, maintain etc., the administration of this school already established. It has also been submitted that the institution was established only by persons, whose names appear as Founders from the Souvenir published in 1973 that about 81 persons belonging to Jain Svetamber Sect donated a considerable sum of money for the establishment of this institution. It also appears that this institution was temporarily closed during the Second World War and thereafter these donors and other members of the community got the petitioner No. 1 - society, which according to them was in existence from the beginning of the starting of the school was registered in 1936-37, and the society was entrusted with the entire functions for running the institution after the present site was

acquired by the Society and the school buildings were reconstructed and/or remodelled and all the furniture and fixtures were also purchased by the Society with the funds donated by the members of the minority community to the society. It also appears that all the members of the society are members belonging to the minority community and it is they who contributed a considerable amount of money as stated by the petitioner amounting to Rs. 56 lakhs of rupees for carrying on the administration of this school. It also appears from the Memorandum of Association of the society that this school has been established and is being run for the purpose of promoting the culture and religious tenets of this sect primarily, along with the secular education imparted to its pupils, majority of which hailed from this minority sect or religion.

21. In these circumstances, I am constrained to hold that this institution has been established by the petitioner No. 1 society solely with the funds contributed by the members of that religious minority community viz, Jain Swetamber Terapanthi Sect primarily for the purpose of promoting their culture and religious tenets and imparting the same to the pupils belonging to their community. Therefore this institution is entitled to the benefit of Art. 30 (1) of the Constitution of India. The impugned order rejecting the prayer for Special Constitution as regards the constitution and/or reconstitution of the Managing Committee of this school is therefore wholly illegal and bad. I also hold that R. 8 of the Rules framed for Management of Recognised Non-government Institutions (Aided or Unaided), 1969 is not applicable to this institution inasmuch as it purports to interfere with the fundamental freedom guaranteed to the religious minority, i.e., the Jain Swetamber Terapanthi Sect to administer their educational institutions according to their choice. It will be appropriate to refer in this connection to the observations of the Supreme Court in AIR 1979 SC 52 (61) where it has been held that the right to administer the institution of minority's choice enshrined in Art. 30 (1) of the Constitution means 'management of affairs' of the institution. This right is, however, subject to the regulatory power of the State. This regulatory power is to be exercised in such a

manner as to benefit the institution but if it exceeds that limit and imposes what is in truth not a mere regulation but an impairment of the right to administer the Article comes into play and the interference cannot be justified by pleading the interests of general public, the interest justifying interference can only be the interests of the minority concerned. Therefore, in my opinion, R. 8 is not applicable to the Constitution of the Managing Committee of this institution and the impugned order rejecting the prayer for Special Constitution is, to that extent, illegal and void.

22. In view of the findings made above it is not necessary to consider whether the order refusing Special Constitution by the West Bengal Board of Secondary Education dated 4th of July, 1977 is one made in accordance with the provisions of R. 8 (2) of the Rules for Management of Recognised Non-Government Institutions (Aided and Unaided), 1969 because of the consideration by the Board of the report of the Recognition Committee whom the matter was referred. However, as arguments have been advanced by the parties on this point, I think it proper to deal with this branch of submission made by the learned Advocates for the parties. Sub-rule (2) of R. 8 of the said Rules made in 1969 was amended and substituted by new Sub-r. (2) published in Calcutta Gazette dated 11th Jan. 1974. This Rule empowers the Board to approve on the application of any institution of the Special Constitution of a Committee in favour of such institution or class of institutions and in approving of Special Constitution of a Committee the Board shall pay due regard to the recommendations of the Director. This Rule merely requires the Board while considering the application for approval for Special Constitution of a Committee made by any institution shall consider the recommendation of the Director of Public Instruction, West Bengal. Therefore, this Rule does not require the Board to take the opinion and/or report of the Recognition Committee on this matter. Moreover, Sec. 19 of the West Bengal Board of Secondary Education Act, 1963 clearly specifies the powers and functions of the Recognition Committee, Sub-sec. (3) of the said Section provides that the Recognition Committee shall

advise the Board on all matters concerning the recognition of institutions and no recognition to any institution shall be accorded by the Board except on the recommendation of the Recognition Committee. Therefore, the Recognition Committee which is a statutory body has not been empowered to exercise any power of considering and giving any opinion on the question of the Special Constitution of a Committee of an institution. The resolution adopted by the West Bengal Board of Secondary Education at its meeting held on 4-7-1977 wherein the report of the Recognition Committee was considered and the prayer for Special Constitution in respect of Sri Jain Swetamber Terapanthi Vidyalaya was rejected is, in my opinion, not a proper and valid order as the said order is vitiated by taking into consideration of the report of the Recognition Committee and determining matter on its basis. It is now well settled that statutory powers are to be exercised by the statutory bodies in the manner as provided in the statute or statutory Rules and Regulations framed thereunder. Neither R. 8 (2) nor Sec. 19 of the said Act thus provide for referring the matter to the Recognition Committee on the question of Special Constitution of committee of an institution and consideration of the said report by the West Bengal Board of Secondary Education.

23. Mr. Chatterjee has tried to submit referring to the decision made by the House of Lords in the case of *Local Govt. Board v. Arlidge* (1915) A. C. 120 where question arose whether the Local Board rightly determined a matter on the report of the Inspector. It was held that when the duty of deciding an appeal is imposed on the authority, the authority is to act judicially while deciding the appeal. In doing so the authority may obtain information in any way it thought best giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view. If the authority failed in this duty, its order might be the subject of certiorari and it must itself be the subject of mandamus. This case has got no application to the facts of the present case in view of the fact that the Board was empowered by R. 8 (2) to exercise its

power in determining Special Constitution of a committee in respect of an institution in the manner provided therein. I have held that the Board while deciding the matter did not act in accordance with the manner laid down in the said Rule and as such the decision is bad.

24. In the premises aforesaid this Rule succeeds and is made absolute.

25. Let a Writ in the nature of Mandamus be issued on the respondents Nos. 2, 3 & 4 to forbear from giving effect to the order of appointment of Administrator or Ad hoc Committee as made on Mar. 19, 1977 mentioned in Annexure 'A' to the petition as well as the order dated 4th of July, 1977 rejecting prayer of Special Constitution of Managing Committee for Swetamber Terapanthi Vidyalaya as annexed in the Annexure 'C' to the petition.

26. Let a Writ of Certiorari be issued directing the respondents to quash and set aside the impugned orders mentioned in Annexures 'A' and 'C' to the petition.

27. There will, however, be no order as to costs.

28. The prayer for stay is refused.

Petition allowed.

AIR 1982 CALCUTTA 113

B. N. MAITRA, J.

Anadi Nath Chakraborty and others, Appellants v. Dukhiram Ghose and another, Respondents.

A. F. A. D. No. 595 of 1974, D/- 14-7-1981.

(A) Civil P. C. (5 of 1908), Secs. 100, 101 — Second appeal — Suit for declaration of title over suit land — Lower Courts concurrently disbelieving that appellant has any interest in the land — This is a finding of fact — Decision of the final Court of fact cannot be reopened in second appeal, however, erroneous that decision may be. AIR 1981 SC 707, Rel. on. (Paras 7, 9)

(B) Civil P. C. (5 of 1908), Sec. 146; O. 22 R. 10 — Applicability — Suit for permanent injunction against 'C' by 'A' licensee holding 'profits a prendre' in land of 'B' for a term of one year —

IY/KY/E300/81/AAJ/SNV

Claim cannot be granted in favour of 'B' after expiry of term of licence — Sec. 146 and O. 22, R. 10 do not apply.

Where the alleged interest of the plaintiff 'A' in the disputed land was not identical or at par with that of defendant 'B' owner of the land, inasmuch as the former held profits a prendre for a fixed term of only one year, i. e. 1375 B. S., then relief claimed by 'A' for permanent injunction that 'C' cannot disturb his licensee's right could not be granted, after expiry of period of licence, to 'B' on the ground that there was assignment or devolution of 'A's' interest within the meaning of O. 22 R. 10 in favour of 'B'. Rule 10 of O. 22 or S. 146 would have no application to such a case. The Court also could not take note of the subsequent grant of licence by 'B' in favour of 'A'. (Case law discussed).

(Paras 18, 20)

Cases Referred: Chronological Paras

AIR 1981 SC 707: 1981 UJ (SC) 137 9

AIR 1979 SC 1066: 81 Pun LR 490 12, 16

AIR 1977 SC 2149: 1977 UJ (SC) 586 14, 19

AIR 1973 Cal 168: 77 Cal WN 129 (SB) 14

AIR 1971 SC 2097: 1971 UJ (SC) 458 14

AIR 1968 SC 1165: 1968 SCD 500 17

AIR 1959 SC 57: 1958 Andh LT 834 9

AIR 1958 SC 394: 1959 SCA 129 12, 15

AIR 1921 Cal 422: (1922) 26 Cal WN 361 12, 14

AIR 1917 Cal 716: (1916) 20 Cal WN 1099 17

AIR 1915 Cal 103: (1914) 20 Cal LJ 107 12, 15

(1907) 11 Cal WN 732: 6 Cal LJ 74 17

(1901) ILR 28 Cal 171: 5 Cal WN 307 12, 14

N. R. Chatterjee, for Appellants; Dipak Kumar Sen Gupta (for No. 1), Saktinath Mukherjee with Samaresh Nandy (for No. 2), for Respondents.

JUDGMENT:— The plaintiff has alleged that the three disputed plots belonged to pro forma defendant No. 2 who retained the same under the provisions of the West Bengal Acquisition Act. He paid licence fee of Rs. 300/- and on the 15th Sravan, 1375 B. S., took a licence of that property for that year from pro forma defendant No. 2. The defendant No. 1 came to catch fish from that pond, but he put up obstruction. Due to such threat, the plaintiff has instituted the present suit for a permanent

injunction on declaration that he is a licensee regarding that property in question under pro forma defendant No. 2.

2. Defendant No. 1 has filed a written statement denying the plaintiff's allegations. His defence is that out of the big plot No. 518, he took settlement of two bighas on the north east from pro forma defendant No. 2. He is in possession of that property. One Nitya Gopal Biswas took settlement of plot No. 293 and the area of the land taken settlement of by the latter from pro forma defendant No. 2 is 2.72 acres. He is a bargadar of that land under Nitya Gopal.

3. The learned Munsif believed the plaintiff's version and decreed the suit. The defendant No. 1 filed an appeal. The appellate court affirmed the decision of the learned Munsif and held that the case of the plaintiff's right in the disputed property as a licensee was true. The defendant No. 1 had no interest in two bighas of land out of the disputed plot No. 518. Nitya Gopal's case of settlement of 2.72 acres of land was not true. The appeal was dismissed. Hence this appeal on behalf of the defendant No. 1.

4. It has been contended on behalf of the appellant that when the judgment was delivered, the plaintiff was no longer a licensee regarding the disputed property. The case became infructuous, when the appeal was filed. P. W. 3, Gunindra Choudhury, admitted the receipts, Exts. A to A/2. But the courts below did not consider this material evidence. Defendant No. 1 called for the Muris from the office of the pro forma defendant No. 2, but those documents were not produced. Hence there will be an adverse inference against the pro forma defendant No. 2 for non-production of those documents. The learned courts below illegally rejected the evidence of the D. Ws. The entire evidence given by them was not discussed or considered. The evidence of P. W. 3, Gunindra Choudhury, was also not considered. There was a case with Maharaja of Nadia pro forma defendant No. 2, under Sec. 144 of the Criminal P. C. because there was an obstruction of the way to the disputed property and a police report, Ext. I, was submitted. But the courts below did not consider that report, Ext. I. The letter, Ext. E, written from the office of the Maharaja

of Nadia shows that a direction was given to Bata Krishto Mondal not to depose in favour of defendant No. 1. Bata Krishto was intentionally withheld by pro forma defendant No. 2 and hence, there will be an adverse inference against him. In fact, pro forma defendant No. 2 has been pulling the strings from behind. The courts below illegally rejected the dakhilas, Ext. B series.

5. The learned Advocate appearing on behalf of the respondent No. 1 supported the decision of the courts below.

6. The learned Advocate appearing on behalf of the respondent No. 2 has stated that the appellant does not claim any title to the plot No. 293. He only says that the plot was erroneously recorded in the name of pro forma defendant No. 2 in the R. S. Khatian.

7. Now question arises whether the appellant has any interest in two bighas of land on the north-eastern portion of the big plot No. 518. That plot measures 17.94 acres. No commission was taken out by defendant No. 1 to establish the identity regarding the alleged two bighas of land. Moreover, both the courts below have concurrently disbelieved this portion of the appellant's case. Hence in second appeal this finding of fact cannot be disturbed.

8. The appellant does not claim interest in the second plot No. 562.

9. Then about the third disputed plot No. 293. The police report, Ext. I, cannot be considered in civil cases of this type. Bata Krishna is not the plaintiff's employee. There is no question of drawing any adverse inference for his non-examination, as defendant No. 2 is not the plaintiff. Nitya Gopal Biswas was not examined as a D. W. There is no explanation why he was not examined on behalf of the defendant No. 1. The entry in the R. S. Khatian regarding plot No. 293 is against defendant No. 1. That is a big plot. It has been rightly stated that Bata Krishto Mondal, who purported to issue dakhilas, Ext. A series, had no authority to grant the same. The courts below rightly negatived the appellants' claim, that of that plot 2.72 acres of land had been settled by the estate of Maharaja of Nadia to Nitya Gopal Biswas. This finding cannot be disturbed in second appeal. Consequently the appellant's claim, that he

is a bargadar under Nitya Gopal Biswas regarding such 2.72 acres of land, cannot be accepted. The presumption of correctness of the R. S. Khatian has not been rebutted. The decision of the final court of fact cannot be reopened in second appeal, however erroneous that decision may be. This was laid down by the Supreme Court in the case in AIR 1959 SC 57 and of Kshitish Chandra in AIR 1981 SC 707. Hence though there was non-consideration of the receipts, Ext. A series, by the courts below, the judgment is not vitiated nor there was any failure of justice because the case of settlement in favour of Nitya Gopal Biswas was not established by clear and cogent evidence. Moreover, all these grounds were not taken by the appellant in his memo of appeal.

10. The important question arises whether the case has become infructuous. It has been stated that the plaintiff's case is that a licence regarding the disputed property had been granted to him only for the year 1375 B. S. Since that period is over, he cannot ask for declaration of his interest as a licensee and for a permanent injunction.

11. It has been argued on behalf of the respondent No. 2 that as the owner of the property, he is in constructive possession of the same through the plaintiff, who is in immediate possession and possession of defendant No. 2 is only "mediate." Reference has been made to pages 282, 283 and 285 of Salmond's Jurisprudence, 12th Edition. It has been contended that even where the landlord or the bailor transfers possession of the property to his tenant or his bailee, the latter and not the former has a right of action. When that property was in the possession of the plaintiff, who had merely profits a prendre, defendant No. 2 had no right of action. But there was a change of circumstances within the meaning of the provisions of O. 22 R. 10 and Sec. 146 of the Civil P. C. as it has been held that yearly licence was later granted to the plaintiff by defendant No. 2 up to 1379 B. S., i. e. beyond the 5th July, 1972, which is the date of the decree of the trial court. Due to such subsequent event, the latter has a right of action to ask for declaration regarding such right of a licensee and for permanent injunction as well.

12. Reference has been made to the case of Rai Charan v. Biswanath in (1914) 20 Cal LJ 107: (AIR 1915 Cal 103) to show that the trial of a suit cannot be arrested merely by reason of the devolution of interest of the plaintiff. The successor-in-interest may, if he chooses, obtain leave of the court under O. 22, R. 10 of the Code to continue the suit. In the case of Sourindra Mohun v. Siromoni Debi in (1901) ILR 28 Cal 171, the suit was filed by one Bishnu Charan Kaviraj as Manager of the Dhalbhoom encumbered estate against Raja Sourindra Mohun for arrears of rent. Subsequently, a prayer was made for substitution under Sec. 372 of the old Civil P. C. The Manager was only an agent of the party. Subsequently, there was a change of the ownership pending the suit and consequently, the prayer for substitution was allowed. In the case of Bepin Behari v. K. S. Bonnerjee in (1922) 26 Cal WN 361: (AIR 1921 Cal 422) a rent suit was filed by the Receiver of an estate and a decree passed. Subsequently, the Receiver was discharged and there was a devolution of interest. The decree made in favour of the Receiver was held not to be a bad one, but it would enure for the benefit of the party, on whom the interest devolved. Reference has also been made to the case of Saila Bala v. Nirmala Sundari in AIR 1958 SC 394 at p. 397 to show that even if a suit is pending, when the transfer in favour of the appellant was made, that would not affect the result when no application had been made by her to be brought on the record. An appeal is a proceeding for the purpose of Sec. 146 of the Civil P. C. and the expression "claiming under" used therein is wide enough to include cases of devolution and assignment, mentioned in O. 22 R. 10 of the Code. This decision was followed by the Supreme Court in the case of Zila Singh v. Hazari in AIR 1979 SC 1066 at pages 1071 and 1072, where it has been stated that Sec. 146 has been introduced with the object of facilitating the exercise of rights by persons in whom they came to be vested by devolution or assignment and being a beneficent provision, should be construed liberally so as to advance justice and not in a restricted or technical sense.

13. Reference has been made to Halsbury's Laws of England, Vol. 12, 3rd

Edition, para 1359, to show that the owner of profits a prendre can bring an action for trespass at common law for their infringement. Although his primary remedy is trespass, he may in a suitable case maintain an action for nuisance if he is disturbed or adversely affected in the enjoyment. It has been urged that there was a devolution of interest in his favour within the meaning of provisions of Sec. 146 and O. 22 R. 10 of the Civil P. C. Defendant No. 1 has been trying to disturb his possession therein. Hence, the entire relief asked for by the plaintiff can be granted in his favour.

14. The plaintiff has made out a case that the owner-defendant No. 2 had parted with his possession in the disputed property and granted a licence thereof to him for 1375 B. S. In the case of State of West Bengal v. Saradiya Thakurani in AIR 1971 SC 2097 and of Ahindra v. Manmatha Nath reported in (1973) 77 Cal WN 129: AIR 1973 Cal 168 (SB), it has been stated that such right is a licence. In my opinion, it is not a bare licence as such licence is coupled with a grant. It is, therefore, more than a mere licence for it is profits a prendre. In the case of Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. v. Sipahi Singh in AIR 1977 SC 2149 at p. 2153, it has been stated that the right to catch fish and carry it away being profits a prendre has to be regarded as immovable property within the meaning of the Transfer of Property Act read with Sec. 3 (26) of the General Clauses Act. The grant of profits a prendre has to be made by a registered instrument. It has been further observed that even if the settlement of jalkar is regarded as a lease, it would not make any difference because a lease of fishery, which is immovable property as defined by Sec. 2 (6) of the Registration Act, if it is for any term exceeding one year or reserves a yearly rent, has also to be made by a registered document as required by Sec. 17 (1) (d) of the Indian Registration Act and Sec. 107 of the Transfer of Property Act. Hence the aforesaid cases of Sourindra v. Siromoni ((1901) ILR 28 Cal 171) (supra) and Bepin Bihari v. K. S. Bonnerjee (AIR 1921 Cal 422) (supra) are distinguishable.

15. The case of Rai Charan v. Biswanath (AIR 1915 Cal 103) (supra) was on

a different point because that was a suit for recovery of possession of land with mesne profits on declaration of title to the property in question. In the case of *Saila Bala v. Nirmala Sundari* (AIR 1958 SC 394) (supra), the second respondent, Sudhir Kumar, was the owner of two houses in Calcutta. He executed a mortgage regarding those houses in favour of the 1st respondent, Nirmala Sundari. The latter instituted the suit on the mortgage and a preliminary decree was passed. In a proceeding, which arose out of the execution of the mortgage decree, one Saila Bala, appellant of that case, sought to intervene, on the footing that she had purchased the property comprised in the decree. But after her purchase, the 1st respondent started the proceedings for the sale of the property. So, that case is clearly distinguishable.

16. Then about the other Supreme Court decision of *Zila Singh v. Hazari* (AIR 1979 SC 1066) (supra). That was a pre-emption case. The question arose whether the purchaser of the property could apply for execution of the decree.

17. In the case of *Ram Ratan v. Bishnu Chand* reported in (1907) 11 Cal WN 732, Sir Ashutosh Mookerjee and Halmwood, JJ. have stated that as a general rule, a court of appeal will confine itself to the state of the case at the time such judgment of the trial court was rendered and will not take notice of any facts which may have arisen subsequently. But in exceptional case, the Court will depart from this rule to shorten litigation and attain the ends of justice. It will appear from page 734 of the report that the court can take notice of the subsequent event where the plaintiff, who sued at a time when he had no subsisting title, was not allowed the benefit of a title which had accrued to him during the pendency of the case. This decision was approved by the Supreme Court in the case of *Nair Service Society v. K. C. Alexander* in AIR 1968 SC 1165 at p. 1177 of the report. In the case of *Nuri Mian v. Ambica* in (1916) 20 CWN 1099: (AIR 1917 Cal 716), the prayer was for pre-emption. There was a partition of the property after the suit was filed, but before the decree was passed. It was held that the court was bound to take notice of such subsequent event, because by a partition, the plaintiff's interest in

the property was gone and so, the suit could not be maintained: vide page 1108 of the report.

18. Law is that a case is to be decided on the cause of action given in the plaint. Of course, this rule admits of some exceptions. But this is not a case where the application of any exception is called for. The alleged interest of plaintiff is not identical or at par with that of defendant No. 2, inasmuch as the former holds profits a prendre for a fixed term of only one year, i.e. 1375 B. S., whereas defendant No. 2 is its owner. The plaintiff's claim for a permanent injunction, so that defendant No. 1 cannot disturb his licensee's right, is different from the right of defendant No. 2, who is in mediate or constructive possession.

19. Cases filed by agents, managers or receivers stand on a different footing altogether for they have no personal interest in the subject matter of the litigation. They sue for and on behalf of their masters and represent the latter, who are the real plaintiffs. In view of the aforesaid decision of *Bihar Eastern Gangetic F. C. Society v. Sipai Singh* (AIR 1977 SC 2149) (supra), the holder of profits a prendre possesses an immovable property and has an independent right of his own. In case his interest in his immovable property is in jeopardy, he sues not to prove his grantor's interest but only to establish his own right therein. He does not sue for and on behalf of his grantor. When his fixed term of holding the property is over, neither he nor his grantor can claim any relief in that suit. As the defendant No. 2 does not hold that right of profits a prendre, his remedy is to file a separate suit to establish his claim.

20. This is not a case of assignment or devolution of interest within the meaning of R. 10 of O. 22 of the Code. That rule or S. 146 has no application. S. 146 of the Code says that save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken by or against any person, then the same may be made by or against any person claiming under him. Here, the plaintiff is claiming through defendant No. 2 and not vice versa. Even if the provisions of S. 146 of the Code be liberally construed, the position will not im-

prove. So, it is held that the prayer for permanent injunction must fail and the plaintiff also cannot ask for an injunction and declaration of his interest as a licensee beyond 1375 B. S.

21. Of course, the learned Appellate Court affirmed the decree of the trial court on the footing that subsequently, a licence had been granted by defendant No. 2 to the plaintiff. The court ought not to have taken notice of such subsequent event. Defendant No. 2 did not and could not claim to be transposed to the category of the plaintiff. It is, therefore, held that since there was no devolution of interest or assignment, this right cannot be claimed by defendant No. 2. The submissions made on behalf of the respondent No. 2 on this cannot be accepted.

22. The appeal is allowed in part. The judgment and decree appealed against be hereby set aside. The suit is decreed in part. It is hereby declared that the plaintiff was a licensee regarding the property in question in 1375 B. S. The other prayers stand refused.

23. The parties will bear their own costs throughout.

Appeal partly allowed.

AIR 1982 CALCUTTA 118

SUDHINDRA MOHAN GUHA, J.

Jaynal Haldar, Petitioner v. Khorsed Sheikh, Opposite Party.

C. R. No. 1477 of 1980, D/- 19-6-1981.

Civil P. C. (5 of 1908), S. 47 — Suit for specific performance of contract decreed on compromise — Defendant required to pay amount due within specified time — Court could not extend time for deposit on application by defendant without consent of plaintiff.

Where the suit for specific performance of the contract was decreed on compromise and the solenama mentioned time as the essence of the contract and on failure of payment by defendant within specified time the plaintiff could deposit and have Kobala executed through court by way of execution of the decree, the court could not extend the time ex parte without the consent of the plaintiff on an application for extension of time by the defendant a copy of which was served on the Advocate of the plaintiff. As the decree was passed on consent

without the consent of the plaintiff the court could not extend the time ex parte after the decree of the suit by serving application for extension of time on the Advocate of the plaintiff as the Advocate of plaintiff became functus officio. Before extending the time the court would have to secure the consent of the plaintiff and without doing so the court would have no power or jurisdiction to change, vary or alter the terms of the Solenama decree. After the Solenama decree, the court looses seisin of the suit altogether and as such there is no scope for extension of time. AIR 1962 Cal 485 Ref. (Paras 11 and 13) Cases Referred : Chronological Paras AIR 1962 Cal 485 : 66 Cal WN 645 13

Dilip Kumar Seth, for Petitioner;
Aloke Chakraborty, for Opposite Party.

ORDER :— This application for revision arises out of an order dated December 22, 1979 passed by Shri K. Ganguly, Munsif 3rd Court, Diamond Harbour, disallowing an objection under Section 47 of the Code of Civil Procedure which was numbered as Misc. Case No. 72A of 1979.

2. The facts giving rise to the filing of the objection under Section 47 of the Code of Civil Procedure may be summarised as follows :—

The opposite party as plaintiff on 17-7-1973 instituted a suit being Title Suit No. 517/73 for specific performance of contract in the 3rd Court of the Munsif, Diamond Harbour, against the present petitioner. The plaintiff's case inter alia was that the defendant agreed to sell the suit property for a consideration of Rs. 1500/- and accepted a sum of Rs. 1300/- and executed an agreement for sale on 9-3-1972 corresponding to 25th Falgoon-1378 B. S. that the transaction was to be completed within 15th Chaitra B. S. on receipt of the balance of Rs. 200/- but in spite of successive offers by the plaintiff the defendant failed and neglected to complete the transaction and ultimately refused and hence the suit.

3. The defendant put in defence for contesting the suit. But eventually the suit was decreed on compromise filed on 13-7-1979 and the Solenama was recorded on 1-9-1979.

4. In terms of the Solenama the defendant agreed to pay a sum of Rs. 700 within 15th of Falgoon 1384 B. S. in

two equal instalments payable at the interval of one year each in default the plaintiff was at liberty to apply for execution of the decree and to have the sale deed executed in his favour through court on deposit of Rs. 200.

5. On 14-3-1978 corresponding to 30th Falgoon 1384 B. S. the defendant made an application for extension of time for depositing the said sum of Rs. 700/-, a copy of which was served on the Advocate of the plaintiff. As no objection was raised the learned court below extended the time and on court's order the petitioner deposited the said amount in court.

6. But in spite of the fact the opposite party plaintiff deliberately and willfully executed the decree and got the Kobala through court on deposit of Rs. 200/- and thereafter was threatening to take possession of the suit tank. Accordingly the petitioner made an application under Section 47 of the Code of Civil Procedure. The plaintiff filed written objection to the said application under Section 47 of the Code of Civil Procedure. By an order dated 22-12-1979 the learned Munsif rejected the said application under Section 47 of the Code of Civil Procedure holding inter alia that the learned court below had no jurisdiction to extend the time to the petitioner for making deposit of Rs. 700/-.

7. Mr. Dilip Kumar Seth, learned Advocate appearing for the petitioner contends that without setting aside or recalling the order extending the time, the learned court below had no jurisdiction to entertain the execution proceeding simply by holding that the earlier order was without jurisdiction. It is further contended that the learned court below could not go beyond the decree which stood concluded on the deposit of the amount within the extended time in view of the contingency imposed. Again the learned Munsif was said to have acted without jurisdiction in going behind the decree.

8. Mr. Aloke Chakraborty, the learned Advocate for the opposite party contends that the suit in question was decreed on compromise. The notice for extension of time by the petitioner was served on the Advocate for the plaintiff at a time when he was functus officio. It is contended by him that after a decree on compromise, extension of time

could be allowed by the court only on the consent of the parties. In the absence of such consent the court had no jurisdiction to extend the time and as such the order having been passed without the consent of the plaintiff, was without jurisdiction. Accordingly the court acted justly and properly in ignoring the order permitting extension of time as that order was without jurisdiction.

9. It appears that under the terms of the Solenama the defendant petitioner was required to pay Rs. 350/- by 15th Falgoon 1383 B. S. and the balance of Rs. 350/- by 15th Falgoon 1384 B. S. It was specifically mentioned in the terms of the Solenama "the time was the essence of the contract" and in failure of such payment of Rs. 700/- the Opposite party plaintiff would deposit Rs. 200/- and would have the Kobala executed through court by way of execution of the decree.

10. The question now arises whether on the basis of such terms of agreement or contract the court could extend the time for making deposit. It is said that a copy of the petition had been served on the Advocate of the plaintiff but it is rightly pointed out by Mr. Chakraborty, after the decree of the suit the learned Advocate became functus officio.

11. As the decree was passed on consent without the consent of the plaintiff the learned Court below could not extend the time ex parte. So before extending the time the court could have secured the consent of the plaintiff, without doing so the court had no power or jurisdiction to change, vary or alter the terms of the Solenama decree.

12. Next question arises whether the order extending the time to make deposit is binding on the plaintiff or the court itself. It is apparent that the said order was passed without jurisdiction and as such the court need not pass any order vacating or expunging the order of extending the time. No notice be taken of such order.

13. Reference may be made to the decision of a Division Bench of this Court in the case of Bhutnath Das v. Sahodeb Chandra Panja, reported in 66 Cal WN 645: (AIR 1962 Cal 485) In this case the question was whether a trial court after it had ordered specific performance of a contract on a sum of money being put

in within a specified time and also ordered that if the money be not deposited within that date, the suit would stand dismissed, had any jurisdiction there-after to extend the time. It was held that in such circumstances, the court had no jurisdiction to extend the time. The facts of the present case are stronger even. In this case the terms of the Solenama were recorded by the court and the decree was passed in terms of the Solenama. In this view of the matter without the consent of the other party, the court had absolutely no jurisdiction to extend the time for making the deposit of money. It also follows that after the Solenama decree, the Court lost seisin of the suit altogether and as such there was no scope for extension of time.

14. As found out earlier the order extending the time was without jurisdiction, and as such the learned court below committed no error in overruling the objection under Section 47 of the Code of Civil Procedure.

15. In the result, this application for revision is rejected and the Rule is discharged. Each party to pay and bear its own costs.

Application rejected

AIR 1982 CALCUTTA 120

Mrs. JYOTIRMOYEE NAG, J.

Kaumudi Mohan Guha Raja, Appellant v. Paresh Nath Mitra and another, Respondents.

A. F. A. D. No. 705 of 1978, D/- 27-3-1981.

West Bengal Premises Tenancy Act (12 of 1956), S. 13 — Suit for eviction against tenant and his assignee — Assignee putting in appearance only after landlord filed application under S. 17 (3) — His written statement filed along with costs, accepted — Landlord withdrawing costs deposited — Application by him for framing additional issue as to existence of relationship of landlord and tenant between him and landlord — Cannot be resisted — Prior finding in that suit as to absence of tenancy would not operate as *res judicata*. (Civil P. C. (1908), S. 11; O. 14, R. 5.)

Where in a suit for eviction against the tenant and his assignee the written statement by the assignee who did not

appear in the suit and entered appearance only at the time when the petition under S. 17 (3) was filed by the landlord was accepted on his paying the cost required to be paid by him and the landlord did not object to the acceptance of the written statement and even withdrew the amount deposited by the assignee, the landlord having acquiesced by acceptance of written statement could not at subsequent stage object to the prayer made by the assignee for framing additional issue as to existence of relationship of landlord and tenant or for adducing evidence in support of his written statement. The order passed in the earlier stages of the suit that there was no relationship of landlord and tenant between the landlord and assignee would not operate as *res judicata* and the assignee could be allowed to frame additional issue to that effect.

(Para 1)

Cases Referred: Chronological Paras

AIR 1964 SC 993:1964 SCD 715 1

AIR 1960 SC 941: (1961) 1 SCA 10 1

P. K. Sengupta, H. N. Halder and T. N. Banerjee, for Appellant; Malay Kr. Basu, and Bimal Jotsna Chatterjee, for Respondents.

JUDGMENT:— This appeal is from the judgment and decree passed by the learned Additional District Judge at Alipore in Title Appeal No. 775 of 1977 affirming the judgment and decree passed by the learned Munsif, 1st Additional Court at Alipore in Title Suit No. 35 of 1976. The suit was filed by the plaintiff respondent for ejectment of the defendant No. 1 on the ground of default and reasonable requirement of the owner. The defendant No. 2 was also made a party inasmuch as it was the case of the plaintiff that the defendant No. 1 had assigned his tenancy to the defendant No. 2, the present appellant. The defendant No. 1 was the tenant in respect of the entire ground floor flat of premises No. 2/D, Bawali Mandal Road, P. S. Tollygunge at a monthly rental of Rs. 126/- payable according to English Calendar month. The defendant No. 1 defaulted in payment of rent since Jan. 1971. The plaintiff respondent's further case is that the defendant No. 1 without the consent of the landlord plaintiff assigned his right in the said tenancy in respect of the suit property to his brother-in-law defendant No. 2 who is the present appellant before this Court.

Apart from the ground of default, the plaintiff respondent prayed for eviction on the ground of reasonable requirement for his own use and occupation and for the use and occupation of his family members and, in particular, for accommodating his daughter who is qualified as a doctor for the purpose of providing a chamber for practising as a doctor and also for providing a drawing room for himself and for accommodation of his other daughters whenever they come to live with him. Notices were served upon both the defendants Nos. 1 and 2 (vide Exts. 2 and 2/a). As the defendant No. 1 did not vacate the suit premises the plaintiff respondent filed the suit being Title Suit No. 35 of 1976. The defendant No. 1 appeared and contested the suit on filing a written statement but the defendant No. 2 did not appear in spite of notice being served upon him. The defendant No. 2 entered appearance at the time when the plaintiff respondent filed the petition under Section 17 (3) of the West Bengal Premises Tenancy Act and the same was heard and allowed and filed a petition giving explanation for not coming to court in time together with written statement. On 13-6-1975 the learned Munsif passed the following order.

"Plaintiff present. Defendants 1 and 2 file haziras. Plaintiff filed objection against the petition to show cause to defendant No. 2. Copy served and objected to. Heard both sides. Considered. The causes shown by the defendant No. 2 are not accepted. However as a matter of indulgence defendant No. 2 will be allowed to contest and his written statement will be accepted if he pays cost of Rs. 100 by 14-7-1975. To 14-7-1975 for payment of cost (vide order-sheet)".

On 14-7-1975 a sum of Rs. 100 was deposited by the defendant No. 2 as per order dated 13-6-1975 and the learned Munsif passed the following order.

"Let the written statement of defendant No. 2 be accepted. To 1-9-1975 for framing further issues, if any".

On 10-12-1975 (vide order No. 85) upon a petition being filed on behalf of the plaintiff respondent for permitting him to withdraw the sum of Rs. 100/- deposited by the defendant No. 2 (present appellant), the learned Munsif granted the prayer of the plaintiff for withdraw-

wal of the same and accepted the written statement of the present appellant (defendant No. 2). On 2-4-1976 (order No. 102) the petition filed by the defendant No. 2 appellant for allowing him to lead evidence on the point regarding his tenancy right was heard by the learned Munsif in presence of the learned Advocates of both sides. The defendant's petition dated 6-7-1976 for framing additional issues was also taken up along with his application for permission to lead evidence as stated above. The learned Munsif considered submissions on both sides and found that in view of the finding of his learned predecessor who found that there was no relationship of landlord and tenant between the plaintiff respondent and defendant No. 2, after hearing the learned advocates of both sides, on the issue whether there was any relationship of landlord and tenant between the respondent and the defendant No. 1 which was decided in favour of the respondent, this question could not be agitated again for framing fresh issue at the instance of defendant No. 2, the present appellant. As the finding of the court on an interlocutory matter is binding upon it at the subsequent stage and is, therefore, barred by the principles of res judicata and accordingly it was found that the defendant No. 1 was the tenant under the plaintiff, that finding was binding upon the defendant No. 2, the present appellant and accordingly the learned Munsif rejected the prayer of the defendant No. 2 appellant for framing an additional issue on the question that there was any relationship of landlord and tenant. On 11-1-1977 (vide order No. 110) the learned Munsif disposed of an application made on behalf of the defendant No. 2 on 4-1-1977 for adducing evidence. He rejected the prayer of the defendant No. 2 appellant on the ground that he was trying to set up a new defence by praying for permission to adduce evidence that he is not an assignee or a sub-tenant but that he has been in occupation of the suit premises on and from before 1956. Thus his prayer for adducing evidence that he was in occupation of the suit premises from Feb. 1956 was rejected. The learned Munsif however permitted the (defendant No. 2) appellant to cross-examine the plaintiff's witnesses on the question of assignment. The defendant

appellant was debarred from challenging the plaintiff's case of reasonable requirement either by cross-examination or by leading evidence as well as also on the question that he had been residing in the suit premises from before 1956. The learned Munsif on a consideration of the evidence before him decreed the suit of the plaintiff respondent on the finding that the defendant No. 1 was a tenant under the plaintiff respondent and defendant No. 2 could not challenge that finding. He found that defendant No. 2 appellant could at best be regarded as a sub-tenant under the defendant No. 1 to which the plaintiff respondent had given no consent. He also found that the defendant No. 1 had left the premises in or after 1956 and her consent as landlord is necessary to validate the sub-tenancy of the defendant No. 2 if any. Against the judgment and decree of the learned Munsif, an appeal was preferred which was disposed of by the learned Additional District Judge at Alipore. He affirmed the finding of the learned Munsif and dismissed the appeal. This second appeal was admitted on the point, namely, whether the trial court was justified in debarring defendant No. 2 from raising an issue and giving evidence even though it accepted his written statement. It is submitted on behalf of the appellant by Mr. Sengupta that once the written statement of the appellant had been accepted by the court all the defence pleaded in the written statement would be available to the appellant (defendant No. 2) and, accordingly, he will be entitled to cross-examine the witnesses of the plaintiff and also to lead evidence on all the points raised by him in his written statement. As already referred to above, the appellant (defendant No. 2) was denied the opportunity of raising an additional issue as to whether there was relationship of landlord and tenant between the appellant (defendant No. 2) and the respondent and he was also debarred from cross-examining the plaintiff's witnesses on the question of relationship of landlord and tenant and also from adducing fresh evidence to support his defence that he was in occupation of the tenancy on and from before 1956. In this connection, Mr. Sengupta has pointed out to the provision of O. 9, R. 7 of the Civil P. C. which runs as follows:

"Where the Court has adjourned the hearing of the suit *ex parte*, and defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance."

The learned Munsif had accepted the written statement filed by the defendant No. 2 appellant on condition of his paying cost of Rs. 100/- which was complied with by the defendant No. 2, hence it is argued by Mr. Sengupta that all the defence that was taken in his written statement was accepted thereby. Accordingly, to debar him from raising an additional issue on the question of relationship of landlord and tenant between the (defendant No. 2) appellant and respondent and also to debar him from adducing evidence on the points raised by him including the point that he was in occupation of the suit premises on and before 1956 was illegal and in violation of the provision of O. 9, R. 7 of the Code. On the other hand, Mr. Basu appearing for the respondent has submitted that the condition precedent to the acceptance of written statement is the acceptance of cause shown by the appellant defendant. The cause shown by him was not accepted by the learned Munsif but his written statement was accepted as it would be clear from the order-sheet of the learned Munsif. The stress is on good cause being shown. As the cause being shown by him was considered to be unsatisfactory by the learned Munsif, it could not be said that he had accepted the same but he permitted him to file his written statement and only those points were open to him which were not earlier decided by the learned Munsif and Mr. Basu supports the orders dated 2-9-1976 and 11-1-1977. It is submitted by Mr. Basu that if the cause shown is accepted by the learned Munsif the written statement is accepted. But when the cause shown is not accepted and the acceptance of the written statement is only conditional, the defendant will only be permitted to cross-examine those witnesses who have not been cross-examined till the filing of his written statement on those points which have not been decided against him by the learned Munsif. The finding of the learned Munsif on the point decided

by him previous to the filing of the written statement by the defendant No. 2 appellant namely the question of relationship of landlord and tenant between the plaintiff and the defendant will operate as *res judicata* and therefore, he cannot be permitted to reopen the same subsequently. In this connection, Mr. Basu has relied upon a decision reported in AIR 1960 SC 941. The question that came up before their Lordships of the Supreme Court in the case reported above is the scope and effect of Ss. 11 and 105 of the Civil Procedure Code. The relevant portion is at page 943 para 7 which runs as follows :

"The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata*, it shall not be adjudged again. Primarily, it applies as between past litigation and future litigation. That a matter — whether on a question of fact or a question of law—has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a further suit or proceeding between the same parties to canvass the matter again. This principle of *res judicata* is embodied in relation to suits in S. 11 of the Civil P. C. but even where S. 11 does not apply the principle of *res judicata* has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.

The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings."

"But an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken can be challenged in an appeal from the final decree or order." It is this observation upon which Mr. Sengupta lays stress saying that in an appeal a question

which was decided by the learned Munsif can be raised in appeal and decided as to whether debarring the appellant from raising an additional issue regarding the relationship of landlord and tenant between the parties in view of the earlier finding of the learned Munsif that there was no relationship of landlord and tenant between the defendant No. 1 and the respondent (sic). The other decision which has been relied upon by Mr. Basu is reported in AIR 1964 SC 993. That related to interpretation of O. 9, R. 7 C. P. C. The provision of O. 9, R. 7 C. P. C. comes into operation only where the court has adjourned the hearing of the suit *ex parte*. Obviously it assumes that there is to be a hearing on the date to which the suit stands adjourned. If the entirety of the hearing of the suit has been completed and the court being competent to pronounce the judgment then and there, adjourns the suit merely for the purpose of pronouncing judgment under O. 20, R. 1. there is clearly no adjournment of the hearing of the suit, for there is nothing more to be heard in the suit. In such a case O. 9, R. 7 could have no application and the matter would stand at the stage of O. 9, R. 6 to be followed up by the passing of an *ex parte* decree making R. 13 the only provision in O. 9 applicable. The portion relied upon by Mr. Basu is quoted below: (See pp. 1000 and 1001 of AIR 1964 SC 993).

"Where the principle of *res judicata* is invoked in the case of the different stages of proceedings in the same suit, the nature of the proceedings, the scope of the enquiry which the adjectival law provides for the decision being reached, as well as the specific provisions made on matters touching such decision are some of the material and relevant factors to be considered before the principle is held applicable." (AIR 1960 SC 941).

"There are other orders which are also interlocutory, but would fall into a different category. The difference from the ones just now referred to lies in the fact that they are not directed to maintaining the status quo, or to preserve the property pending the final adjudication, but are designed to ensure the just, smooth, orderly and expeditious disposal of the suit. They are interlocutory in the sense that they do not decide any matter in issue arising in the suit, nor

put an end to the litigation. The case of an application under O. 9, R. 7 Civil P. C. would be an illustration of this type. If an application made under the provisions of that rule is dismissed and an appeal was filed against the decree in the suit in which such application was made, there can be no doubt that the propriety of the order rejecting the re-opening of the proceeding and the refusal to relegate the party to an earlier stage might be canvassed in the appeal and dealt with by the appellate court. In that sense, the refusal of the court to permit the defendant to set the clock back does not attain finality. But though the same court is not finally bound by that order at later stages, so as to preclude its being reconsidered, and even if the rule of res judicata does not apply it would not follow that on every subsequent day on which the suit stands adjourned for further hearing, the petition could be repeated and fresh orders sought on the basis of identical facts".

The O. 9, R. 7 is not of the kind which can operate as res judicata so as to bar the hearing on the merits of an application under O. 9 R. 13 C. P. C. On a consideration of the common decisions cited by both the parties I am of the view that once the learned Munsif accepted the written statement of the defendant No. 2 appellant it was open for the appellant to contest the suit on all the points raised by him in his written statement. It is significant to note that the condition regarding payment of cost which was the only condition imposed on the appellant for acceptance of his written statement was complied by him and not objected to by the other side, the plaintiff. In fact, the plaintiff withdrew the amount deposited by the appellant. He, having acquiesced by acceptance of the written statement, cannot at a subsequent stage object to the prayer made by the defendant No. 2 appellant for framing an additional issue or for adducing evidence in support of his written statement. So far as the order No. 102 dated 2-9-1976 is concerned for framing an additional issue the plea taken by the respondent-plaintiff that he cannot be allowed to raise such an issue in view of the decision by the predecessor of the learned Munsif that there was no relationship of landlord and tenant between the defendant No. 1

and the respondent as the same is binding on the defendant No. 2 appellant, the same being res judicata, I am inclined to hold that that order dated 2-9-1976 is bad in law and liable to be set aside in view of the acceptance of the written statement by the learned Munsif. That will not operate as res judicata so far as defendant No. 2 is concerned. The hands of the clock are set back by acceptance of the written statement and the appellant-defendant will be deemed to be in the position in which he would be had he filed the written statement at the time he was supposed to do so. The submission made by Mr. Malay Bose that the acceptance of written statement is a conditional acceptance of the same and is limited to the acceptance of the cause shown does not appear to be very reasonable, in view of the fact that the only condition that is imposed upon the appellant (defendant No. 2) is the condition of payment of cost which he did within the time. Therefore, all the pleas taken by the (defendant No. 2) appellant and the defence as set out in the written statement would be available to him and the suit should have been tried from the very beginning, as though the defendant No. 2 had appeared by filing the written statement within time.

2. In the result, the impugned orders are set aside and the judgment and the decree passed by the appellate court are set aside and the case remanded back to the trial court to frame fresh issues and to try the suit from the stage of filing of the written statement according to the directions given above.

3. The appeal is allowed without costs.

4. No decree need be prepared. Let a copy of the judgment be sent down to the court below at once.

Appeal allowed.

AIR 1982 CALCUTTA 124

SABYASACHI MUKHARJI AND
C. K. BANERJI, JJ.

Shree Choudhary Cold Storage (1972),
Appellant v. Ruby General Insurance
Co. Ltd., Respondent.

Appeal No. 415 of 1978, D/- 6-8-1981.

General Insurance Business (Nationalisation) Act (57 of 1972), Sec. 16 (1) —

KY/AZ/F433/81/SMA/SNV

National Insurance Company Limited (Merger) Scheme (1973) Sec. 8 — Cause title of suit filed in Sept. 1975 describing defendant as named General Insurance Company — Management of Company vesting in Govt. Company before aforesaid date, by virtue of Sec. 8 — Suit being one against dissolved Company is liable to be dismissed.

Where the cause title of a suit filed in Sept. 1975 described the defendant as the named General Insurance Company Ltd. of which the management vested in Govt. of India, the same would be liable to be dismissed as it was a suit against a dissolved company as the company had stood dissolved under Sec. 8 of the Scheme which had come into force on 1st of Jan. 1974. Also, mention of the Govt. as a party in the cause title could not be considered as a misdescription since the assets and liabilities of the company had vested in a company, which was a Government company. A Government company is a different entity from the Government of India. (Para 4)

Cases Referred: Chronological Paras

AIR 1980 SC 575:	1980 All LJ 242:	
1980 UJ (SC) 361		3
1978 Tax LR 673:	1978 UPTC 571	4
AIR 1973 Cal 78:	43 Com Cas 337	4
AIR 1964 Mys 293		4
AIR 1962 SC 199:	(1961) 2 SCJ 592	4

P. C. Sen, for Appellant; S. K. Kapur with Sudipta Sarkar, for Respondent.

SABYASACHI MUKHARJI, J.:

This is an appeal from an order and judgment passed by Ajay K. Basu, J., dated 1st June 1976 dismissing the suit on an application made by National Insurance Co., Ltd. under O. 7 R. 11 of C. P. C. It appears, that a suit was instituted by the plaintiff/appellant against Ruby General Insurance Company Limited. In view of the contentions raised it would be appropriate to set out the description of the defendant in the cause-title which reads as follows:—

"Ruby General Insurance Company Limited of which the management is vested in the Government of India by the provisions of the General Insurance (Emergency Provisions) Act 17 of 1971 having its registered office at Ruby House at 6, India Exchange Place, Calcutta-1 within the aforesaid jurisdiction."

2. The cause-title indisputably mentions the provisions of General Insurance (Emergency Provisions) Act 17 of 1971. The suit in question was filed on the 18th Sept. 1975. In para 2 of the plaint it has been stated that the defendant, a public limited company carrying on business in General Insurance, was taken over and its management was vested in the Government of India by virtue of the provisions of the General Insurance (Emergency Provisions) Act 17 of 1971 as amended by the General Insurance (Emergency Provisions) Amendment Act 27 of 1972. Since then for the purpose of convenience the aforesaid Ruby General Insurance Company Ltd., thereafter referred to as the 'Insurance Company,' was functioning and was being managed by Messrs. National Insurance Company and/or was a unit of the latter.

3. It appears that the National Insurance Company Limited (Merger) Scheme, 1973 came into force, under Sec. 1, sub-sec. (2), on the 1st of Jan. 1974 and in that scheme, which was published in the Government of India Gazette Extraordinary on the 21st Dec. 1973, there is a definition of the Act which means the General Insurance, Business (Nationalisation) Act 1972 and under Sec. 8A merged company shall on the specified day stand dissolved without winding up. Therefore, the Ruby General Insurance Co. Ltd. by virtue of the aforesaid provisions has stood dissolved since that date. As we have mentioned before the suit was filed in Sept. 1975. The main point that was urged in this application and which found favour with the learned trial Judge was that the suit being against a dissolved company was an incompetent suit and liable to be dismissed under the provisions of O. 7. R. 11, C. P. C. On behalf of the appellant/plaintiff it was urged that the cause-title clearly indicated that this was a mere misdescription of the defendant. It was emphasised that there was no question of the present applicant being taken by surprise and if it was misdescription the plaint should be allowed to be amended on an oral prayer which was made at the time of hearing of the application before the learned trial Judge. The question, therefore, is whether the description of the defendant in the cause-title was a mere misdescription or was against a dissolved company. It is well settled that a company ceases

to exist on dissolution. For this proposition reliance was placed on the observations of the Supreme Court in the case of *Narendra Bahadur v. Shanker Lal*, AIR 1980 SC 575 where the Supreme Court observed that after a company was dissolved the liquidator could not thereafter claim to represent the company and execute a registered deed of sale. Once the company was dissolved it ceased to exist and the company became a non-existing company.

4. In this connection reference was made to the observations of the Division Bench of this Court in the case of *Malhati Tea Syndicate v. Revenue Officer, Jalpaiguri*, AIR 1973 Cal 78 where at para 20 at p. 83 of the report the Court observed as follows:—

"There can be no doubt that on the day on which the appeal was filed, there was no company in existence by the name of *Malhati Tea Syndicate Ltd.* and the appeal purported to have been filed by a company which was not on the Register of Joint Stock Companies, and had therefore no existence in accordance with the provisions of the Companies Act, 1956, cannot but be held to be incompetent. Learned Advocate for the applicant contended that the appeal was competent by reason of the provisions in sub-s. (3) of S. 23, Companies Act, 1956. That sub-section runs as follows:—

"The change of name shall not affect any rights or obligations of the company or render defective any legal proceedings by or against it; and any legal proceedings which might have been continued or commenced by or against the company by its former name may be continued by or against the company by its new name."

There the Court was dealing with an appeal preferred by the dissolved company. It was held, an appeal filed by the dissolved company would mean an appeal by non-existent person. The same principle would be applicable in respect of a suit initiated by a dissolved company. Our attention was also drawn to the observations of the Division Bench of the Allahabad High Court in the case of *Modi Sugar Mills v. Union of India*, 1978 Tax LR 673 (All) where at page 675 of the report the Allahabad High Court observed that under civil law it was well known that an order against the dead person was a nullity. The Allahabad High Court applied this

principle in the case of an assessment against the dissolved company. Counsel for the respondent also drew our attention to the decision in the case of *Hiralal v. Kali Nath* AIR 1962 SC 199. There, at p. 200 of the report, the Supreme Court observed that the Court was lacking inherent jurisdiction, if the suit was against a person, who was dead at the time of the institution of the suit. The same principle that a suit against a dead person is a nullity was reiterated by the Division Bench of Mysore High Court in the case of *C. Muttu v. Bharat Match Works*, AIR 1964 Mys 293. In that case, the Mysore High Court reiterated that there was no scope for amending the plaint where the Court has no jurisdiction. Because of it being a nullity, there is no scope for making an application for amendment. In this case the suit indisputably, as the cause title of the defendant indicates, was against the dissolved company and, as such, was incompetent. Learned counsel for the appellant contended that the Government was mentioned as a party and this was misdescription. That even was incorrect. The Ruby General Insurance Co. did not vest in the Government. The assets and liabilities of the company had vested in a company, which was a Government company. A Government company is a different entity from the Government of India. As such, this contention on behalf of the appellant also cannot be accepted. In view of the framing of the suit, in the description of the cause title, we are unable to accept the contention that it was a misdescription. Therefore we are on this aspect of the matter in agreement with the view taken by the learned trial Judge.

5. It was contended that in this case, in any event, in view of the arbitration clause which indicated that the claim had to be instituted in terms of cl. 19 of the arbitration agreement where it was stipulated that the company should not be liable for any loss or damages after the expiry of 12 months from the happening of loss or damages unless the claim was the subject matter of pending arbitration clause. In this case an attempt was made for the arbitration on behalf of the plaintiff. But there (as?) was clear from the affidavit, it was contended on behalf of the respondent, by the letter dated 21st March, 73 which was reiterated on 9th July, 1973 and 27th Aug. 1973 there was total repudiation

of the claim and the question of the right of repudiation could, in any event, be not subject matter of arbitration because the arbitration clause covered only a limited dispute and that clause provided, *inter alia*, as follows:—

"If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference, or, if they cannot agree upon a single arbitrator, to the decision of two disinterested persons as arbitrators, of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by the other party. In case either party shall refuse to appoint an arbitrator within two calendar months after receipt of notice in writing requiring an appointment the other party shall be at liberty to appoint a sole arbitrator; and in case of disagreement between the arbitrators, the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference and who shall sit with the arbitrators and preside at their meetings. The death of any party shall not revoke or affect the authority or powers of the arbitrator; arbitrators or umpire respectively and in the event of the death of an arbitrator or umpire, another shall in each case be appointed in his stead by the party or arbitrators (as the case may be) by whom the arbitrator or umpire so dying was appointed. The costs of the reference and of the award shall be in the discretion of the arbitrator, arbitrators or umpire making the award. And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right or action or suit upon this Policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained."

But in this case the repudiation could not be the subject matter of the arbitration at all. In this case the plaintiff had made an attempt to refer the matter to arbitration and had appointed its arbitrator. The respondent also had appointed its arbitrator without prejudice to its contention that this was wholly without jurisdiction. Thereafter the arbitration

did not proceed and by an order of this Court dated the 11th Sept. 1975 of Mr. Justice Sali K. Roy Chowdhury the authority of the arbitrators was revoked. It was, therefore, contended on behalf of the appellant that in view of these proceedings it could not be said *ex facie* under O. 7 R. 11 that the claim was barred by limitation and was not maintainable. Though we are inclined to think that there is good deal of substance in the contention raised on behalf of the respondent that the claim was barred on this score also, in the view we have taken on the first aspect of the matter it is not necessary to adjudicate on this aspect of the matter.

6. In the premises, the appeal fails and is accordingly dismissed with costs.

C. K. BANERJI, J.:— I agree.

Appeal dismissed.

AIR 1982 CALCUTTA 127

P. K. BANERJEE AND

B. N. MAITRA, JJ.

M/s. Tide Water Oil Company (India) Ltd., Appellant v. K. D. Banerjee, Respondent.

A. F. O. O. No. 6 of 1980, D/- 15-12-1981.

(A) Civil P. C. (5 of 1908), Order 41 R. 22 (1) — Respondent can challenge adverse finding without filing appeal or cross-objection. (1890) ILR 17 Cal 809 (PC), AIR 1962 SC 779, AIR 1963 SC 1516 and AIR 1964 SC 1425, Foll.

(Para 9)

(B) W. B. Premises Tenancy Act (12 of 1956), Sections 13 (1) (k), 13 (6) — Protection of tenant against eviction — No written undertaking given by tenant to vacate premises — Landlord cannot avail of provisions of S. 13 (1) (k).

(Para 11)

(C) W. B. Premises Tenancy Act (12 of 1956), S. 13 (1) (ff) — Reasonable requirement for personal use and occupation — Tenant company occupying ground floor of premises — Landlord contending that he is partially paralytic and suffering from heart trouble therefore, needs ground floor — Pathologist and not cardiologist examined in support of case of landlord — Reliance held, could not be placed on his evidence — Landlord's case of reasonable

LY/AZ/G334/81/JJS/MVJ

requirement within meaning of Section 13 (1) (ff) not accepted. (Para 13)

(D) W.B. Premises Tenancy Act (12 of 1956), S. 13 (1) (ff) — Eviction of tenant — Notice to quit — Meaning of service by post — Notice terminating tenancy duly sent by registered post — Notice received by Treasurer and Secretary of tenant-company — Register of letters received and issued maintained by tenant-company not produced on ground that it was not called for by landlord — Adverse inference drawn against tenant and notice to quit held valid. Case law discussed. (Evidence Act (1872), Secs. 103, 114 (g); Transfer of Property Act (1882), S. 106; General Clauses Act (1897), S. 27).

(Para 19)
Cases Referred : Chronological Paras

AIR 1981 SC 1284 : (1981) 2 SCC 535 :

1981 All LJ 504 15

AIR 1979 SC 1559 6

AIR 1979 SC 1745 15

AIR 1975 SC 1750 20

(1970) 74 Cal WN 647 15

AIR 1968 SC 1413 19

AIR 1964 SC 1425 9

AIR 1964 Cal 1 15

AIR 1963 SC 499 6

AIR 1963 SC 1516 9

AIR 1962 SC 779 9

(1961) 65 Cal WN 1119 : 1962 Cal LJ 46 15

AIR 1937 Bom 81 8

AIR 1919 Cal 972 : 27 Cal LJ 447 8

AIR 1918 PC 102 : 23 Cal WN 77 15

AIR 1917 PC 6 : 21 Cal WN 761 : 15

All LJ 281 19

(1907) 11 Cal WN 340 8

(1900) 4 Cal WN 274 : 26 Ind App 216 (PC) 8

(1899) 3 Cal WN 222 8

(1890) ILR 17 Cal 809 : 17 Ind App 57 (PC) 9

B. C. Dutt, Sudhis Das Gupta and P. Roy, for Appellant; M. N. Ghose and P. Bhattacharya, for Respondent.

B. N. MAITRA, J.:— The plaintiff has instituted the suit on the allegation that he is the owner of the property in question. The defendant, Messrs Tide Water Oil Company, was the tenant regarding the premises in question in the front portion of that building under him at a monthly rental of Rs. 650/- payable according to English calendar. Previously, he was posted in Bombay. At that time, one Mr. K. L. Gupta, defendant's officer, was transferred to Cal-

cutta. The latter persuaded the plaintiff to let out the front portion of the ground floor of the house including the front lawn, the garden and the garage. He had been assured by Mr. Gupta that the demised portion would be vacated after he was transferred from Calcutta or on his retirement from service, whichever was earlier. That proposal was accepted. The plaintiff has retired from service and has been residing in Calcutta. He and his wife have been suffering from various ailments and it is extremely difficult for them to go upstairs. The only passage leading to that house is a very filthy and slippery one because the courtyard is used by the defendant's employees for cleansing utensils and storing garbage. The accommodation available to the plaintiff is not sufficient and reasonably suitable. He reasonably requires the disputed premises for his own use and occupation and for the occupation by the members of his family. He submitted a plan to the Corporation of Calcutta for building and rebuilding of the house for properly utilising the vacant space in front of the building for its economic user. The plan has been sanctioned. Unless the defendant is evicted, it is not possible for the plaintiff to make such building and rebuilding. That tenancy was duly determined by a notice to quit. The suit is for ejectment and for recovery of damages.

2. The defendant-company has filed a written statement denying the plaintiff's allegations. It has been alleged, inter alia, that no such assurance had been given by Mr. K. L. Gupta. The plaintiff's case is a false one. The accommodation available to the plaintiff is sufficient. The notice to quit is not valid in law and it was not properly served.

3. The learned Subordinate Judge accepted the defendant's version and dismissed the suit. The plaintiff went up in appeal.

4. The learned appellate Court held that no undertaking had been given on behalf of the defendant to the plaintiff within the meaning of the provisions of S. 13 (1) (k) of the West Bengal Premises Tenancy Act. He found that the plaintiff's case of reasonable requirement for his own use and occupation and the case of illness of his wife, and

of himself could not be accepted. The further finding was that a valid notice was duly sent by the plaintiff and received by the defendant-company. The further finding was that the plaintiff's case regarding the provisions of Section 13 (1) (f) required further consideration. So, the suit was sent back on remand with some observations along with a direction to consider whether the plaintiff could make the proposed construction without evicting the defendant from the disputed premises and if total or partial eviction would be necessary. Against that decision, the present appeal has been filed by the defendant as first miscellaneous appeal.

5. The plaintiff-respondent filed a cross-objection beyond time, i. e., only on the 24th November, 1981, with a prayer under S. 5 of the Limitation Act to condone the delay and to accept the same.

6. It has been argued on behalf of the appellant that the learned Additional District Judge arrived at a right finding regarding the provisions of Ss. 13 (1) (k) and 13 (1) (ff) of the West Bengal Act XII of 1956. The plaintiff's case of reasonable requirement is false. No undertaking was given by or on behalf of the defendant to vacate the premises. The notice to quit, Ext. 3, was sent by registered post. It came back with an endorsement that it had been received by M/s. Andrewyule & Co. Ltd, Ext. 5. According to the amended provisions of S. 324A of the Companies Act, which was inserted with effect from 3-4-1969, the posts of Managing Agents, Secretaries and Treasurers have been abolished with effect from 3-4-1970. Previously, Messrs Andrewyule, Co., could act as the defendant's agent. But after such mandatory provisions of the Companies Act came into force, that company could no longer act as the defendant's agent. Even if the alleged notice to quit had been received by Messrs Andrewyule & Co. Ltd., that company had no authority to receive the same on behalf of the defendant. So, it was an unauthorised action. The provisions of S. 106 of the Transfer of Property Act have been referred to. The notice to quit was, therefore, not properly received and the same is invalid in law. The plea of building and

rebuilding as envisaged by the Cl. (f) of sub-sec. (1) of S. 13 of the Act, does not come into the picture because the evidence on the record shows that an alteration of only a few inches can serve the plaintiff's purpose. It is not necessary to evict the defendant even if the plaintiff has the luxury of making a new construction on the vacant space in front of the building by spending a huge sum of two lakhs of rupees. The plaintiff's requirement in that respect is not a bona fide one. The case in AIR 1963 SC 499, has been cited to show that the landlord must have bona fides and honest intention in this respect. The case in AIR 1979 SC 1559 has also been referred to.

7. The learned Advocate appearing on behalf of the plaintiff-respondent has contended that he will not press the belated cross-objection. Nevertheless, according to the provisions of law, he can urge all the points mentioned in the cross-objection because the appeal was allowed.

8. There is an observation by the learned Additional District Judge that the point regarding the provisions of S. 13 (1) (k) of the Act was not argued before him. But an admission by a lawyer on a wrong point of law or on a misapprehension of the position of law cannot bind the client. The cases in (1899) 3 Cal WN 222, (1900) 4 Cal WN 274 (PC), (1907) 11 Cal WN 340, (1918) 27 Cal LJ 447 : (AIR 1919 Cal 972) and AIR 1937 Bom 81, have been cited. The learned Courts below did not properly consider the letters, Ext. 6 series, by which a clear undertaking was given on behalf of the defendant to vacate the disputed premises by 30th June, 1974. So, the Court will hold that since the defendant gave an undertaking in writing to vacate the disputed premises within 30th June 1974, a decree for eviction can be passed. There is no difficulty in this respect because S. 13 (6) of the West Bengal Premises Tenancy Act says that notwithstanding anything in any other law for the time being in force, no suit for ejectment on any of the grounds mentioned in sub-section (1), except the grounds mentioned in Cl. (j) and (k) shall be filed by the landlord unless he has been given by the tenant

one month's notice expiring with a month of the tenancy. Since the case is squarely covered by the provisions of S. 13 (1) (k), no notice to quit is necessary. The defendant did not state in the written statement that the notice to quit was not received by them. The plaintiff is partially paralytic and his wife is also seriously ill. The two rooms in the ground floor were used as a godown and so, a man of the plaintiff's status cannot be expected to live in those rooms in the ground floor. The notice to quit was properly addressed and registered. It was received by M/s. Andrewyule & Co. Ltd. The defendant did not produce its Register of letters received and issued to show that, in fact, no such notice to quit was actually received by it.

9. It has already been indicated that the cross-objection has not been pressed at present. Nevertheless, law is well-settled on this because of the provisions of Order 41 R. 22 (1) of the Civil P. C. The decision of the Privy Council in the case of *Lala Gourisunker v. Janki* in (1890) ILR 17 Cal 809 (PC), the cases in AIR 1962 SC 779, AIR 1963 SC 1516 (*Panna Lal v. State of Bombay*) and AIR 1964 SC 1425 (*Virdha Chalam Pillai v. Chaldean Bank*) at page 1438 may be referred to show that the respondent can challenge an adverse finding without filing an appeal or a cross-objection.

10. The first question is, whether the plaintiff can succeed according to the provisions of S. 13 (1) (k) of the Act. This clause read with sub-sec. (6) thereof will show that a decree for ejectment can be passed without serving any notice if subsequent to the creation of the tenancy, the tenant agreed in writing with the landlord to deliver vacant possession of the premises to the landlord and he had failed to do so. Ext. 6 (d) is the letter by which the premises in question was let out by the plaintiff to the defendant-company. The agreement was that the defendant-company was prepared to take lease of the premises for a period of two years and thereafter on the basis of one month's notice". It is, therefore, clear that in that letter, there was no undertaking to vacate the premises by 30th June, 1974. The letter, Ext. 6 (a), dated 13th February, 1974, shows that the Chairman of the defendant-company wrote to the

plaintiff that the feasibility of vacating the disputed premises by the company was only being examined. No written undertaking was given by the defendant in this respect. The last letter addressed by the defendant-company is dated 23rd May, 1974, vide Ext. 6 (a). It shows that while the defendant-company was eager to co-operate with the plaintiff, the latter was requested to appreciate that unless Mr. Gupta was in a position to find out an alternative accommodation, no question of vacating the premises would arise. The last sentence shows that Mr. Gupta was out of Calcutta. He would return on the 10th June, 1974, or so and then the defendant-company would discuss the matter with the plaintiff and advise him on the same. There was no further correspondence by the defendant on this.

11. The aforesaid discussion clearly shows that no definite date was given by the defendant-company to vacate the premises in question. Hence it is of no consequence if this point was not argued in the court of appeal. No written undertaking was given by the defendant, as alleged. We, therefore, hold that the plaintiff cannot avail of the provisions of S. 13 (1) (k) of the Act.

12. Then about the question of reasonable requirement, within the meaning of the provisions of S. 13 (1) (ff) of the Act. In this respect, there is concurrent finding of fact by the courts below against the plaintiff. The trial court did not state anything about the plaintiff's physical condition when he was in the dock. Of course, according to the latest amendment, the present appeal cannot be treated as a second appeal and it has to be considered only as a first misc. appeal. Nonetheless, there is concurrent finding of fact on this against the plaintiff.

13. It has been contended on behalf of the plaintiff that he is partially paralytic and he has been suffering from heart trouble. This has been stated by P. W. 2, Kalidas Banerjee, (plaintiff). He examined Dr. Bata Krishna Ghosh, P. W. 3, to support his version. But the evidence of this last witness shows that he is a pathologist and not a cardiologist. In such circumstances, the courts below rightly refused to place any reliance on the plaintiff's evidence in this respect.

The submissions advanced on behalf of the appellant on this cannot be accepted. We, therefore, find that the plaintiff's case of reasonable requirement for the purpose of his own use and occupation and for the occupation by the members of his family cannot be accepted, within the meaning of the provisions of S. 13 (1) (ff) of the Act,

14. Then about the question of notice. In the plaint, it has been clearly stated that the notice to quit was properly addressed, registered and sent to the defendant. It was received by M/s. Andrewyule & Co. Ltd., Ext. 5. The learned Advocate appearing on behalf of the respondent has pointed out that the notice of the suit, which was instituted in 1976, i. e., long after the amendment of the aforesaid S. 324A of the Companies Act, was received by Messrs Anderwyule & Co. Ltd., on behalf of the defendant-company. When the appeal was filed, a registered notice was issued and that was also received by Messrs. Andrewyule & Co. Ltd. The postal acknowledgment receipt Ext. 5, of the notice to quit was received by Messrs. Andrewyule & Co. Ltd. So the question has to be considered whether the receipt of the notice to quit by Messrs. Andrewyule & Co. Ltd. and not by the defendant-company itself would make the same invalid in law and if the presumption of proper service has been rebutted.

15. Two bench decisions of this Court may be referred to. The first case is of Radharani v. Angurbala, reported in (1961) 65 Cal WN 1119 at pp. 1123 and 1124. Following the famous Privy Council case of Harihar v. Ramshashi in (1919) 23 Cal WN 77 : (AIR 1918 PC 102) it has been stated that in the absence of very strong evidence to the contrary, when in the matter of service by registered post, as acknowledgment comes back, signed or purported to be signed by some persons on behalf of the addressee, it is good service under the law. The next case is of Seuli v. Maydha in (1970) 74 Cal WN 647. There also a Bench of our Court has stated that the notice had been properly directed and posted under registered post with acknowledgment due and it was addressed to the defendant No. 3 being at Titagarh, where the

cinema house was located. The acknowledgment due with regard to three notices came back to the sender. It was held that the notice had been properly directed and posted per registered post because they were presumed to have reached defendant No. 3. It has been further held that even if the signatures in the acknowledgment receipt have been subscribed on behalf of the defendant No. 3 by somebody who was not proved to have any authority from defendant No. 3 to receive the same, still the service would be a good one. In the case of V. Dhanapal Chettiar v. Yesodai Ammal in AIR 1979 SC 1745, the Special Bench case in AIR 1964 Cal 1 was overruled. It was held that at present no notice to quit under S. 106 of the Transfer of Property Act was required. So now only the provisions of S. 27 of the General Clauses Act, and not of S. 106 of the Transfer of Property Act, have to be considered. In the latest case of Har Charan v. Shivrani, reported in (1981) 2 SCC 535 at p. 542 : (AIR 1981 SC 1284 at p. 1288) it has been stated that Section 27 of the General Clauses Act deals with the topic "meaning of service by post" and says that where any Central Act or regulation authorises or requires any document to be served by post, then unless a different intention appears, the service shall be deemed to be effected by properly addressing prepaying and posting it by registered post and that section raises a presumption of due service or proper service if the document sought to be served is sent by properly addressing, prepaying and posting by registered post to the addressee and such presumption is raised irrespective of whether any acknowledgment due is received from the addressee or not.

16. The notice was only sent by registered post, Ext. 4. There is no whisper in the written statement that the notice to quit was not received by the defendant.

17. The evidence of D. W. 1, Bejoy Kumar Tandon, employee of the defendant-company, shows that he looks after the suit on the defendant's behalf. He has stated in his cross-examination that prior to 1971, M/s. Andrewyule & Co. Ltd., were the Treasurer and Secretary of the defendant-company. The office of Andrewyule & Co., is at 8, Clive Row

He also says that he has not filed any paper to show that Andrewyule & Co. has ceased to be the Treasurer and Secretary of the defendant-company.

18. The address of appellant-company (defendant) is 8, Clive Row D. W. 1, Bejoy Kumar Tandon, has made a very significant statement that Mr. R. Lall is the Chairman of the Board of Directors of their Company and also the Chairman of the Board of Directors of Andrewyule & Co. He has further admitted that in their office, they maintain a Register of letters received and letters issued. That Register has not been produced.

19. It has been contended on behalf of the appellant that the Register for letters received and issued was not called for by the plaintiff and hence, the defendant was not bound to produce the same. But in the case of T. Pillai v. Manicka Vasaka Desika Gana Sambandha in (1917) 21 Cal WN 761 : (AIR 1917 PC 6) Lord Shaw has stated that regarding the parties to the suit those desiring to rely on a certain state of facts are not justified in withholding written evidence in their possession which would throw light upon the proposition, merely because the onus of proof may be on the other side. When it is so withheld, the Court is free to conclude that if the same had been produced, they would have supported the case of the opponent. In the case of Gopal Krishnaji v. Mohamed Haji Latif in AIR 1968 SC 1413 at page 1415, it has been stated if a party to a suit is in possession of best evidence which will throw light on the issue in controversy and withholds it, the Court should draw an adverse inference against him though the onus of proof does not lie on him. It has been further stated that Court cannot rely on mere onus of proof and say that there is no onus on him or he was not called upon to produce the document. Thus, there will be an adverse inference against the defendant-company for not producing its Register of letters received and issued. The submissions made on behalf of the appellant cannot be accepted. We, therefore, hold that the notice to quit, Ext. 3, was properly addressed and registered and it was duly received by the defendant-company and it is valid in law. We fur-

ther find that the presumption of proper service has not been rebutted by the defendant-appellant,

20. Lastly about the provisions of S. 13 (1) (f) of the Act. The learned Court of appeal has pointed out that in the case reported in AIR 1975 SC 1750 it has been stated that the landlord has a right to demolish his property to build a new one with a view to improving his business or for getting better return on his investment. But he has made an observation that the facts of the instant case are entirely different from those of the aforesaid Supreme Court case. After considering the submissions made by both the sides, we are of opinion that the matter must be remitted to the learned appellate Court for considering whether the plaintiff's case under Section 13 (1) (f) has been proved and whether the proposed construction can be carried out without evicting the defendant from the premises. If that Court finds that the plaintiff's case in this respect has been established, then he will consider the provisions of Section 18-A of the West Bengal Premises Tenancy Act and pass necessary orders. We make it clear that the unwarranted observations made by the learned Appellate Court on this are set aside. All the points on this are left open.

21. The appeal is allowed to the extent indicated above. The judgment and decree of the appellate Court be set aside. The matter is remitted to the learned Additional District Judge for disposal according to law in the light of the observations made in the body of the judgment.

22. There will be no order as to costs. The cross-objection is rejected without costs.

23. Preparation of formal decree is dispensed with.

BANERJEE, J.:— I agree.

Order accordingly.

AIR 1982 CALCUTTA 133**BANERJEE AND B. N. MAITRA, JJ.**

M/s. Thakuruddin Ramjash, a firm, Appellant v. Sourendra Nath Mukherjee, Respondent.

A. F. O. D. No. 524 of 1973, D/- 1-12-1981.

(A) Civil P. C. (5 of 1908), S. 11, O. 23, R. 1 — Res judicata — Withdrawal of suit alleging determination of lease — Determination of lease by efflux of time — Subsequent suit for khas possession — Not barred by S. 11. (Transfer of Property Act (1882), S. 111 (a)).

Where in an earlier suit it was alleged that the lease executed in tenant's favour regarding the disputed land along with structure for a certain period had been determined, but the suit was withdrawn, a subsequent suit, after determination of lease by efflux of time for khas possession of the disputed land could not be said to be not maintainable on the ground of res judicata as a new cause of action arose after the determination of the lease by efflux of time, within the meaning of S. 111 (a) of T. P. Act. AIR 1970 SC 987, Rel. on. (Para 5)

(B) Transfer of Property Act (4 of 1882), S. 116 — Lease for 15 years expiring in 1965 — Tenant holding over — No intention to create new lease — Landlord not assenting to his continuing in possession — Held there was no new tenancy in his favour. AIR 1949 FC 124, AIR 1961 SC 1067, AIR 1972 SC 819, Rel. on.

(Paras 6, 7)

Cases Referred : Chronological Paras

AIR 1972 SC 819	6
AIR 1970 SC 987	5
AIR 1961 SC 1067	6
AIR 1949 FC 124	6

S. B. Bakshi, for Appellant; S. N. Mukherjee and S. P. Roy Chowdhury, for Respondent.

B. N. MAITRA, J.:— The plaintiff has alleged that on the basis of a deed of lease executed by the defendant and also by the plaintiff and his brother, Rabindra Nath Mukherjee, as well on the 7th Sept., 1949, the disputed land was leased out to the defendant for 15 years expiring with the 31st Dec., 1964. The condition was that after the expiry of the period of the lease, the defendant would deliver vacant possession of the suit land after removing the structures standing on the land

at his own cost, failing which the structures would belong to the lessors. Then on the 16th Aug., 1962, a partition was effected between the plaintiff and his brother, Rabindra Nath Mukherjee, and the disputed property was exclusively allotted to his share. Though the defendant's tenancy was determined by efflux of time on the expiry of 31st Dec., 1964, he did not vacate the property. Though he was not entitled to any notice, still a notice to quit was served on the defendant. The defendant did not vacate. Hence this suit for recovery of khas possession.

2. The defendant has filed a written statement alleging, inter alia, that the suit is not maintainable in law. He is a 'thika' tenant regarding the disputed property because the structures on the property had been constructed by him. There was a holding over of the tenancy with effect from the 1st Jan., 1965.

3. The learned Judge of the City Civil Court accepted the plaintiff's version, decreed the suit and directed the defendant to remove the structures. Hence this appeal by the defendant.

4. It has been contended on behalf of the appellant that previously a suit was filed by alleging that the lease had been determined, but that suit was withdrawn. There is no new cause of action for filing this suit because the lease in question had already been determined when the previous title suit for ejectment was filed. So, on that score, the suit is not maintainable in law. Moreover, the corporation taxes were paid by the defendant-appellant, from the 1st of Jan., 1965, and hence, there was holding over within the meaning of the provisions of S. 116 of the T. P. Act. The structures do not belong to the landlord. The schedule to the plaint clearly shows that the plaintiff also has asked for recovery of khas possession regarding the disputed land along with the structures. There is no prayer for declaration of title regarding the structures. So, the suit is bad on that score as well.

5. According to the provisions of Section 111 (a) of the T. P. Act, a lease of immovable property determines by the efflux of time limited thereby. Here, the lease executed in the defendant's favour regarding the disputed land along with the structures was for a period of 15 years expiring with the 31st Dec., 1964. That period is over. It is true that the previous suit was filed and there was no

decision in that case. Hence, simply because the previous suit was filed, there cannot be any question of *res judicata*. In the case of *V. Das v. Madanlal* in AIR 1970 SC 987, it has been stated that mere identity of some issues will not do. The cause of action and relief claimed in the second suit must be the same as the first one. The cause of action of the first suit was the alleged determination of the lease. But a new cause of action arose after the determination of the lease on 31-12-1964 by efflux of time, within the meaning of Cl. (a) of S. 111 of the T. P. Act. The first contention advanced on behalf of the appellant is overruled.

6. Then about the holding over. In this respect, the cases of *Kai Khurshroo v. Bai Jerbai* in AIR 1949 FC 124 decided by Sir B. K. Mukherjee, of *Ganga Dutt v. Kartick Chandra* in AIR 1961 SC 1067 and of *Bhawanji v. Himat Lal* in AIR 1972 SC 819 may be cited. It has been stated that mere holding over after expiration of the term of the lease does not create a tenancy of any kind. Mere acceptance of an amount equivalent to rent by a landlord cannot be regarded as evidence of a new agreement.

7. According to the provisions of lease executed on 7-9-1949, the corporation taxes were payable by defendant. There was no intention to create a new agreement or a new lease and the landlord did not assent to his continuing in possession, within the meaning of the provisions of S. 116 of the T. P. Act. We hold that there was no holding over by the defendant and there was no new tenancy in his favour, as alleged.

8. Now about the structures. It is true that the plaintiff asked for recovery of khas possession of the land as well as of the structures standing thereon. No prayer for any declaration was made regarding the structures. The learned Judge passed a decree that the defendant must remove the structures within two months. This direction is correct. Unless the structures are removed by the defendant, the plaintiff is legally entitled to remove the same. Hence, this contention also will fail.

9. The appeal is, therefore, dismissed.

10. There will be no order as to costs.

BANERJEE, J. : I agree.

Appeal dismissed.

AIR 1982 CALCUTTA 134

SUDHINDRA MOHAN GUHA, J.

Haridas Chatterjee, Petitioner v. Debendra Nath Basu, Opposite Party.

Civil Order No. 4002 of 1981, D/- 11-12-1981.

(A) West Bengal Premises Tenancy Act (12 of 1956), S. 8 (1) (c) — Rent Controller — Status of — Rent Controller is a Court.

On an application under S. 8 (1) (c) the Rent Controller is to fix fair rent on evidence under S. 9. Thus, in doing so, the Rent Controller is to pronounce a judgment. So it should not be laid down that the Rent Controller is not a Court. AIR 1956 SC 66 Rel. on. (Para 5)

(B) West Bengal Premises Tenancy Act (12 of 1956), S. 17 (3) — Deposit by tenant — Arrears of rent must be paid at rate at which rent was last paid and not according to fair rent fixed by Rent Controller during pendency of suit for ejectment. AIR 1980 Cal 114 and (1960) 64 Cal WN 391, Ref.

(Para 9)

Cases Referred : Chronological Paras

AIR 1980 Cal 108 : (1980) 1 Cal LJ 36	6
AIR 1980 Cal 114	8
AIR 1979 SC 1745	6
(1960) 64 Cal WN 391	8
AIR 1956 SC 66 : 1956 Cri LJ 156 : 1956 All LJ 164	5

Kashinath Dey, for Petitioner; Tarun Chatterjee and Jiban Ratan Chatterjee, for Opposite Party.

ORDER :— The order dated the 25th May, 1981 passed by the Munsif 5th Court, at Alipore, allowing an application under S. 17 (3) of the West Bengal Premises Tenancy Act, has been challenged before this Court. The suit in question being Title Suit No. 295 of 1973 was commenced by the opposite party for ejectment of the petitioner from the suit premises only on the ground of reasonable requirement. The tenancy was said to be held at a rental of Rs. 100/- per month according to English Calendar Month. The petitioner defendant after appearance deposited rent under S. 17 (1) of the West Bengal Premises Tenancy Act, since December, 1975 and made an application under S. 70 (2A) (b) of the Act for liquidating the admitted arrears since August, 1973 upon which on a joint petition by the parties, the learned Munsif by an order dated 30-11-

76 directed to liquidate the arrears by 29 months. The petitioner also filed an application for fixation of fair rent in the office of the Rent Controller Alipore, wherein the rent was assessed at Rs. 37/- per month. On appeal the District Judge remanded the case to the Rent Controller against which the petitioner moved this Court and obtained a Rule and by an interim order the order passed by the District Judge was stayed till the hearing of the Rule. Thus following the aforesaid fixation case the petitioner made an application under S. 151 of the Code of Civil Procedure for modification of the order passed under S. 17(2A) of the Act permitting the petitioner to deposit the current rent at the rate of Rs. 37/- per month, and also to deposit the arrears of the rent at such rate. The petitioner however did not deposit any current as well as arrears of rent, as he was under the impression that he would deposit the same after the modification of the order under S. 151 of the Code of Civil Procedure. The opposite party thereafter filed an application under S. 17 (3) of the Act. On petitioner's insistence on disposing of the application under S. 151 of the Code of Civil Procedure prior to the disposal of the application under S. 17 (3), the learned Munsif by an order dated 29-3-79 rejected the application under S. 151 of the Code. The petitioner against that order came in revision before this Court.

2. On 17-6-80 the rule against the order of the District Judge was discharged after an observation that the petitioner would be entitled to raise objection during the hearing of the application under S. 17 (3) of the Code.

3. The application under S. 17 (3) was disposed of by the impugned order on 20-5-1981.

4. It is contended by Mr. Kashinath Dey, the learned Advocate for the petitioner that the learned Munsif failed to exercise jurisdiction in not considering the fact that in view of the order passed in C. R. 9538 (W) of 1978 the order passed by the Rent Controller fixing the rate of rent at Rs. 37/- per month was in force and the petitioner was entitled to adjust the excess amount paid by the petitioner and as such the petitioner could not come within the mischief of S. 17 (3) of the Act.

5. The objection raised by the petitioner during hearing of the application under S. 17 (3) of the Act was dispelled by the learned Munsif by observing that

the Rent Controller was not a Court in the strict sense as its order is not binding upon this Court. In *Brajananda Sinha v. Jyoti Narain* reported in AIR 1956 SC 66 it was observed pronouncement of a definitive judgment is considered to be essential sine qua non of a Court and unless and until a binding and authoritative judgment can be pronounced by a person or body of persons it cannot be predicted that he or they constituted a Court. On an application under S. 8 (1) (c) of the Act, the Rent Controller is to fix fair rent on evidence under S. 9 of the Act. Thus in doing so the Rent Controller is to pronounce a judgment. So it should not be laid down that the Rent Controller is not a Court. Now it is to be seen whether the petitioner was justified in not depositing the rent at the rate of Rs. 100/- per month because of fixation of rent at Rs. 37/- per month.

6. Mr. Tarun Chatterjee, the learned Advocate for the opposite party contends that the petitioner being a statutory tenant was not competent to file a petition for fixation of rent. In support of his contention he makes reliance on the decision in the case of *Sudhir Kr. Chakraborty v. Ashutosh Bhattacharya* reported in (1980) 1 Cal LJ 36 : (AIR 1980 Cal 108). It is held therein by G. N. Ray, J., that after the determination of tenancy statutory tenant cannot make an application under S. 8 of the West Bengal Premises Tenancy Act for determination of fair rent by the Rent Controller. But in *Dhanapal Chettiar v. Yesodai Ammal*, reported in AIR 1979 SC 1745, it is held by the Supreme Court that a tenant continues to be so even after determination of the tenancy and till the date of Khas possession. Such is also the definition of the tenant under S. 2 (h) of the West Bengal Premises Tenancy Act, 1956. Having regard to the decision of the Supreme Court and to the definition as hereunder there is little difference between a contractual tenant and a statutory tenant. Be that as it may we need not enter into the controversy whether a tenant after service of notice to quit can file an application for fixation of fair rent under S. 8 of the Act. It can be remembered in this case, this application under S. 8 was filed on 15-5-73 and the suit was filed on 5-8-73. Thus this application for fair rent was filed at a time when there was no suit for ejectment pending against the petitioner.

7. Lastly, Mr. Tarun Chatterjee contends that there was no dispute as to the rate of rent under S. 17 (2) of the Act. In such circumstances, the petitioner tenant was under an obligation to pay rent under S. 17 (1) of the Act at the rate at which it was last paid. S. 17 of the Act lays down that a tenant in order to enjoy protection against delivery of possession is to deposit either within one month from the service of summons or within one month from his appearance in Court, or with the Controller or pay to the landlord an amount calculated at the rate of rent at which it was last paid, for the period for which the tenant may have made default, including the period subsequent thereto up to the end of the month previous to that in which deposit or payment is made together with statutory interest.

8. Mr. Chatterjee next places reliance on the decision of a Division Bench of this Court in the case of Central Coal Fields Ltd. v. Rabindra Nath Dutta reported in AIR 1980 Cal 114 at page 117 wherein it is stated that under S. 17 (1) a tenant is required to deposit or pay to the landlord the entire amount calculated at the rate of rent at which it was last paid for the period for which the tenant may have made default. Mr. Chatterjee also relies on another Division Bench decision of this Court in Ahmed Ali Khan v. Mrs. Ivy Claire Nabi Buksh, reported in (1960) 64 Cal WN 391. It is laid down therein that proper interpretation of S. 17 (2) would be that in a case where rent is standardized before or during the pendency of the ejectment suit and the tenant brings it to the notice of the Court and raises the relevant dispute as to the amount of rent payable by him which includes the rate of rent or the rate at which it is to be paid, the Court in spite of S. 17 (1) is entitled on the tenant's application to determine and fix the rate payable under sub-sec. (2) at the standardized figure.

9. But in this case there was no application under S. 17 (1) of the Act. The rate of rent was not challenged earlier. It was only for fixation of fair rent at Rs. 37/- per month the petitioner being elated? filed an application under S. 151 of the Code of Civil Procedure for reconsideration or modification of the order passed under S. 17 (2A) of the Act. In agreement with Mr. Chatterjee, I would hold that in order to claim protection the tenant had no other alternative but to pay

or to deposit an amount equivalent to rent at the rate at which it was paid last. It is contended however, by Mr. Jiban Ratan Chatterjee, for the opposite party that the decision under S. 17 (3) of the Act can be deferred till the disposal of the writ application filed by the petitioner. As it goes in favour of the petitioner. I do not object to such proposition but before doing so it is to be seen whether the petition under S. 151 of the Code of Civil Procedure was mala fide. As the Rent Controller fixed the rent at Rs. 37/- per month the petitioner was under the impression that the Court would reconsider the order. In view of the matter, before striking out the defence under Section 17 (3) of the Act, the learned Munsif should have given the petitioner another opportunity to comply with the order passed by the Court on 30-11-76. There is no dispute to the fact that petitioner deposited rent from Dec., 1975 to April, 1977. In view of the foregoing findings the impugned order is set aside and the petitioner should be given another chance to comply with the order. In case the petitioner fails to comply with the order the learned Munsif would dispose of the application filed under S. 17 (3) of the Act according to law. It is for him to see whether this would be deferred till the disposal of Writ Petition filed by the petitioner before the High Court. The application is thus disposed of. There will be no order for costs.

Order accordingly.

AIR 1982 CALCUTTA 136

DIPAK KUMAR SEN, J.

Sumani Ferro Alloys Ltd. v. Super Forging Steel Sales Pvt. Ltd. and another. Suit No. 27 of 1981, D/- 18-11-1981.

Civil P. C. (5 of 1908), O. 37, R. 2 — Plaintiff drawing Hundies on bank defendant No. 2 — Acceptance by defendant No. 1 — Bank presenting Hundies to defendant No. 1 for payment — Dishonour of Hundies — Bank endorsing those Hundies in favour of plaintiff for value received — Suit by plaintiff under O. 37 — Defendant No. 1 would be entitled to defend suit. (Negotiable Instruments Act (1881), S. 9).

Plaintiff had drawn some Hundies on the Bank defendant No. 2 which were accepted by the defendant No. 1. The Hun-

dies were presented by the Bank to the defendant No. 1 for payment when they matured but were dishonoured. After that the Bank endorsed the Hundies in favour of the plaintiff for value received. The plaintiff filed a suit under O. 37 on the basis of Hundies. The defendant No. 1 filed application praying for leave to defend the suit, as he had a counter-claim against the plaintiff.

Held, that the plaintiff could not claim to be holder in the due course of the Hundies under S. 9 of Negotiable Instruments Act as the same were not payable to bearer and as the Bank endorsed the same in favour of the plaintiff after the amount mentioned in the Hundies became payable and also after the Hundies were dishonoured. In that view the counter-claim of the defendants could be a sufficient defence to the claim of the plaintiff. Therefore the defendant No. 1 would be entitled to defend the suit. (Para 11)

Cases Referred : Chronological Paras

(1978) 3 All ER 104 : (1978) 3 WLR 39 :

(1978) QB 917, Jade International Steel Stahl Und Eisen Gamb H. & Co. K. G. v. Robert Nicholas Steels Ltd. 7

(1977) 2 All ER 463 : (1977) 1 WLR 713, Nova (Jersey) Knit Ltd. v. Kammgarn Spinnerei G. M. B. H. 6

ORDER:— The Sumani Ferro Alloys

Ltd., the plaintiff instituted this suit under O. 37 of the Civil P. C. against Super Forging Steel Sales Private Limited and the Bank of India, defendants Nos. 1 and 2 respectively, claiming a decree for Rs. 3,62,131/- with interests and costs. The plaintiff's cause of action is based on several Hundies, all drawn by the plaintiff on the defendant No. 2 and accepted by the defendant No. 1 in March, 1979. It is alleged that the said Hundies matured in April and May 1979 when it is alleged they were presented by the defendant No. 2 to the defendant No. 1 for payment but were dishonoured.

2. On or about the 25th Aug., 1980 it is alleged that the defendant No. 2 endorsed in favour of the plaintiff the said Hundies for value received.

3. The plaintiff claims to have become the holder of the said Hundies in due course and alleges that it again presented the said Hundies to the defendant No. 1 for payment but the same were again dishonoured. In this application the plaintiff prays for a final judgment of the amount claimed in the suit with interest and costs.

4. There is another application by the defendant No. 1 praying for leave to defend this suit. The case of the defendant No. 1 is, inter alia, that the transaction between the plaintiff and the defendant No. 1 was for supply of 458 tonnes of steels ingots of different specifications by the plaintiff to the defendant No. 1 at agreed rates. It was a term of the said transaction that the defendant No. 1 would pay the plaintiff for the supply by Hundies presented through the Bank provided the plaintiff was entitled to such payment. The defendant No. 1 alleges that only 84,290 metric tonnes ingots were supplied by the plaintiff in nine instalments, but the same did not conform to the agreed specifications or quality were defective; could not be rolled or forged and were wholly unfit for the purpose for which they were purchased. The defendant No. 1 it is alleged rejected the said ingots supplied and intimated the plaintiff of such rejection directly and through the latter's broker. The defendant No. 1 alleges that it has a counter-claim of over Rs. 9 lakhs against the plaintiff on account of damages and or non-supply.

5. The defendant also contends that the said Hundies are invalid as they are not properly and sufficiently stamped as required in law.

6. At the hearing, learned Counsel for the plaintiff cited a decision of the House of Lords in Nova (Jersey) Knit Ltd. v. Kammgarn Spinnerei G. M. B. H. reported in (1977) 2 All ER 463 for the proposition that a claim for unliquidated damages could not be raised by way of defence, set off or counter-claim to an action on a bill of exchange.

7. Learned Counsel for the defendant No. 1 cited Jade International Steel Stahl Und Eisen Gamb H. & Co. K. G. v. Robert Nicholas Steels Ltd., reported in (1978) 3 All ER 104. In this case the plaintiff sold to the defendants a quantity of steel to be delivered in two consignments and drew a bill of exchange payable on the defendants for the price of the first consignment. The bill was accepted by the defendants. The plaintiff discounted the bill with their Bank which was thereafter discounted with two other Banks. The first consignment of steel was delivered to the defendants. The defendants did not honour the bill on the ground that the first consignment delivered was sub-standard. The bill traced its course back

to the plaintiff's Bank which debited the plaintiff's account for the amount and returned the bill to the plaintiff. The plaintiff brought an action against the defendants and applied for a summary judgment. The defendant alleged that they had good defence by way of a counter-claim and applied for leave to defend. In the Court of the first instance leave was not granted to the defendants to defend the action on the ground that in an action on a bill of exchange defence by way of counter-claim could be put up if the action was between immediate parties to the bill. The plaintiffs having discounted the bill they were not immediate parties to it and they derived their title to it through the holders in due course. The Appeal Court sustained the said order.

8. Submissions were made by learned Counsel on different aspects of the Stamp Act.

9. In the instant case it appears to me that the Hundies were payable to the order of the Bank, the defendant No. 2. The case of the plaintiff is that the Bank endorsed the said Hundies in favour of the plaintiff and returned the same to the plaintiff for value received.

10. S. 9 of the Negotiable Instrument Act, 1881 reads as follows:—

" 'Holder in due course' means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or

the payee or indorsee thereof, if (payable to order) before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title."

11. The plaintiff cannot claim to be the holder in due course of the said Hundies under the said section as the same are not payable to bearer and as the Bank endorsed the same in favour of the plaintiff after the amount mentioned in the Hundies became payable and also after the Hundies were dishonoured. In that view the counter-claim of the defendants can be a sufficient defence to the claim of the plaintiff. I need not express any final opinion on the disputes raised as to the validity or sufficiency of the stamps at this stage. In my view the defendant No. 1 has raised triable issues and is entitled to defend the suit.

12. Leave is given to the defendant No. 1 to defend the suit unconditionally.

Learned Counsel for the defendant No. 1 on instructions waives service of the Writ of Summons. The defendant No. 1 will file its written statement within three weeks from date; cross-orders for discovery within two weeks thereafter; inspection forthwith thereafter. The Suit will appear in the appropriate prospective list for hearing ten weeks hence.

13. This order disposes of both the applications.

Order accordingly.

AIR 1982 CALCUTTA 138

BANERJEE AND B. N. MAITRA, JJ.

Smt. Rita Roy, Appellant v. Sitesh Chandra Bhadra Roy, Respondent.
A. F. O. D. No. 371 of 1978, D/- 5-11-1981.

(A) Hindu Marriage Act (25 of 1955), S. 13 (1) (iii) — Suit for divorce under — Under S. 13 (1) (iii) word "or" has been used after expression "has been incurably of unsound mind" — Averment in plaint that wife became incurably of unsound mind and that she is also intermittently suffering from mental disorder — Plaint is defective as wife cannot become incurably of unsound mind and cannot at the same time intermittently suffer from mental disorder. (Para 9)

(B) Hindu Marriage Act (25 of 1955), S. 13 (1) (iii) — Divorce — Grounds — Allegation that wife suffered from incurable schizophrenia — Maintainability of.

Each case of schizophrenia has to be considered on its own merits. Schizophrenia is an illness of slow insidious onset developing over years. There may be report of strange, odd inappropriate behaviour. There will be progressive deterioration in the level of performance at work and socially; school report, examination results and the employment record will provide objective and usually reliable indices of intellectual performance, its maintenance or decline. According to the Cl. (iii) of the section, two elements are necessary to get a decree of divorce. The party concerned must be of unsound mind or intermittently suffering from schizophrenia or mental disorder. At the same time that disease must be of such a kind and of such an extent that the other party cannot reasonably be expected to live with her. So only one element of that clause is insufficient to grant a decree. (Paras 9, 15)

LY/AZ/F846/81/SAD/MVJ

In the instant case the husband has stated in his evidence that the wife is schizophrenic and she cannot be permanently cured. But the case of schizophrenia did not appear in the report or prescriptions, submitted by him. He has admitted in cross-examination that a schizophrenic patient can recover from illness after treatment and after such recovery she can appear in examination, do all domestic work and such other work. The doctor examined the wife and stated that she has been suffering from mental aberration. The doctor further certified that she was under his treatment for some time and that she had recovered from her illness. It was thus clear that she had no progressive deterioration. Wife's own case was that she was in Mental Hospital. No sign of abnormality was detected in the hospital. Moreover, the doctor in the Hospital examined her only on two occasions. So such examination by him was not sufficient to form an opinion that she had been suffering from schizophrenia. The husband or his mother did not utter a word that it was unsafe to live with her, she ever misbehaved with them or tortured or abused or behaved with them in any violent manner. This evidence could be sufficient for the Court to conclude that her slight mental disorder was not of such kind and to such an extent that the husband could not reasonably be expected to live, with her within meaning of the second portion of S. 13 (1) (iii) of the Act. (1969) 1 All ER 539, (1974) 1 All ER 498, (1975) 2 All ER 979, Distinguished.

(Paras. 12, 13)

(C) Hindu Marriage Act (25 of 1955), S. 13 (1) (iii) — Divorce — Ground that wife suffered from schizophrenia — No provision under Act to compel wife for medical examination — Adverse inference cannot be drawn on her non-examination when wife was examined twice and the matter would not have improved by her examination again by doctor. AIR 1971 Cal 1 (FB), Distinguished. (Constitution of India, Art. 21; Evidence Act (1872), S. 114.) (Para 17A)

(D) Hindu Marriage Act (25 of 1955), S. 13 (1) (iii) — Divorce — Ground that wife suffered from incurable schizophrenia — Proof as to — Non-examination of mother of wife — No adverse inference can be drawn — Wife is under no legal obligation to examine her mother — Husband has to prove his own case. (Evidence Act (1872), S. 114.) (Para 18)

Cases Referred: Chronological Paras

AIR 1975 Cal 109 : 78 Cal WN 448	9
(1975) 2 All ER 979 : (1975) 3 WLR 161 : 119 SJ 406, Thurlow V. Thurlow	4, 16
(1974) 1 All ER 498 : 117 SJ 834, Cleary v. Cleary	4, 16
AIR 1971 Cal 1 (FB)	17
AIR 1970 Bom 312	12
(1969) 1 All ER 539 : (1969) 1 WLR 430 : 113 SJ 284, Bennett v. Bennett	4, 16

Dipankar Ghosh, P. K. Roy and P. C. Roy, for Appellant; S. N. Mukherjee and B. K. Banerjee, for Respondent.

B. N. MAITRA, J.:— The husband has filed the present suit for divorce. The case is that on the 4th Dec., 1969, he was married to the respondent, Rita Roy, according to Hindu rites. The marriage was consummated. After the marriage she showed signs of abnormality. On the 8th Dec., 1970, a daughter was born out of the wedlock. Once she attempted to commit suicide. After observing her abnormal mental condition, he had her examined in the Mental Observation Ward, Bhowanipore, in Jan./Feb., 1970. She was also under the treatment of one Dr. Gobinda Sen. In 1973, she was examined by doctor. Subsequently, she was admitted to Gobra Mental Hospital for treatment. From Jan., 1973, the respondent became incurably of unsound mind and has been suffering intermittently from mental disorder of such kind and to such an extent that she cannot safely and reasonably be expected to live with the petitioner.

2. The respondent filed written statement denying the material allegations made by the husband. Her case is that before the marriage she had passed the Higher Secondary Examination. She had been treated with cruelty after she gave birth to the daughter. In Jan., 1973, she was in a family way. A forced abortion was made and the same told upon her health heavily. She had to go to Gobra Mental Hospital for treatment. After treatment for a short period, she was declared fit.

3. The learned Additional District Judge has believed the petitioner's version, found that the wife has been intermittently suffering from mental disorder which includes schizophrenia and her mental disorder is of such kind and to such an extent that the husband cannot reasonably be expected to live with her. The suit was decreed. The wife has preferred the present appeal.

4. It has been argued on behalf of the appellant that the plaint is defective. Initially a prayer was made before the learned District Judge for representing her by her guardian mother. The learned District Judge examined her and turned down that prayer. The evidence given by the petitioner's side only shows that she has only some mental disorder. But she is not of incurably unsound mind or has not been continuously or intermittently suffering from mental disorder. At any rate, such slight mental disorder is not of such kind and to such an extent that the husband cannot reasonably be expected to live with her, within the meaning of the later portion of the amended S. 13 (1) (iii) of the Hindu Marriage Act. Reference has been made to the certificate Ext. A to show that after treatment she was declared fit in 1974. The case of *Bennett v. Bennett*, reported in (1969) 1 All ER 539, *Cleary v. Cleary*, in (1974) 1 All ER 498 and *Thurlow v. Thurlow*, in (1975) 2 All ER 979 have been cited. It has been stated that this slight mental disorder is curable after treatment and she can fully recover, behave properly and do her household duty. The letters written by her, Ext. B series, demonstrate her normality and coherency. Though in the petition filed by the husband, there is no allegation that her father is off his head. But P. W. 4, Sitesh, petitioner, has stated that her father is also a crazy fellow. There is no evidence that there is no prospect of her recovery. So, the Court should reject the husband's prayer.

5. The learned Advocate appearing on behalf of the husband has stated that she has been suffering from schizophrenia. Reference has been made to the pages 237, 245, 266, 270, 275 and 324 of *Clinical Psychiatry*, Mayer-Gross, Slater and Roth, 3rd Edition. It has been stated that schizophrenia is of various kinds. In some case life-long hospitalization is necessary. At page 245, there is a table to show how a child born of a patient suffering from schizophrenia may also be a victim of such disease. The element of association is also important and others may be affected. There is abnormality of thinking, disturbance of the thought process and of volition. Such a patient does not always act out of his own volition and there is hardly any voluntary action. He or she is not a free agent. Sometimes he is aggressive and sometimes there are manifestations of schizophrenia. On most occasions he is a normal being and his abnormality is not

continuous or patent. The Court shall have to consider the future life of the petitioner, who is a young man and has a social life. From 1969 to 1973 she lived with the petitioner. In the later portion of 1973 she went to her father's family and lived there. In 1975, she returned to the husband's place. Then she was again treated at the Gobra Mental Hospital. This has been admitted in the evidence, vide the statement made by D. W. 1 Rita Roy. The letters, Ext. B series, also prove the husband's version. So considering the facts of the case, the Court should have no hesitation in stating that Rita is incurably of unsound mind or she has been suffering intermittently from schizophrenia of such a kind and to such an extent that the husband cannot reasonably be expected to live with her, within the meaning of S. 13 (1) (iii) of the Act.

6. So the point for consideration is whether Rita has been incurably of unsound mind or has been suffering intermittently from schizophrenia or mental disorder of such kind and to such an extent that the husband cannot reasonably be expected to live with her.

7. There is no denial on behalf of the appellant that Rita had some mental disorder. Through the evidence of P. W. 2 Swadeshi Bala, petitioner's ex-maid-servant, and P. W. 3, Gautam, petitioner's extenant, an attempt was made to show when she tried to commit suicide and how Rita behaved after the marriage and up to 1973. Similarly the petitioner examined P. W. -5 Basudeb Majumdar, who speaks of the incident and Rita's behaviour at the time of her 'Boubhat' and the period subsequent thereto. This evidence is hardly relevant because in the plaint, the petitioner's allegation is that Rita is of incurably unsound mind from Jan. 1973 and since then she has been intermittently suffering from the same. But after the alleged attempt to commit suicide and strange behaviour, a daughter was born. P. W. 2 Swadeshi Bala left the petitioner's service in 1975. P. W. 3 Goutam ceased to be the petitioner's tenant in 1973. Hence this chapter of the petitioner's evidence is of no consequence in this case.

8. It has been rightly pointed out on behalf of the Appellant that the plaint is defective because in S. 13 (1) (iii) of the Act the word "Or" has been used after the expression "has been incurably of unsound mind". In paragraph 4 of the plaint the averment is, "The respondent became

incurably of unsound mind since Jan., 1973 and that the respondent is intermittently suffering from mental disorder” This statement in the plaint is inconsistent because if Rita is incurably of unsound mind from Jan., 1973, she cannot at the same time intermittently suffer from mental disorder for the same period.

9. Then about schizophrenia, which is a mental disorder. In the bench case of *Pronab v. Krishna*, reported in (1974) 78 Cal WN 448 : (AIR 1975 Cal 109), it has been stated that each case of schizophrenia has to be considered on its own merits. Schizophrenia is an illness of slow insidious onset developing over years. There may be report of strange, odd inappropriate behaviour. There will be progressive deterioration in the level of performance at work and socially; school report, examination results and the employment record will provide objective and usually reliable indices of intellectual performance, its maintenance or decline; vide page 454 (of Cal WN) : (at p. 113 of AIR) of the report. The observations made by Handerson and Gillespies (10th edn) at page 279 may also be referred to.

10. Let us apply the principles of law discussed in this case to the facts of the present one. P. W. 1, Dr. Gobinda Sen, examined the wife in 1973. He has stated in his evidence that she is schizophrenic and she cannot be permanently cured. But the case of schizophrenia does not appear in the report or prescriptions, Ext. 1 series and A, submitted by him. He has admitted in cross-examination that a schizophrenic patient can recover from illness after treatment and after such recovery she can appear in examination, do all domestic work and such other work.

11. Let us now look to the report submitted by him. His report is Ext. A dated 3-2-1974. This doctor examined the wife Rita on that date and stated that she has been suffering from mental aberration. Any way, this doctor further certified that she was under his treatment up to 13-11-1973 and at present she has recovered from her illness. It is thus clear that she had no progressive deterioration.

12. In the case of *Dr. Narayan Ganesh v. Mrs. Sucheta Narayan*, reported in AIR 1970 Bom 312 that Court dealt with the case of schizophrenia elaborately. It will appear from the page 317 of the report that it will always be wise, even for the consultant psychiatrist to see the patient

on several occasions before ruling out schizophrenia, and his relatives, employers and friends should be interviewed. A single interview may not disclose any abnormalities. But if he can be observed in hospital, quite blatant signs may be recognized. Now, the petitioner's own case is that she was in Gobra Mental Hospital. No blatant sign of abnormality was detected in the hospital. Moreover, P. W. 1 Dr. Gobinda Sen examined her only on two occasions. So such examination by him is not sufficient to form an opinion that she has been suffering from schizophrenia.

13. There is a very important aspect of the case because she has stated in her evidence that her husband can have no fear if he lives with her, vide the evidence of D. W. 1 Rita Roy. No Cross-examination was levelled on this. It will be pertinent to point out that according to the amended R. 3A of O. 18 of Civil P. C. the petitioner was required to be examined first. If he is examined later, the Court shall have to record reasons and grant him permission to be examined subsequently. No such permission was given by the Court. Still the husband, P. W. 4, Sitesh, or his mother (P. W. 6 Saila Roy) does not utter a word that it is unsafe to live with her, she ever misbehaved with them or tortured or abused or behaved with them in any violent manner. This evidence is sufficient for the Court to conclude that her slight mental disorder is not of such kind and to such an extent that the husband cannot reasonably be expected to live with her within the meaning of the second portion of S. 13 (1) (iii) of the Act.

14. The letters Ext. B, series, written by her to her relations in 1976 consistently show her sobriety and coherency as well. The husband's case is that in 1976 she was thoroughly deranged. There is no cogent and clear evidence on behalf of the husband to show that such slight illness cannot be fully recovered.

15. A party's behaviour is associated with mental disorder, Reference may be made to *Raydon on Divorce*. Vol. 2, thirteenth edition, at p. 226, that in dealing with the Matrimonial Causes Act, 1973, it has been stated that broadly speaking the phrase “The respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent” is within the same range as conduct amounting to constructive desertion, that is, grave and weighty conduct—

serious conduct — which reasonably results in one party leaving the other: or, to put the matter another way, it may broadly be said to be cruelty without injury to health. It has already been stated that though the husband was examined later, he does not say anything that she was either cruel in her behaviour or she ever misbehaved with him on any occasion. According to the aforesaid cl. (iii), two elements are necessary to get a decree. The party concerned must be of unsound mind or intermittently suffering from schizophrenia or mental disorder. At the same time that disease must be of such a kind and of such an extent that the other party cannot reasonably be expected to live with her. So only one element of that clause is insufficient to grant a decree.

16. The case of *Bennett v. Bennett* (1969-1 All ER 539) (supra) shows that the parties were married in 1965, but were together for only short periods. Before the marriage she was admitted to a mental hospital on two occasions, she received shock treatment and was subsequently discharged. The husband was not aware of those facts. In Nov., 1965, the husband returned home and came to know of the same. He went abroad and returned in 1966. He did not see the wife. But he immediately consulted a solicitor and filed a petition for a decree of nullity under S. 9 of the Matrimonial Causes Act, 1965. It has been held that there was no evidence that the wife had suffered from recurrent attacks of insanity, within the meaning of S. 9 (1) (b) (iii), insanity being interpreted to mean the same as unsoundness of mind in S. 9 (1) (b) (i). It has been further held that although the wife had been temporarily insane and of unsound mind for a short period in 1955, she suffered from a temporary hysterical neurosis, within the definition of mental disorder in S. 4 of Mental Health Act, 1959. There was no evidence that she was suffering from a mental disorder of such kind or to such an extent as to be unfitted for marriage and the procreation of children, within the meaning of S. 9 (1) (b) (ii) of the section. The husband's petition was, therefore, dismissed. The case of *Cleary v. Cleary* (1974-1 All ER 498) (supra) is on adultery and has therefore no bearing on the facts of the present one. The next case of *Thurlow v. Thurlow* (1975-2 All ER 979) (supra), cited on behalf of the appellant, shows that the wife was suffering from increasingly

severe neurological disorder and she ceased to do any house work. The husband had to do the house-work and nurse the wife in addition to his full time employment. She had an attack of epilepsy. So, that case is also distinguishable.

17. It has been contended on behalf of the respondent that the husband filed an application before the learned District Judge that the wife was completely insane and without her medical examination, his case could not be proved. The wife was not willing to subject herself to any medical examination. Hence the prayer was not allowed. The Full Bench case in AIR 1971 Cal 1 has been cited. It has been stated that in that case one of the parties to the marriage was reluctant to be examined by a doctor. Since Rita was not willing to get herself examined by a doctor, there will be an adverse inference against her.

17-A. That case is clearly distinguishable because that was a case of impotency and not of insanity. Moreover, there is no provision in the Hindu Marriage Act, 1955, or in the rules framed thereunder or in the Civil Procedure Code or in the Indian Evidence Act to compel the wife to subject herself to such medical examination. The P. W. 1 Dr. Govinda Sen examined her twice. The matter would not have improved by her examination again by a doctor. So there is no scope for drawing any adverse inference.

18. It has been further contended on behalf of the respondent that there will be an adverse inference because her mother was not examined. This contention cannot be accepted because the wife was under no legal obligation to examine her mother. The husband has to prove his own case and he cannot succeed on the weakness of the wife's case. There can be no adverse inference for the non-examination of Rita's mother.

19. The prescriptions, Ext. 1 series, show that only tranquilisers were prescribed for her. The husband's version is that in 1976 her madness did aggravate. But the letter Ext. B (9) dated 9-1-1976 will show that after an examination she was selected as a candidate for training in the education institution. True the prescription Ext. 1 (a) dated 30-6-1976 reveals that she was in an anxious state of mind. But such anxiety is expected of such a young wife because her letter Ext. B (3) of March 1976, clearly shows that the

husband's side was having consultations with lawyers and she asked her mother not to go to see her for her husband's elder brother forbade anyone of her house to go to her.

20. Thus from the aforesaid discussion, the contention put forward on behalf of the respondent cannot be sustained. We are clearly of opinion that she only has slight mental disorder and she has been suffering intermittently from the same. But after considering the totality of the evidence and the impact on the husband, we must hold that such mental disorder is not of such a kind and to such an extent that the husband cannot reasonably be expected to live with her, within the meaning of the second portion of cl. (iii) of S. 13 (1) of the Act. One expects that the husband would be tolerant and not file a suit for divorce seven years after the marriage, specially when a child was born. We, therefore, find that the decisions arrived at by the learned Additional District Judge are erroneous.

21. The appeal is allowed. The judgment and decree of the trial Court be hereby set aside and the suit dismissed.

22. There will be no order as to costs.

BANERJEE, J.:— I agree.

Appeal allowed.

AIR 1982 CALCUTTA 143

RAMENDRA MOHAN DATTA AND

C. K. BANERJI, JJ.

Shib Nath Paul, Appellant v. Jaharlal Paul and others, Respondents.

Suit No. 1032 of 1980 and Appeal No. Nil of 1981, D/- 16-6-1981.

Civil P. C. (5 of 1908), O. 39, R. 1 — Transfer of Property Act (1882), S. 44 — Transfer of premises by one co-sharer to outsider — Right of transferee to joint possession — Grant of injunction to co-sharer.

There is no dispute that there is no bar in a co-sharer transferring his share in a property belonging to an undivided family. Section 44 of the T. P. Act itself proceeds on such basis and recognises such right of transfer by a co-sharer. S. 44 of the T. P. Act has two limbs. Under the first limb the purchaser by the purchase acquires, inter alia, the right to joint possession of the property along with the other co-sharers. Under the second limb

the section does not entitle him to joint possession. Acquisition of a right to joint possession and giving effect to such right are distinct questions. A purchaser is entitled to possession of the property purchased from his vendor according to the nature of such property: if it is in the possession of tenants by letters of attornment and if it is in the possession of the vendor by actual physical possession. Under the second limb the transferee is not entitled to joint possession or other common or part enjoyment of the house. AIR 1975 SC 1409 and AIR 1976 SC 49, Rel. on. (Paras 14, 17)

In the instant case the plaintiff a co-sharer filed a suit for declaration that he was the exclusive owner of the part of the premises in dispute. In this suit opposite part also one of the co-sharers made an application for an injunction restraining the plaintiff from parting with possession of premises in dispute. The application was disposed of without any order on it. During the pendency of appeal filed thereon, the property was sold by the plaintiff to a person who was not a member of the family.

Held, that an order restraining the plaintiff from parting with possession of the vacant portion of the disputed premises to the purchaser until the disposal of the appeal could be granted. (Para 18)

Cases Referred : Chronological Paras

AIR 1976 SC 49	9
AIR 1975 SC 1409	9
AIR 1973 Pat 142	9
(1970) 74 Cal WN 871	9
AIR 1964 Cal 52	9
AIR 1953 Cal 259	9
AIR 1950 Cal 111 : 54 Cal WN 660	9

Jayanta Mitra, for Appellant; P. C. Sen, (for No. 1) and Swapan Mallik, for No. 2), for Respondents.

C. K. BANERJI, J.:— In this interlocutory application the appellant is asking, inter alia, for an injunction restraining the respondent No. 1, his servants, agents and assistants from parting with possession of the vacant portion of Lot 'B' of premises No. 203/4C, Bidhan Sarani, Calcutta, to Sm. Monika Ghose or to any other stranger to the family.

2. The short facts relating to the property in dispute may be briefly stated. By an Award dated 12th April, 1949 Mr. Hem Chandra Majumder, Barrister-at-law, divided the original premises No. 203/4, Cornwallis Street (now Bidhan Sarani) into four lots being lots A, B, C and D.

Lot A was allotted to Ananda the respondent No. 2, Lot B was allotted to Jahar the respondent No. 1, Lot C was allotted to Manick and Lot D was allotted to Sushila Bala the mother. A decree was passed thereafter in terms of the said Award. The said lots were subsequently separately numbered by the Corporation of Calcutta whereby Lot A was numbered as 203/4B, lot B as 203/4C, lot C as 203/4D and lot D as 203/4A Bidhan Sarani. Lot C allotted to Manick and numbered as 203/4D, Bidhan Sarani was sold in execution of a decree some time in 1960 to Subal Chandra Pan and others strangers to the Paul family who are residing and enjoying the same exclusively.

3. By a Deed of Settlement Sushila Bala gave away lot D being No. 203/4A, Bidhan Sarani to Manik's son Shibnath through the medium of a Trust of which Jahar was appointed the Trustee. Sushila Bala died, on or about 7th Nov., 1977.

4. Shibnath filed a suit in this Court being Suit No. 701, of 1979 against Jahar claiming absolute ownership of 203/4A Bidhan Sarani and also for a decree for a large sum. An application made by Shibnath in the said Suit was decided against Jahar and on an appeal therefrom by Jahar, the appeal was disposed of by an order dated the 5th Dec., 1980 made by the Appeal Court allowing Jahar to sell No. 203/4C, Bidhan Sarani being the lot B allotted to him upon his furnishing Bank guarantee for a sum of Rs. 20,000.00 to secure the claim of Shibnath.

5. The suit herein out of which this appeal arises, was filed by Jahar, inter alia, for a declaration that he was the exclusive owner of premises No. 203/4C Bidhan Sarani, injunction restraining Ananda and Shibnath from obstructing enforcement of the said Award by construction of partition walls and for a declaration that he has a right of passage through premises No. 203/4A, Bidhan Sarani.

6. It may be noted that in the said Award a plan was annexed demarcating each lot; but there was no separation of the lots by raising boundary walls and by constructing separate stair cases, privies, etc., except for 203/4D, Bidhan Sarani which was purchased by Subal Chandra Pan and others and separated by metes and bounds by raising boundary walls to make it separate from the rest of the dwelling house.

7. On or about 5th Jan., 1981 Shibnath made an application in the said suit of Jahar out of which this present appeal arises, inter alia, for an injunction restraining Jahar, his servants and agents from parting with possession or vacating premises No. 203/4C, Bidhan Sarani to Sm. Monika Ghose or her servants or agents or to any other stranger who is stranger to the Paul family. It was urged on behalf of Shibnath in the Court below that the said application was made under S. 44 of the Transfer of Property Act. The said application was disposed of by the Court below on the 20th Feb. 1981 by making no order on the said application. The present appeal was filed by Shibnath against the said order.

8. Since then on or about 12th Mar., 1981 Jahar sold the premises No. 203/4C, Bidhan Sarani to Sm. Monika Ghose.

9. Mr. Jayanta Mitra appearing for the appellant Shibnath submitted that the said application in the Court below was made under S. 44 of the T. P. Act. Alternatively, it was in the nature of a quia timet action for an injunction against a threatened injury, namely, sale by Jahar of 203/4C, Bidhan Sarani whereby the purchaser would be entitled to possession of the said premises. S. 44 of the T. P. Act confers a right to other co-sharers to prevent the purchaser from taking possession; the threatened injury being the threat of possession by the intending purchaser upon purchase of the property by her. In any event, even if S. 44 did not apply in terms when the said application was made in Court below as there was no transfer of the property at the time, yet today the admitted position is that there has been a transfer in fact. The Appeal Court will, therefore, take note of the subsequent event and will deal with the matter as if it is a re-hearing of the application in the Court below as on this date and, therefore, grant relief to the appellant under S. 44 of the T. P. Act on equitable considerations and to avoid multiplicity of proceedings. In support of the above Mr. Mitter cited two decisions of the Supreme Court (1) Pasupuleti Venkateswarlu v. Motor & General Traders, reported in AIR 1975 SC 1409; (2) Rameshwar v. Jot Ram reported in AIR 1976 SC 49 Mr. Mitter next contended that the different lots, apart from 203/4D which has been made a separate unit and sold to Subal Chandra Pan and others, still constitute a dwelling house

belonging to an undivided family. All the three lots although separately numbered, are in joint and common use and enjoyment of the parties and the parties constitute an undivided family in respect of the said lots. The four points which weighed with the learned Judge of the Court below in making the order appealed from were: (1) existence of tenants, (2) lot C bearing No. 203/4D, Bidhan Sarani sold in execution of a decree to Subal Chandra Pan and others, who were strangers to the family, (3) demarcation in the plan was sufficient to constitute partition by metes and bounds to take the said lots out of the mischief of S. 44 of the T. P. Act and S. 4 of the Partition Act and (4) the application was outside the scope of the suit in which it was made and, as such, not maintainable. Mr. Mitter submitted that the suit was to enforce the partition directed by the said Award. So it could not be said that an application under S. 44 of the T. P. Act could not be made in such suit. The consideration for the Court was if a co-sharer could prevent a stranger purchaser from taking possession as contemplated by the said section. Mr. Mitter cited several decisions of this Court and other High Courts to show the meaning of the expression "share of a dwelling house belonging to an undivided family" in S. 44 of the T. P. Act and to establish that it did not affect the position if there were tenants or even if a separated portion of the property had been sold to a stranger and that such an application could be made even after the final decree in a partition suit inasmuch as there was no actual physical partition and separation of the divided portions of the property. The cases cited by Mr. Mitter were *Boto-krishna Ghose v. Akhoy Kumar Ghose* (1950) 54 Cal WN 660; (AIR 1950 Cal 111); *Dulal Chandra Chatterjee v. Gostha Behari Mitra* (AIR 1953 Cal 259); *Satyendu Kundu v. Amar Nath* (AIR 1964 Cal 52); *Satya Narayan Chakravarty v. Biswanath Paul*. ((1970) 74 Cal WN 871), *Harendra Nath Mukherjee v. Shyam Sunder Kuer*, (AIR 1973 Pat 142).

10. Mr. Swapan Mallik appearing for Ananda the respondent No. 2, submitted that there has been no actual physical partition and separation of lots A, B and D which are still in joint possession and enjoyment of the parties as one property. The Thakur Ghar and the bathroom are in common use and enjoyment of the parties. There is only one staircase which is

used by all the parties and the parties have to go through the other lots to reach their individual lots.

11. Mr. P. C. Sen appearing for Jahar the respondent No. 1 urged that the application by the appellant in the Court below was barred by *res judicata* by reason of the order dated 14th Jan., 1981 passed by the Appellate Court constituted by A. N. Sen, C. J. (as he then was) and M. M. Dutt J. granting leave to Jahar to sell premises No. 203/4C, Bidhan Sarani upon furnishing Bank guarantee for the sum of Rs. 20,000.00. The respondent No. 1 in view of such leave granted could not now be restrained by an injunction from making over possession to the purchaser.

12. He next urged that S. 44 of the T. P. Act recognises the right of a co-sharer to transfer a share of the property. There is no legal bar on such transfer. The respondent No. 1 having lawfully transferred his lot to Sm. Monika Ghose cannot be restrained from making over possession to her which he is bound to do under the law and also under the Conveyance. Under S. 44 of the T. P. Act the remedy of the appellant, if any, is against the transferee and not against the transferor. The transferee is not a party to the proceeding and no order can be made against her. By seeking an order of injunction against the respondent No. 1 the appellant is trying to get indirectly what he could not get directly. Mr. Sen next urged that the application in the Court below was made at a time when there was no transfer by Jahar of his lot either to Monika Ghose or to any other person. Section 44 of the T. P. Act would be attracted only when there has been a transfer. Thus the said application in the Court below was misconceived and was not maintainable under the said section. There is no scope for applying the principles of *quia timet* action for an injunction against a threatened injury on equitable grounds, sale by respondent No. 1 to Monika Ghose was not an injury threatened or otherwise. If sale cannot be prevented, what the purchaser may do or may not do after purchase cannot be a matter of injunction against the respondent No. 1 the vendor. In any event the purchaser not being before the Court any order of injunction against the respondent No. 1 will be meaningless and will neither affect nor bind the purchaser. She would be entitled to

take possession on her own rights as the purchaser.

13. Mr. Sen urged that, the decisions cited by Mr. Mitter have no application to this case. All those cases are after the purchaser has come into the picture or either has taken proceedings or has been made a party to the proceedings. None of them relates to an intending purchaser.

14. There is no dispute that there is no bar in a co-sharer transferring his share in a property belonging to an undivided family. S. 44 of the T. P. Act itself proceeds on such basis and recognises such right of transfer by a co-sharer.

15. Jahar was lawfully entitled to transfer his share in the property and he has, therefore, done so. The order of A. N. Sen, C. J. (as he then was) and M. M. Dutt J. secured the claim of Shibnath against Jahar directing him to furnish security. Prima facie, it does not appear that the said order could be said to operate as *res judicata*.

16. It is true that S. 44 of the T. P. Act did not apply in terms when the said application was made by Shibnath in the Court below as there was no transfer at the time by Jahar to Monika Ghose. The substantial question which would arise in the appeal is whether this Court would take note of the subsequent event, that is, transfer by Jahar to Monika Ghose and grant the relief accordingly. The further substantial question would be whether there has been such partition and separation of the joint property by the said Award and demarcation of the lots in the plan annexed thereto so as to take the said property out of the mischief of S. 44 of the T. P. Act and the said property has ceased to be a property belonging to an undivided family.

17. Section 44 of the T. P. Act has two limbs. Under the first limb the purchaser by the purchase acquires, *inter alia*, the right to joint possession of the property along with the other co-sharers. Under the second limb the section does not entitle him to joint possession. Acquisition of a right to joint possession and giving effect to such right are distinct questions. A purchaser is entitled to possession of the property purchased from his vendor according to the nature of such property. If it is in the possession of tenants by letters of attornment and if it is in the possession of the vendor by actual physical possession. The second limb provides "nothing in this section shall be deemed to entitle

him (transferee) to joint possession or other common or part enjoyment of the house". Apart from the tenanted portion of premises No. 203/4C, Bidhan Sarani the rest of the said premises is in the possession of Jahar and the purchaser Monika Ghose is, therefore, entitled thereto from Jahar and thus she would get joint possession or common or part enjoyment thereof. In that view of the matter *prima facie* it appears, that the contention of Mr. Jayanta Mitter that an injunction against Jahar would be sufficient is not wholly without any substance. There are arguable points to be decided in the appeal.

18. In that view of the matter there will be an order restraining the plaintiff respondent No. 1, his servants and agents from parting with possession of the vacant portion of premises No. 203/4C, Bidhan Sarani, Calcutta, to Smt. Monika Ghose until the disposal of the appeal.

19. The appeal is expedited in the manner following: The notice of appeal is waived. Settlement of index is dispensed with. All papers used in the Court below as well as the order appealed from and the order admitting the appeal be included in the Paper Book which is to be filed within six weeks from date. Appeal to appear at the top of the appropriate Warning List eight weeks hence. The Department to issue the certified copies of the aforesaid Orders forthwith on a signed copy of the minutes. Costs cost in the appeal.

RAMENDRA MOHAN DATTA, J.:— I agree.

Order accordingly.

AIR 1982 CALCUTTA 146

ANIL K. SEN AND

B. C. CHAKRABARTI, JJ.

Ismail Sk., Petitioner v. Fosiuddin Mondal, Opposite Party.

C. R. Nos. 2487 and 2488 of 1980, D/-22-12-1981.

West Bengal Land Reforms Act (10 of 1956), Secs. 8 and 14-M — Order as to pre-emption — Determination of ceiling area is not condition precedent. (1981) 2 Cal LJ 22 and (1978) 2 Cal LJ 155, Overruled.

The expression "subject to limit...etc" in Sec. 8 does not require the Munsif to determine the ceiling area before

AZ/BZ/A230/82/JDD/SNV

making the order of pre-emption. It only means that after the order of pre-emption is made it shall be subject to the limitations prescribed by Sec. 14-M. (Para 13)

The use of the above expression in Sec. 8 may not be very happy but where the main object and intention of a statute are very clear, it must not be reduced to a nullity or absurdity by the draftsman's unskillful or unnecessary use of words. Even if the expression had not been introduced in Section 8, the pre-emption would still then have been subject to Sec. 14-Y and therefore to Section 14-M as well. The use of the words "subject to the limit mentioned in Section 14-M" was clearly redundant but it can never be construed to confer a jurisdiction on the Munsif to determine the ceiling which jurisdiction is exclusively conferred by clear and unambiguous terms on the Revenue Officer. (1981) 2 Cal LJ 22 and (1978) 2 Cal LJ 155 Overruled; (1978) 2 Cal LJ 143, Approved. (Para 12)

Cases Referred: Chronological Paras
(1981) 2 Cal LJ 22: 82 Cal WN 947 6
(1978) 2 Cal LJ 143: 1978 Cal HC (N) 755 4. 12
(1978) 2 Cal LJ 155: 82 Cal WN 950 6

Mihir Kumar Ray, for Petitioner;
Hafizur Rahaman and Rafiqul Islam, for Opposite Party.

B. C. CHAKRABARTI, J.:— These two Rules are directed against an appellate order passed in Misc. Appeal Nos. 87/78 and 88/78 of the 3rd Court of the 1d. Additional District Judge, Murshidabad affirming an order of pre-emption under Sec. 8 of the West Bengal Land Reforms Act passed in Misc. Case Nos. 19/77 and 20/77 of the 2nd Court of Munsif at Jangipur. The miscellaneous cases were disposed of by a common judgment and the appeals too were heard analogously.

2. Both the courts below having allowed the prayer for pre-emption, the petitioners in these revisional applications have raised a short point in opposing the order, namely whether the court could legally make any order for pre-emption in view of the provisions of Sec. 14-M of the Land Reforms Act. (hereinafter referred to as the Act), without determination of the ceiling area mentioned in the said section.

3. Section 14-M appertains to Chapter IIB of the Act which was introduced

by the West Bengal Land Reforms (Amendment) Act, 1971. The section provides for a ceiling area which the different categories of raiyats referred to in the various sub-sections of Sec. 14-M, may hold and retain. Lands in excess of such area vest in the State in view of Section 14-S of the Act. With the introduction of Chapter IIB, Sec. 8 also was amended. The section, in material part now reads as follows:— "(1), If a portion or share of a holding of a raiyat is transferred to any person other than a co-sharer in the holding, any co-sharer raiyat of the holding may, within three months of the service of the notice given under sub-sec. (5) of Sec. 5 or any raiyat possessing land adjoining such holding, may, within four months of the date of such transfer, apply to the Munsif having territorial jurisdiction, for transfer of the said portion or share of the holding to him, subject to the limit mentioned in Sec. 14-M on deposit of the consideration money together with a further sum of ten per cent of that amount."

4. In view of this provision the petitioners raised a point before the lower appellate court that no order for pre-emption could be lawfully made until determination of the question whether the land sought to be pre-empted if added to the land already held by the raiyat would or would not exceed the limit prescribed by Sec. 14-M. Relying upon a single Bench decision in the case of *Asraf Hossain v. Jahangir Hossain* reported in (1978) 2 Cal LJ 143, the appellate court overruled the contention.

5. Being aggrieved at the decision the petitioners have moved the present revisional applications. In view of conflicting decisions on the point, the Rules which were previously pending before a learned single Judge of this Court, have been assigned to us for disposal.

6. Mr. Roy appearing in support of these applications relying on the authority of a single Bench decision in the case of *Pasupati Mondal v. Subhrangsu Mondal* reported in (1981) 2 Cal LJ 22, and another single Bench decision in the case of *Kalipada v. Dulal* (1978) 2 Cal LJ 155, contended that Sec. 14-M of the Act enjoins a duty on the court to take into consideration the limits mentioned in the said section, the grant of pre-emption being dependant on the limit prescribed

therein. Mr. Roy argued that pre-emption is a very weak right encroaching on the contractual right of a person to acquire or transfer property, and it is incumbent on the court to construe the provisions rather strictly and meticulously. He contended that determination of the ceiling is a condition precedent to the grant of pre-emption.

7. There is indeed some conflict of opinion in the decisions referred to above. Necessarily the point deserves a closer examination. The question that falls for our consideration precisely is whether determination of the ceiling is a condition precedent to the grant and whether the Munsif in seisin of an application for pre-emption has the requisite jurisdiction to make such determination.

8. We have already indicated that Sec. 14-M prescribes the maximum quantum of land that a raiyat may hold. Sec. 14-S provides for vesting of lands in excess of ceiling area in the State free from all incumbrances. Sec. 14-T casts a duty on every raiyat owning land in excess of the ceiling area to furnish a return to the Revenue Officer containing a description of the lands he proposes to retain together with a description of the lands which are in excess of the ceiling. Sub-sec. (3) empowers the Revenue Officer on receipt of a return, to determine the extent of land which is to vest in the State under Sec. 14-S and take possession of such lands. The proviso to sub-sec. (3) lays down that the Revenue Officer may, in appropriate cases even disregard the choice exercised by the raiyat. Sub-section (4) provides for imposition of penalty if a raiyat fails to furnish the return or wilfully makes any omission or incorrect statements therein. S. 14-Y lays down that if any raiyat acquires any land, whether by transfer, inheritance or otherwise, after the commencement of the provisions of this Chapter namely Chapter IIB, and such land, together with the land owned by him, exceeds the ceiling area applicable to him under Sec. 14-M, the area of land which is in excess of such ceiling shall vest in the State and all the provisions relating to ceiling on holding shall apply to such land. Finally Sec. 14X provides that no civil court shall have jurisdiction to decide or deal with any question or to determine any matter which is,

under the provisions of this Chapter determinable by the Revenue Officer.

9. These are the relevant provisions touching the point now awaiting decision by us. It is clear that acquisition of property is not prohibited by the provisions of Chapter IIB. Pre-emption in substance is also a mode of acquisition of property. Such acquisition is subject to the provisions of S.14Y which lays down what is to be done in the case of future acquisition meaning thereby acquisitions made subsequent to the introduction of the Amending Act of 1971. The raiyat in such a case would be required to furnish a further return. The Revenue Officer is then required to act in terms of Chapter IIB to determine as to how to deal with the acquired land. In this connection a reference to the Rules framed under the Act may be usefully made. Under S. 60 of the Act the rules made shall have effect as if they were incorporated in the Act. Rule 14C deals with the form and manner of submission of return. Sub-rule (3) lays down that if any raiyat acquires land whether by transfer, inheritance or otherwise after the 15th day of Jan. 1971 and such land exceeds the ceiling he shall within 3 months from the date of such of acquisition furnish a return in triplicate, in Form 7A to the Revenue Officer having jurisdiction in the area. It may be mentioned here that the impugned sales which are sought to be pre-empted took place in 1975. It follows therefore that future acquisition is not prohibited and in case of future acquisition a further return in the prescribed form is required to be submitted to the Revenue Officer. Acquisition by pre-emption being also an acquisition within the meaning of the Act, what is necessary is the submission of a fresh return. If the land pre-empted either in whole or in part exceeds the limit, it is for the Revenue Officer to deal with it. Needless to say that the right to determine the ceiling is with the Revenue Officer.

10. Again, the land pre-empted may be partly within the ceiling and partly outside. The raiyat in such a case can exercise his choice of retention. For the sake of homogeneity and compactness he may choose to retain the pre-empted land and give up other lands lying scattered and elsewhere. Under S. 14T, it is for the Revenue Offi-

cer to decide whether the choice exercised by the raiyat should be accepted or not. The Munsif in dealing with an application for pre-emption cannot require the raiyat to exercise his choice of retention and then assume a jurisdiction to deal with it. The statute does not confer any such powers on him.

11. Now if Mr. Roy's contention is accepted it would mean as if the Munsif dealing with an application for pre-emption would be required to determine whether the pre-empted land or any part of it if added to the land already held by the raiyat would exceed the limit prescribed by S. 14M. Such determination being in the exclusive jurisdiction of the Revenue Officer, in terms of S. 14X, the Munsif would be incompetent to make any such determination. Even if he does, the Revenue Officer's jurisdiction would not be fettered thereby. He would still be entitled to determine the ceiling in his own way and under the statute the latter determination should prevail. In such a situation, any determination by the Munsif, before granting pre-emption, apart from being without jurisdiction, would lead to an absurdity which can never be the intention of the legislature. Considered in that light, the use of the expression "subject to the limit mentioned in the Section 14M" in S. 8 of the Act can only mean that the order for pre-emption would not be exempt from the operation of S. 14M or for the matter of that, other provisions of Chapter IIB.

12. The use of the above expression in S. 8 may not be very happy but where the main object and intention of a statute are very clear, it must not be reduced to a nullity or absurdity by the draftsman's unskilful or unnecessary use of words. Even if the expression had not been introduced in the S. 8, the pre-emption would still then have been subject to S. 14Y and therefore to S. 14M as well. The use of the words "subject to the limit mentioned in Sec. 14M" was clearly redundant but it can never be construed to confer a jurisdiction on the Munsif to determine the ceiling which jurisdiction is exclusively conferred by clear and unambiguous terms on the Revenue Officer. We are therefore inclined to accept the view taken in *Asraf v. Jahangir* (1978-2 Cal LJ 143) (supra) and respectfully differ with the contrary view expressed in the other cases.

13. It may be that an order granting pre-emption may enable a raiyat to hold lands in excess of the ceiling temporarily but that is inevitable. And if such a situation can arise in the event of acquisition of land in any other mode, we do not see why there should be a departure in the case of acquisition by pre-emption. This apart it will bear repetition that the jurisdiction of the Civil Court and necessarily of the Munsif is expressly taken away by S. 14X. In the result we find that the expression "subject to the limit etc." does not require the Munsif to determine the ceiling before making the order. It only means that after the order is made it shall be subject to the limitations prescribed by S. 14M.

14. In this view of the matter, we are unable to accept the contention of Mr. Roy. The revisional applications are thus liable to fail and are hereby dismissed.

15. Rules are discharged. There will be no order for costs.

ANIL K. SEN, J. :— I agree.

Revision dismissed.

AIR 1982 CALCUTTA 149

BANERJEE AND B. N. MAITRA, JJ.

Smt. Ina Kar, Appellant v. Amitava Ghosh, Respondent.

A. F. O. D. No. 58 of 1979, D/- 17-11-1981.

Civil P. C. (5 of 1908), O. 6. R. 2 — Ejectment suit on ground of subletting without consent — Defendant cannot be allowed to adduce evidence to show that he only occasionally visited the tenant in absence of such a case in the written statement. AIR 1953 SC 235, AIR 1958 SC 255 and (1980) 84 Cal WN 221, Rel. on. (Para 9)

Cases Referred: Chronological Paras
(1980) 84 Cal WN 221 9
AIR 1958 SC 255 9
AIR 1953 SC 235 9

S. C. Mitter, N. D. Roy and Bhudeb Bhattacharjee, for Appellant; Bholanath Bhattacharjee, for Respondent.

B. N. MAITRA, J. :— The plaintiff has alleged that the defendant, Amitava Ghosh, was her tenant regarding the disputed premises at 2E, Kala Chand Sanyal Lane, Shyampukur, Calcutta, at a

LY/AZ/F836/81/MRD/RSK

monthly rental of Rs. 250 payable according to the English Calendar. The defendant is a defaulter from November, 1973. He has illegally sublet or transferred a portion of that flat without her permission after the provisions of the West Bengal Premises Tenancy Act, 1956, came into force. She requires the said premises for her own use and occupation. The defendant's tenancy was duly determined by a notice to quit. The suit is for ejection.

2. The defendant filed a written statement denying the plaintiff's allegations and stated that he did not transfer or sublet the premises in question.

3. The learned Judge of the City Civil Court disbelieved the plaintiff's version, held that the defendant was not a defaulter and the plaintiff did not require the premises in question for her own use and occupation. He also disbelieved the story of subletting to Sadhan Sarkar. The suit was, therefore, dismissed. Hence this appeal by the appellant.

4. It has been contended on behalf of the plaintiff-appellant that the evidence on record clearly shows that the plaintiff's version is the true one. The documentary evidence has clearly established her case.

5. It has been urged on behalf of the respondent that the plaintiff failed to establish her case. Sadhan Sarkar is a friend of the defendant's family. He occasionally comes to the defendant's flat and stays there. But he is a permanent resident of Kanchrapara. The learned Judge rightly disbelieved the plaintiff's version.

6. The question for consideration is whether the defendant has sublet a portion of the disputed premises without the previous consent in writing of the landlord, as alleged. It is necessary to point out at the outset that the plaintiff's case is that the alleged subletting took place after the provisions of the West Bengal Act XII of 1956 came into operation.

7. The plaintiff's husband, P. W. 1, Samir Kar, was examined to prove her version of subletting by defendant to Sadhan Sarkar. She has also examined P. W. 2, Krishna Chandra Polley, P. W. 3, Amarendra Nath Acharya, and P. W. 4, C. S. Venkatesh, to substantiate her allegations. She has also produced an

employee of the State Bank of India viz., P. W. 3, Amarendra Nath Acharya. He works in the Shyambazar branch of the State Bank of India. He says that one Sadhan Chandra Sarkar of 2E, Kala Chand Sanyal Lane opened an account in their branch. P. W. 4, C. S. Venkatesh, proved Sadhan Chandra's signature on the application form of Metal Box Co. of India Ltd. The learned Judge disbelieved this evidence on the ground that the identity of D. W. 2, Sadhan Chandra Sarkar, was not established. In other words, the plaintiff could not prove that the account holder at the Shyambazar branch of the State Bank of India and of the fixed deposit of Metal Box Co. was the same person as D. W. 2, Sadhan Chandra Sarkar, who is claimed by the plaintiff as the sub-tenant of the defendant.

8. Let us now go to the evidence of the defendant, D. W. 1, Amitava Ghosh, is the defendant. He says that Sadhan Babu occasionally stays in his house. But no such case was made out in the written statement. D. W. 2, Sadhan Sarkar, has made the same version by saying that he occasionally stays at premises No. 2E, Kalachand Sanyal Lane.

9. Law in this respect is clear. In the case of Trojan and Company v. Nagappa, reported in AIR 1953 SC 235 at page 240 it has been stated that the decision of a case cannot be based on grounds outside the parties' pleadings and it is the case pleaded that is to be found by the court. In the case of Venkatramana reported in AIR 1958 SC 255, it has been stated that a case which has not been made out in the pleading should not be considered by the court and evidence to support such case cannot be allowed. This decision of the Supreme Court was followed by a Bench of this Court in the case of West Bengal Co-operative Bank v. S. N. Ghosh reported in (1980) 84 Cal WN 221. Since no such case was pleaded in the written statement, the learned Judge was absolutely wrong in allowing D. W. 1, Amitava, and D. W. 2, Sadhan, to adduce evidence that the latter occasionally stays at premises No. 2E, Kala Chand Sanyal Lane. Mr. Mitter has pointed out that D. W. 1, Amitava Ghosh, has stated that Sadhan does not live in his premises for the last 5 years. He has also drawn our attention to the documentary evidence, Ext. 6, which was

issued by the Metal Box Company of India Limited. It relates to interest of fixed deposits regarding Sadhan Chandra Sarkar of 2E, Kala Chand Sanyal Lane. That document is dated 30th June, 1978. It shows that interest was due to Sadhan Chandra Sarkar of 2E Kala Chand Sanyal Lane from the 1st April, 1978, to 30th June, 1978.

10. Let us now turn to the evidence given by D. W. 2, Sadhan Chandra Sarkar. He has admitted in his chief that he has an account with the State Bank. The authority wanted for a local address and so he gave the address of Amitava Babu as his address. He further admits in his chief that he also made a fixed deposit with Metal Box describing his address as that of Amitava Babu only to avoid postal difficulties. One fails to understand how after this evidence given by D. W. 2, Sadhan Sarkar, the learned Judge could come to the conclusion that the plaintiff failed to establish her case. In view of this evidence, the learned Judge should have believed the evidence given by P. W. 3, Amarendra Nath Acharya, and P. W. 4, C. S. Venkatesh. It cannot be believed that such fixed deposit was made with the Metal Box Company by Sadhan Chandra Sarkar to avoid postal difficulties. This untrue statement should not have been accepted by the trial court. We hold that the trial court was wrong in finding that such identity of D. W. 2, Sadhan Ghosh, was not proved.

11. It has been further contended on behalf of the appellant that the money order coupon, which was marked XI for identification by the learned Judge, shows that one S. C. Sarkar gave his address at 2E, Kala Chand Sanyal Lane, Calcutta-4 and the money order coupon was signed by one Rasik Chandra Sarkar. D. W. 2, Sadhan's deposition shows that he is Rasik Chandra Sarkar's son. It is not the defence case that there is anybody else of the name of Sadhan Chandra Sarkar who stayed at 2E, Kala Chand Sanyal Lane, Shyampukur Lane, Calcutta.

12. Thus, from the aforesaid discussion the submissions made on behalf of the respondent cannot be accepted. We believe the plaintiff's version and find that Sadhan Chandra Sarkar actually lives at 2E Kala Chand Sanyal Lane, Calcutta, the defendant has sublet a portion of the disputed premises to

Sadhan Chandra Sarkar without the written consent of the landlord and hence, he is liable to be evicted on that ground alone.

13. The appeal is allowed. The judgment and decree appealed against be hereby set aside and the suit decreed. The plaintiff do eject the defendant from the disputed premises. There will be no order as to costs.

14. On the prayer made on behalf of the respondent, the operation of this order is stayed for three months from date.

BANERJEE, J.:— I agree.

Appeal allowed.

AIR 1982 CALCUTTA 151

S. C. GHOSE, C. J. AND R. N. PYNE, J.
Maharani Kamsundari v. Durganand Jha and others.

Appeal No. 1735 of 1980, D/- 4-11-1981.

Civil P. C. (5 of 1908), O. 39, R. 2A — Injunction order restraining trustees from selling or disposing of Trust property — Violation of — Application for punishing trustees — Sale made by trustees without understanding implication of Court's order and bona fide for protection of trust properties — Unqualified apology tendered by trustees was accepted. (Para 4)

J. N. Roy, for Trustees.

S. C. GHOSE, C. J.:— This application has been made against the respondents for committing them to prison or visiting them with such punishment as this Court may think proper on account of violation of court's order of injunction restraining the respondents from selling, disposing of, transferring or in any way encumbering any of the assets of the Estate and from incurring any liability until further orders. This order was passed in an appeal for the removal of the trustees from their offices on 22nd June 1979 and thereafter confirmed in the presence of the parties.

2. At the material time after the said order of injunction was in force the trustee-respondents sold a metergauge saloon as also a shed belonging to the Darbhanga Raj Estate.

3. Mr. J. N. Roy appearing on behalf of the trustees admitted that such sale was made but the same, according

to him, was not made in a contumacious disobedience of the order of the Court. The said sale was made to avoid waste and inasmuch the said properties could not be maintained or protected by the trustees. Mr. Roy tendered unconditional apology for the said sale made by the trustees without knowing the implication of violating the order of the Court. The said sale, according to Mr. Roy, was made bona fide for the purpose stated hereinbefore. Mr. Roy tendered unqualified apology on behalf of the trustee-respondents.

4. In the facts and circumstances of this case, it appears to us that the said sale was made without understanding the implication thereof and bona fide for the protection of the properties of the Darbhanga Raj Estate. In the circumstances, in our opinion, we think fit to accept the unqualified apology tendered by Mr. Roy on behalf of his clients.

5. Against the respondent No. 4 it does not appear to us that there is any case made out in the petition. In our opinion, he has been unnecessarily dragged into this proceeding.

6. For the aforesaid reasons, we do not think fit to pass any order in this application save and except that the trustee-respondents shall pay the costs of this application to the petitioner. The respondent No. 4 shall pay and bear his own costs.

R. N. PYNE, J.:— I agree.

Order accordingly.

AIR 1982 CALCUTTA 152

ANIL K. SEN, J.

Protiva Debi and others, Petitioners v. Zilla Parishad, Howrah, Opposite Party.

C. R. No. 2004 of 1981, D/- 24-12-1981.

(A) Civil P. C. (5 of 1908), O. 39, R. 1 — Transfer of Property Act (1882), Section 108 (1) (p) — Permanent lease — Lessee raising permanent structures on leasehold land — Temporary injunction against — Grant of — Balance of convenience and inconvenience of parties should be duly considered — Negative covenant alleged conduct of party in relation to such covenant must also be considered.

In disposing of an application for temporary injunction under O. 39, R. 1

and 2 the court must take into consideration all aspects. The fact that such a prayer is being made in aid of a relief for enforcement of an alleged negative covenant must enter into consideration as much as the mutual convenience of the parties and other attending circumstances like the conduct of the parties in relation to such a covenant. (Para 12)

Where a lessee under a permanent lease has already raised permanent structures on the leasehold land long back without any objection in this regard on the part of the lessor, it would be too hasty a conclusion at the time of considering the question of grant of interim injunction commanding the lessee to pull down a construction that has reached an advanced stage, to hold that Section 108 (1) (p) of the T. P. Act was not ruled out by an agreement to the contrary due to the conduct of lessor merely because there was no express agreement to the contrary. Consequently, interim injunction as sought for, could not be granted, especially when the lessor had not made out what prejudice would be caused to him if the injunction was not granted and the grant of injunction would cause irreparable loss to the lessee. AIR 1959 Madh Pra 309 Rel. on. AIR 1975 Ker 175 Referred.

(Paras 11, 12, 13)

(B) Civil P. C. (1908), S. 115, O. 39 Rr. 1 and 2 — Permanent lease — Lessee raising permanent structures on leasehold land — Injunction against — Grant of — Balance of convenience and inconvenience of parties not duly considered while granting injunction — Order can be interfered with under Sec. 115 of Civil P. C.

In considering an application under O. 39, Rr. 1 and 2, the court cannot exclude the consideration of the balance of convenience and inconvenience of the parties. Where the court has granted temporary injunction without considering the mutual prejudice of the parties and other necessary elements required by law to be considered, the exercise of jurisdiction by the Court would be in breach of O. 39, Rr. 1 and 2. As such, the Court would be deemed to have exercised its jurisdiction with material irregularity and the order granting injunction would be open to challenge in revision. (Para 10)

Cases Referred: Chronological Paras
AIR 1975 Ker 175 7
AIR 1959 Madh Pra 309 12

Saktinath Mukherjee and D. P. Mukherjee (II) for Petitioners; M. P. Banerjee and Alak Banerjee, for Opposite Party.

ORDER :— This Rule was obtained by the defendants in Title Suit No. 362 of 1980 of the Court of the learned Munsif, Uluberia on a revisional application and is directed against an appellate order dated June 29, 1981, passed by the learned Subordinate Judge, 3rd Court, Howrah, in Misc. Appeal No. 28 of 1981 thereby affirming an order of temporary injunction granted by the learned Munsif as against the defendants. The Rule is being contested by the plaintiff/opposite party, the Zilla Parishad, Howrah.

2. It is not in dispute that by a registered deed of lease dated December 10, 1906, the District Board of Howrah, the predecessor-in-interest of the present plaintiff granted permanent lease in respect of 8 cottahs 9 chittaks and 35 square feet of barrow pit land described within boundaries in favour of the predecessor-in-interest of the present defendants. It would appear from the boundary of the leasehold land as set out in the said deed of lease that but for a village pathway on the north and Bagāan Station Road on the west there was no land of the lessor on the other two sides of the land so leased out. Such a permanent lease was granted on the consideration that the predecessor-in-interest of the present defendants excavated a tank for the District Board on his own land adjacent to the leasehold land abutting on the village pathway. It is also not in dispute that the predecessor-in-interest of the present defendants erected permanent structures on a part of the leasehold land since recorded in the C. S. records of 1930 — the leasehold land being recorded as C. S. dags Nos. 1108, 1100 and 1099. It is also not in dispute that the total area of these three C. S. plots has been recorded as 20 decimals or near about 12 cottahs but the whole of it has been recorded as in the possession of the defendants.

3. In that background when the present defendant/petitioners started raising further constructions of permanent nature on the 3 plots as aforesaid, the plaintiff raised a dispute to the effect that the defendants are encroaching upon Zilla Parishad land to the extent of

nearly 4 cottahs. A proceeding under S. 144 of the Criminal P. C. was initiated on behalf of the Zilla Parishad where in an enquiry being held through an engineer it was found that there is no major encroachment either on the Station Road or on the village pathway and the defendants having given an undertaking in writing to the court that they would make no construction which would in any manner encroach upon the Station Road or the village pathway as per the enquiry report submitted in the said proceeding, the learned Magistrate disposed of the said proceeding recording the said undertaking.

4. The Zilla Parishad authorities, however, were not satisfied by the said order and they instituted the aforesaid Title Suit No. 362 of 1980 against the defendants for the following reliefs, namely,—

“(i) permanent injunction restraining the defendants from making any further construction of permanent nature on the leasehold land or any structure on the rest of the land in suit;

(ii) an injunction commanding the defendants to demolish the pucca structures made by them on the lands in suit;

(iii) temporary and ad interim injunction to the above effect.”

5. Having filed such a suit the plaintiff filed an application under O. 39, Rr. 1 and 2 of the Civil P. C. for injunction restraining the defendants from raising any construction of permanent nature on the suit land which included not only the land alleged to have been encroached upon but also the leasehold land.

6. This application for injunction was strongly contested by the defendants. They disputed the claim of the plaintiff that there had been any encroachment whatsoever. According to them, the lease was granted at a time when the record of rights was not prepared. What had been recorded subsequently in the C. S. records as the area of the three plots is not the area of the leasehold land but also a part of the land belonging to the defendants' predecessor lying to the contiguous east of the leasehold land which alone explains the discrepancy as to the area. According to them, again the District Board or its successor the Zilla Parishad having no land contiguous to the disputed leasehold land

there was no question of any encroachment on any land belonging to either of them. In opposing the prayer for interim injunction, the defendants not only claimed that they as permanent lessees are entitled to raise such construction but further pleaded that their predecessor had long ago raised such structures without any objection by the District Board. Moreover they made out a strong case of prejudice that they would suffer in the event such an injunction is granted on the ground that they had already proceeded with the construction to a great extent and the structures up to the ground level and part of the first floor, having been already completed and they having made all arrangements including collection of materials for completion of the construction, they would suffer irreparable loss and injury in the event such an interim injunction is granted.

7. On the pleadings as aforesaid, the learned Munsif proceeded to consider the plaintiff's prayer for interim injunction. The learned Munsif found that on the entries in the settlement records the defendants must be found to be in possession of the 3 plots measuring 20 decimals and at this stage it is not possible to hold as to whether there has been any encroachment by the defendants or not. But nonetheless relying on the provision of S. 108 (1) (p) of the Transfer of Property Act the learned Munsif took the view that even as a lessee the defendants are not entitled to raise any permanent structure on the leasehold land without the consent of the lessor. In that view, according to the learned Munsif the plaintiff was entitled to an order of injunction as prayed for. The learned Munsif did not consider the respective cases of convenience and inconvenience though he observed that in view of the provision of S. 108 (1) (p) of the Transfer of Property Act, the balance of convenience and inconvenience must be found in favour of the plaintiff. The defendants preferred an appeal, being Misc. Appeal No. 28 of 1981 as aforesaid. The learned Subordinate Judge not only concurred with the finding of the learned Munsif regarding the defendants' possession of the 3 plots, but he went on further to hold that the entries in the C. S. and R. S. records raise a presumption that the defendants have acquired a tenancy right in respect of the entire 20 cents

of the aforesaid 3 plots under the plaintiff. He further found that the defendants are in possession of the entire 3 plots as tenants under the plaintiff and that they had already raised certain permanent structures thereon. Notwithstanding such a finding the learned Subordinate Judge went on to hold that in the absence of any agreement to the contrary cl. (p) of S. 108 (1) of the Transfer of Property Act must be read as an implied covenant between the parties and, as such, the defendants are prohibited from raising any structures of permanent nature without the consent of the plaintiff notwithstanding the fact that the lease is one for perpetuity. On the question of convenience or inconvenience of the parties, the learned subordinate Judge relied on a single Bench decision of the Kerala High Court in the case of Kurian v. Job, AIR 1975 Ker 175 in holding that the question of convenience or inconvenience is of no moment when the breach complained of is in respect of a negative covenant. In that view the learned Subordinate Judge dismissed the appeal and confirmed the order of injunctions as passed by the learned Munsif. Feeling aggrieved, the defendants have now challenged those orders in the present revisional application.

8. Mr. Mukharji appearing in support of this Rule has strongly contended that the court of appeal below misguided itself in thinking that in the matter of granting an interim injunction in a case like the present one convenience and inconvenience of the parties would be of no moment and, as such, required no consideration. According to Mr. Mukharji the court of appeal below failed to appreciate that at this stage the court is not enforcing any negative covenant but is merely exercising its discretion in terms of Order 39 Rules 1 and 2 of the Code which must necessarily be based upon consideration of all factors relevant to the exercise of such jurisdiction. A negative covenant, if any, has to be established at the trial and enforced by the decree. It has further been contended by Mr. Mukharji that the two courts below were in error in thinking that there is no agreement to the contrary and, as such, cl. (p) of S. 108 (1) of the Transfer of Property Act must be read as an implied covenant between the parties. According to Mr. Mukharji when it had consistently been held by

this court that a right in favour of the lessee to raise permanent structure is an element indicative of permanency of the lease, the very fact that in the present case the lease on its express terms is a permanent one, indicates an implied agreement between the parties conferring a right on the lessee to raise permanent structure. According to Mr. Mukherji this aspect having been overlooked by the two courts below, the said courts arrived at a wrong conclusion that cl. (p) of S. 108 (1) of the Transfer of Property Act must be read as an implied covenant between the parties in the present case.

9. Mr. Banerji appearing on behalf of the plaintiff/opposite party has contested all the points raised by Mr. Mukherji. According to Mr. Banerji conferment of a right to raise permanent structure does not necessarily lead to the conclusion that the lease is a permanent one. According to him even a lessee in respect of a temporary lease may be conferred the right to raise permanent structure on the leasehold land during the period of lease. Hence, according to Mr. Banerji the right to build a permanent structure is not necessarily a constituent element of a permanent lease. Mr. Banerji in his turn has strongly contended that in the absence of any express agreement to the contrary the two courts had rightly held that cl. (p) of S. 108 (1) of the Transfer of Property Act must be read as an implied covenant between the parties which would entitle the plaintiff to ask for an interim injunction for enforcement of such a prohibition irrespective of the consideration of convenience or inconvenience of the parties. Incidentally, Mr. Banerji has raised a preliminary objection that the two courts below having jurisdiction to make an order of interim injunction, this court should not in the exercise of its revisional jurisdiction set aside an order so made even if the same was erroneously made as contended for by Mr. Mukherji.

10. Before I proceed to consider the contentions raised by Mr. Mukherji on their merits, I must, in fairness to Mr. Banerji, dispose of the preliminary objection raised by him to the effect that in the facts and circumstances this court should not in exercise of its revisional jurisdiction interfere with the order of injunction passed by the two courts be-

low. On a careful consideration of the legal position in the facts and circumstances of the present case, I am, however, unable to sustain this objection raised by Mr. Banerji. I would have felt no hesitation in accepting such a contention if the ground for the challenge to the order had been merely one of error of law or fact not affecting the exercise of jurisdiction. In the present case the learned Munsif did not consider the mutual convenience and inconvenience of the parties while making the order of interim injunction though he observed that in view of the prohibition incorporated in S. 108 (1) (p) of the Transfer of Property Act the balance of convenience and inconvenience must be held to be in favour of the plaintiff. Before the learned Subordinate Judge this point was specifically raised and the learned Subordinate Judge obviously found that this aspect had not been gone into by the learned Munsif. But nonetheless he observed that convenience or inconvenience of the parties is of no moment because what the plaintiff prays by an order of injunction is enforcement of a negative covenant. According to Mr. Mukherji the learned Subordinate Judge overlooked the position that the suit had not reached the stage where any negative covenant being established is to be enforced by a decree of injunction irrespective of the consideration of inconvenience or damage to be suffered by the party who had agreed to such a covenant. According to Mr. Mukherji at this stage the court is merely considering an application under Order 39, Rules 1 and 2 of the Code which requires the balance of convenience and inconvenience of the parties to be duly considered before an order of injunction is made and, as such, such a consideration could not have been excluded. If this contention of Mr. Mukherji be accepted then it would be well established that the courts below have exercised their jurisdiction in disposing of an application under Order 39, Rules 1 and 2 of the Code without due consideration of necessary elements which are required in law to go into the consideration of a court exercising such a jurisdiction. That makes the exercise of the jurisdiction one in breach of the provision of Order 39, Rules 1 and 2 of the Code and necessarily makes it a case where the court had exercised its jurisdiction if not illegally at least with

material irregularity so that if it had resulted in serious prejudice to the defendants the order becomes open for challenge even in revision. In this view, I overrule the preliminary objection raised by Mr. Banerji.

11. This leads me to consider the more important point raised by Mr. Mukherji on merit, viz., whether the two courts below could have granted the injunction prayed for without considering the balance of convenience and inconvenience between the parties. In the facts set out hereinbefore it is quite apparent that though the plaintiff came with a primary complaint that the defendants had encroached upon a part of the plaintiff's land beyond the leasehold, upon the concurrent finding of the two courts below up to this stage no prima facie case in this regard has been made out. As a matter of fact the last court of fact has found that the defendants are in possession of the entire 20 cents of land covered by the 3 disputed plots as lessees under the plaintiff. Having found as such the two courts below proceeded to grant injunction solely because of the provisions of cl. (p) of S. 108 (1) of the Transfer of Property Act reading the prohibition prescribed by the said clause as an implied covenant between the parties. It has, however, rightly been pointed out by Mr. Mukherji that such a clause is subject to an agreement to the contrary as provided for by sub-section (1) itself. The court of appeal below proceeded upon an assumption that there is no such agreement to the contrary overlooking the position that it is yet for the court of fact to find at the trial whether such an agreement to the contrary is ingrained in the lease itself, it being a permanent lease or is otherwise established on evidence having regard to attending circumstances and the conduct of the parties. Though right to raise permanent structures does not always lead to establish the lease to be a permanent one, it goes without saying that such a right is considered by courts to be a relevant element indicating the lease to be permanent. If, therefore, right to raise a permanent structure is one of the elements of a permanent lease Mr. Mukherji has rightly pointed out that it is yet for the court to construe the lease, which admittedly is a permanent one, and determine whether it incorporates by necessary implication

such a right in favour of the lessee at the trial. Moreover to me it appears when it is undisputed that the lessee under such a lease had already raised permanent structures since prior to 1930 without any objection in this regard on the part of the lessor it would be too hasty a conclusion at this stage of the suit to hold that Sec. 108 (1) (p) of the Transfer of Property Act is not ruled out by an agreement to the contrary. Any observation of mine in this regard should not go to prejudice the decision of the courts below on that issue now awaiting adjudication at the trial. All that I mean is that at this stage of the suit in disposing of an application for interim injunction the courts below should not have assumed that there being no agreement to the contrary Section 108 (1) (p) of the Transfer of Property Act must be read as an implied covenant between the parties. Such a view again was taken without reading the lease itself properly in the context of the conduct of the parties in this regard.

12. In this view I proceed to consider the main point raised by Mr. Mukherji viz., whether the court could have disposed of the prayer for injunction without considering the respective convenience or inconvenience of the parties and their mutual prejudice. On this point I feel inclined to agree with Mr. Mukherji that the courts below could not have ruled out consideration of convenience and inconvenience of the parties or their mutual prejudice while considering the prayer for interim injunction. It may be that the prayer for interim order is one in support of the principal relief in the suit which may be for enforcement of a negative covenant. But even then the court is exercising its discretion under Order 39 Rules 1 and 2 so that all matters relevant for the exercise of such a discretion must form part of its consideration. A negative covenant is to be so enforced as an agreement between the parties irrespective of inconvenience or damage to be suffered by the party who had agreed to such a covenant. But it has been rightly pointed out by Mr. Mukherji that such is the position when the suit is to be decreed or the final order is to be passed on an adjudication which establishes such a covenant. The decision of the Kerala High Court relied on by the court of appeal below lays down nothing more. In that case, the

court had granted a decree enforcing a negative covenant against the lessee by injunction and the only point raised before the High Court was whether such a covenant could be enforced even during the continuance of the tenure of the lease. In that case the Kerala High Court was not called upon to consider whether convenience and inconvenience of the parties should form part of the consideration of the court disposing of an application for temporary injunction only because the temporary injunction has been sought for in aid of a relief for enforcement of an alleged negative covenant. In my view in disposing of an application under Order 39 Rr. 1 and 2 of the Code, the court must take into consideration all the aspects. The fact that such a prayer is being made in aid of a relief for enforcement of an alleged negative covenant must enter into consideration as much as the mutual convenience of the parties and other attending circumstances like the conduct of the parties in relation to such a covenant. Such was the view expressed by the Madhya Pradesh High Court in the case of *Md. Latif v. Smt. Amritkala*, AIR 1959 Madh Pra 309 with which I respectfully agree. The learned Judge in the court of appeal below in citing authorities from Halsbury and Snell failed to appreciate the fact that there the point dealt with is with regard to the general mode of enforcement of negative covenants as a part of the agreement between the parties and not a point as to how an application for temporary injunction is to be dealt with. Mr. Mukherji on the other hand has cited *Spry on Equitable Remedies* pp. 498-500 and Snell on Principles of Equity 20th Edition page 571 in contending that the rule that a negative covenant has to be enforced irrespective of other consideration is not such an absolute proposition that it admits of no exception particularly when such a covenant is not an express one. It is, however, not necessary for me at this stage to go into that issue. But I agree with Mr. Mukherji that in the present case orders impugned having been passed without taking into consideration the relevant factors cannot be sustained.

13. On the conclusion as above, the normal course for me to follow is to set aside the orders passed by both the courts and then send back the applica-

tion for injunction to the trial court for re-consideration having regard to all material facts and considerations relevant for grant or refusal of an interim injunction. But I propose to dispose of the application myself since all the materials are on record and a remand at this stage would constitute harassment to the parties. The two courts have found *prima facie* that the lease of the defendants extends to the plots in dispute and no case of encroachment has yet been made out. Whether the lease excludes a right to build permanent structure on the leasehold land is not free from doubt particularly when such structures were allowed to be raised since before 1930 without any objection from the lessors. Further structures which are now being raised are at an advanced stage when the ground floor and part of first floor are nearing completion. They have done so upon an undertaking given in the proceeding under Sec. 144 of the Code of Criminal Procedure that they would not raise any structure encroaching upon either the Station Road or the village pathway. In such a situation to restrain them by an injunction would necessarily mean irreparable loss and prejudice to them. On the other hand, the plaintiff had failed to make out what prejudice they would suffer if the defendants be permitted to complete the construction subject to the undertaking given by them. No case of prejudice so far as the plaintiff is concerned, having been made out in the facts and circumstances only on the off chance of the plaintiff being entitled to read cl. (p) of Sec. 108 (1) of the Transfer of Property Act as an implied covenant between the parties, the plaintiff should not be favoured with an interim injunction.

14. In the result, this revisional application succeeds and the Rule is made absolute. The orders of injunction passed by the two courts below being set aside, the plaintiff's application for injunction is dismissed. There will be no order for costs.

Revision allowed.

AIR 1982 CALCUTTA 158**AMITABHA DUTTA, J.**

Kali Sadhan Banerjee and others,
Appellants v. K. K. Banerji and others,
Respondents.

S. A. No. 1471 of 1973, D/- 17-12-1981.

Transfer of Property Act (4 of 1882).

Secs. 11, 28, 32 — Deed of settlement — Construction — Defeasance clause — What amounts to. (Succession Act (1925), Secs. 131, 138, 135) — (Deed — Construction).

In a case where the donor grants an absolute estate to the donee and in a subsequent clause in the deed provides that on the happening of a contingency the absolute estate would be curtailed to a life estate after the death of the donee by exclusion of all the heirs at law of the donee from inheritance, such a clause is a defeasance clause as it defeats or extinguishes the absolute estate and not a repugnant clause. (Para 3)

Where the settlor made a deed of settlement and transferred the properties to his wife for her life and thereafter to his son absolutely with right to transfer by way of sale or gift and enjoy the properties in any manner he liked being succeeded by his heirs from generation to generation and further there was a clause in the deed according to which if both the wife and the son of the settlor died during the settlor's lifetime the properties would revert to the settlor as an absolute estate, then the said clause would be a defeasance clause and not a clause repugnant to the grant of absolute estate to the settlor's son because the effect of that clause was to reduce or curtail the absolute estate granted to the son of the settlor to a life estate on the happening of the contingency. Consequently, where the settlees died during the lifetime of the settlor, the property would revert to the settlor and having become the absolute owner thereof he would be competent to dispose it of. AIR 1933 Mad 80; AIR 1939 Cal 226 and (1878) 5 Ind. App. 138 (PC) Rel. on. (Para 3)

Cases Referred: Chronological Paras

AIR 1939 Cal 226: ILR (1939) 1 Cal	3
63	3
AIR 1933 Mad 80	3
(1878) 5 Ind App 138: ILR 4 Cal	23
(PC)	3

LY/AZ/G339/81/AAJ/SNV.

Kali Das Basu and Nanda Lal Shaw,
for Appellants; Robindra Nath Seal, for
Respondents.

JUDGMENT:— This is an appeal from the decision of the learned Additional District Judge at Suri in Title Appeal No. 59 of 1971 affirming the judgment and decree of the learned Munsiff, First Court at Rampurhat by which he has decreed the Title Suit No. 163 of 1968 for a declaration of title and permanent injunction.

2. The only point that arises in this appeal relates to the construction of the terms of a deed of settlement. Admittedly the disputed tank in Plot No. 1390 of Mouza Karkariya, 8 annas share in which is the subject matter of the suit, originally belonged to Janaki and Aghor Nath Banerjees who were two brothers. Janaki executed a deed of settlement dated 25th Aug. 1918 (8th Bhadra 1325 B. S.) in respect of his 8 annas share in the disputed tank and other properties in favour of his wife Brojendra Bala and son Dhawajadhari. The relevant recitals in the said deed of settlement are as follows:—

"Tumi Srimati Brojendra Bala Debi Adya Nija Jibankal Parjanta Nicher Likhita Sampattite Swatwabati Thakia Tahar Jabatiya Utpanna Grahanadi Jadechcha Bhog Dakhal Karibe O Tomar Ante Oi Sakal Sampattite Amar Putra Tomi Sriman Dhawajadhari Bandyopadhyay Dan Bikrayadi Hastantar Karaniya Dattaswatwa Malik Haia Pct-rapautradi Wariskrame Jadechcha Bhog Dakhal Karibe Tahate Amar Kono Ojar Apatta Chalibe Ne, Adya Haite Ami Nicher Likhita Sampattite Niswatwa Hailam, Iswar Na Karen Jibitakale Tomader Ubhayer Lokantar Ghatile Nicher Likhita Sampatti Amake Arshibe. O Taha Ami Jadechcha Byabahar O Dan Bikrayadi Karite Pariba, Ar Tumi Srimati Brojendra Bala Jibitakale Sriman Dhawajadhari Baba Jibaner Lokantar Ghatile Tumi Srimati Brojendra Bala Debi Nicher Likhita Sampattite Dan Bikroyadir Hastantar Karaner Swatwasaha Sampurna Malik Haibe."

Thus according to the terms of the deed of settlement the settlor transferred the properties to his wife Brojendra Bala for her life and thereafter to his son Dhawajadhari absolutely with right to transfer by way of sale or gift and enjoy the properties in any manner he liked being succeeded by his heirs from

generation to generation. Then the deed provided that in case both the wife and the son of the settlor died during the settlor's lifetime, in that event the properties would revert to the settlor and the settlor would be free to enjoy the properties with right to transfer them by sale or gift. The deed further provided that in the event of the death of the settlor's son during the lifetime of the settlor's wife, she will become absolute owner of the properties with right to transfer them by way of sale, gift, etc. It has been found by the courts below that the deed of settlement was properly executed and was acted upon. These findings of fact are not challenged in second appeal. It is in evidence that Brojendra Bala died in 1329 B. S. and thereafter Dhawajdhari died in 1332 B. S. leaving his minor son Kamakshya who is the plaintiff and widow Anna Kali. Janaki, the settlor survived both the settlees as he died sometime after 1347 B. S. Before his death Janaki transferred 8 annas share in the disputed tank to his brother Aghore Nath by a registered kobala dated 21st Jaistha 1347 B. S. (Ext. A-2). Aghore Nath died in 1367 B. S. leaving a will which was duly probated and by which he bequeathed his property including the disputed tank to his four sons the defendants Nos. 1 to 4 who subsequently sold the suit property to the defendants Nos. 5 and 6 by two registered kobalas dated 8-4-68 and 15-4-68 respectively. The plaintiff has claimed the suit property on the basis of the deed of settlement of 1325 B. S. and his case is that the vested interest transferred to Dhawajdhari under the said deed devolved on him as the other clauses in the deed of settlement were invalid as they were repugnant to the grant of absolute interest to his father. On the other hand, the contesting defendants have resisted the plaintiff's claim on the ground that the absolute interest created under the deed of settlement in favour of the plaintiff's father was contingent on his surviving the settlor and as he predeceased the settlor he became divested of the settled properties which became vested in the settlor who had legal right to transfer the suit property to the predecessor-in-interest of the defendants. According to the defence there were conditions superadded to the absolute grant in the deed of settlement by way of defeasance clause. The court of appeal below has

construed the terms of the deed of settlement in the following words:—

"Giving my most careful consideration it appears to me that the terms of the deed conferred an absolute estate upon Dhawajadhari. By the conditions superadded the interest of the grantee was not sought to be terminated. On the contrary by the added clauses a further interest was sought to be given to the settlor himself after or on the termination of the grantee's interest. It is not a defeasance clause. The condition superadded being derogatory to the grant is void for repugnancy. In my view, S. 31 of the T. P. Act cannot apply to this case. I accordingly hold that upon the death of Dhawajadhari the property did not revert to Janaki but devolved upon his son the plaintiff."

In that view the first appellate court has held that the plaintiff has title to the suit property consisting of 8 annas share in the disputed tank and has further found that the defendants have totally failed to establish that they possessed the tank in assertion of their hostile title. So, the appeal court has affirmed the decree passed by the trial court in favour of the plaintiff.

3. I cannot concur in the view taken by the learned Additional District Judge on the construction of the relevant clause in the deed of settlement according to which if both the wife and the son of the settlor died during the settlor's lifetime the properties would revert to the settlor as an absolute estate. In my opinion, the said clause is a defeasance clause and not a clause repugnant to the grant of absolute estate to the settlor's son Dhawajadhari because the effect of that clause is to reduce or curtail the absolute estate granted to the son of the settlor to a life estate on the happening of the contingency. In a case where the donor grants an absolute estate to the donee and in a subsequent clause in the deed provides that on the happening of a contingency the absolute estate would be curtailed to a life estate after the death of the donee by exclusion of all the heirs at law of the donee from inheritance, such a clause is a defeasance clause as it defeats or extinguishes the absolute estate and not a repugnant clause. The test bringing out the nice distinction between a defeasance clause and a repugnant one has been formulated by the Madras High Court in the

case of *Govindaraja Pillai v. Mangalam Pillai* AIR 1933 Mad 80 in the following words. Where the intention of the donor or testator is to maintain the absolute estate conferred on the donee but he adds some restrictions in derogation of the incidents of such absolute ownership the clause is a repugnant one and is therefore void. If, however, the intention expressed or to be necessarily implied is to extinguish the absolute estate on the happening of a contingency and where the effect of the termination of the said estate would not be violation of any rule of law, the clause is a defeasance clause and would operate according to its tenor. In the Bench decision in the case of *Golak Behari Mondal v. Suradhani Dasi*, ILR (1939) 1 Cal 63: (AIR 1939 Cal 226), the learned Judge Mitter J. held that the intention to terminate a gift or bequest may be an express one or may be inferred by necessary implication and where it is an absolute one, — an estate of inheritance having been conferred on the donee or legatee — and the contingency is one which is to happen if at all, the moment the donee or legatee dies and not earlier, that intention would be necessarily implied if at that moment of time the donee or legatee's absolute estate is cut down by the words used by the donor or testator to a life estate. An absolute estate so conferred can only, where there are no express words of conversion into a life estate, be cut down to a life estate if the quality of heritability be destroyed and that can be done by exclusion of all the heirs of the donee or legatee then living. The exclusion by a subsequent clause of some of the heirs or only a class of heirs of the donee or legatee who has been given an absolute estate, an estate of inheritance, would not make the clause a defeasance clause but only a repugnant one. In the said reported case the testator after granting an absolute estate to his three sons in equal shares provided by a subsequent clause in the will that if any of his sons died without leaving any son then the widow and the daughter of the deceased son of the testator that is to say two only out of a large number of his possible heirs would be deprived of the inheritance. So, it was held that the said clause of the will could not be construed as a defeasance clause but must be taken to be a repugnant clause and so void. In that case the learned Judge Sen J. in his

separate judgment observed as follows:

"I also agree with the proposition stated by the learned advocate for the respondent that where it is sought to be established that an absolute estate granted in one part of a will has been defeated by a subsequent clause it must be shown that the defeasance clause shuts out all heirs from inheriting and reduces the heritable estate to a life estate. A defeasance clause by its very terms means a clause which defeats or destroys. An absolute estate of inheritance cannot be defeated unless the quality or attribute of heritability is destroyed. A clause which does not completely destroy the heritability of the estate but merely modifies it or interferes with the course of succession cannot therefore operate as a defeasance clause."

In the case of *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhury* (1878) 5 Ind App 138 the Privy Council gave effect to a defeasance clause on the interpretation that all the heirs of the donee were shut out on the donee dying without issue. Their Lordships interpreted the deed as granting to the donee an absolute heritable estate which was defeasible on the donee dying without issue and which was in such event to revert to the donor and his heirs. In the present case the contingency in the subsequent clause in the deed of settlement on the happening of which the absolute estate granted to settlor's son Dhvajadhari was intended to be defeated by implication is that if Dhvajadhari after getting the absolute estate died before the settlor, the quality of heritability of the estate of Dhvajadhari would be destroyed and the estate would revert to the settlor as an absolute estate. On the foundation of the reported decisions mentioned above, I hold that the subsequent clause in question in the deed of settlements is a defeasance clause and not a repugnant one. So, I find that after the death of Dhvajadhari during the lifetime of the settlor Janaki the estate reverted to Janaki who became absolute owner thereof and was competent to transfer the disputed 8 annas share in the tank in suit to his brother Aghore Nath by a registered *kobala* dated 21st Jaistha 1347 B. S. (Ext. A-2). Aghore Nath died in 1357 B. S. bequeathing his properties including the suit property to his four sons defendants Nos. 1 to 4 by a will duly probated and

defendants Nos. 5 and 6 purchased the suit property from the defendants Nos. 1 to 4 by two registered kobalas dated 8-4-68 and 15-4-68 respectively. So, the plaintiff who has claimed the suit property as the legal heir of Dhwadhari on the basis of the deed of settlement cannot succeed in his suit. As no other point has been raised in this appeal, the appeal must succeed.

4. The appeal is allowed. The judgment and decree of the court below are set aside. The suit is dismissed on contest. There will be no order for costs throughout.

Appeal allowed.

AIR 1982 CALCUTTA 161

DIPAK KUMAR SEN, J.

Steel Authority of India Ltd., Applicant v. Transworld Marine Ltd. and another, Respondents.

Commercial Cause Suit No. 730 of 1980, D/- 4-11-1981.

Contract Act (9 of 1872), Sec. 230 — X a ship-owner of Taiwan and having Y as his agent at Calcutta — A entering into a contract of carriage with X for carrying steel plates to Calcutta — Ship sunk and goods lost — Suit for damages by A against X and Y — Suit is not sustainable against Y — His name must be struck out from the plaint, AIR 1962 Cal 283, Rel. on. (Civil P. C. (1908) O. 1 R. 10). (Paras 9 and 10)

Cases Referred : Chronological Paras
AIR 1962 Cal 283 10

JUDGMENT:— Steel Authority of India Limited, the plaintiff, has instituted this suit against Transworld Marine Limited and Messrs. Chowgule Brothers, the defendants Nos. 1 and 2 respectively, claiming, inter alia, decree for Rs. 50,59,365.48; interests and costs.

2. The plaintiff's cause of action in the plaint appears to be that on or about the 13th June 1979 the plaintiff shipped a consignment of 434 pieces of mild steel plates on board the vessel "M. V. Chaofong" owned by the defendant No. 1, a company incorporated under the laws of Taiwan and (hereinafter referred to as the said vessel) for being carried from the port of Kachsiung, Taiwan to Calcutta.

3. On the 8th August 1979, the said vessel while proceeding towards the Port of Calcutta sank near the Sandheads at Diamond Harbour and the entire consignment of steel plates were lost. It is alleged that the vessel was unseaworthy and that there was lack of care for the cargo.

4. The plaintiff alleges that the defendant No. 2 is the agent of the defendant No. 1 at Calcutta and gave out by conduct and implication to be liable and responsible for the acts of the defendant No. 1.

5. The present application is by the defendant No. 2 on notice dated the 11th August 1981. In this application it is prayed that the suit be dismissed as against the defendant No. 2 and/or the name of the defendant No. 2 be struck out from the plaint.

6. The case of the defendant No. 2 is that the plaint filed discloses no cause of action against the defendant No. 2 and that the defendant No. 2 is not a necessary party to these proceedings. It is alleged further that the defendant No. 1 does not carry on business in India through the defendant No. 2 and that the latter is only the protecting agent of the defendant No. 1 at Calcutta. It is also alleged that there is no privity of contract or any legal relationship between the plaintiff and the defendant No. 2. It is contended further that the defendant No. 2 is not a party to the contract of carriage between the plaintiff and the defendant No. 1 and that it did not sign the bill of lading. The defendant No. 2 was also not responsible for the navigation of the said vessel or taking care of the cargo.

7. This application is opposed. It is contended on behalf of the plaintiff that the defendant No. 1 is a foreign shipping company and carries on business of shipping through its recognised and notified agent the defendant No. 2. It is contended further that in law as well as by usage and custom of trade the defendant No. 2, as the agent of the defendant No. 1, is bound by the contract of carriage between the plaintiff and the defendant No. 1 and is also privy to the contract. The other allegations in the petition have been denied and the contentions disputed.

8. At the hearing, learned Advocates appearing for the parties reiterated their

respective contentions in the pleading. The learned Advocate for the defendant No. 2 referred to S. 230 of the Contract Act and submitted that under the terms thereof the principal having been sued the plaintiff was not entitled to sue the agent at the same time. He submitted that it was nobody's case that there was a contract by which the defendant No. 2 as the agent of the defendant No. 1 made itself liable to be sued in respect of the said contract of carriage.

9. Learned Advocate for the plaintiff contended to the contrary. In the facts and circumstances of and on the pleadings the plaintiff in my view cannot get over the mischief of S. 230 and sue both the principal and the agent. It is not the case of the plaintiff that by an express contract the defendant No. 2 made itself liable for the contract of carriage. The plaintiff's cause of action is founded on certain representations which, according to the plaintiff, create some sort of estoppel in his favour. Nothing further has been disclosed in the affidavit filed in opposition on behalf of the plaintiff on which the plaintiff can be given a chance to amend its plaint and make out a cause of action against the defendant No. 2.

10. For the reasons stated above, the defendant No. 2 succeeds in its application. The plaint however cannot be struck out in its entirety. Following the decision of the Division Bench in *P. B. Shah & Co. v. The Chief Executive Officer* reported in AIR 1962 Cal 283. It is directed that the name of the defendant No. 2 be struck out and deleted from the cause title of the plaint in this suit.

11. The defendant No. 2 is entitled to the costs of this application.

Application allowed.

AIR 1982 CALCUTTA 162

SUDHINDRA MOHAN GUHA, J.

Gopalan Vikraman Nair, Petitioner v. Taranath Dey Sarkar and another, Opposite Parties.

C. R. No. 1444 of 1981, D/- 23-11-1981.

Civil P. C. (5 of 1908), S. 115, O. 21, R. 106, O. 43, R. 1 (ja) — Order rejecting application under O. 21, R. 106 not on merits but only on preliminary point

LY/BZ/F837/81/MBR/DVT-H

— Even then order is appealable and hence not revisable. (Paras 4, 6)

Cases Referred: Chronological Paras AIR 1978 Cal 392: 1978 Cal HN 537 5

Barun Roychowdhury and Chitta Ranjan Panda, for Petitioner; Prithi Ranjan Guha and Tarun Chand Dutt, for Opposite Parties.

ORDER :— The order dated 28-4-1981 passed by Sri A. K. Chatterjee, Judge, City Civil Court in Misc. Case No. 1429 of 1979 rejecting the application under O. 21, R. 106 has been challenged under the present revision.

2. The decree for ejectment obtained by O. P. against one Narayan Prasad Ghosh was put into execution by Ejectment Execution Case No. 379 of 1979. The execution of the decree being resisted the decree-holder filed an application under O. 21, R. 97, C. P. Code for police help, which was allowed on 21-2-1981.

3. The petitioner wanted to have the said order set aside by an application under O. 21, R. 106. It is observed by the learned Judge that the petitioner entered appearance in the proceeding, cross-examined one of the witnesses for the petitioner and thereafter retired from the proceeding. Accordingly, it was held that the application under O. 21, R. 106 was incompetent. In the result it was rejected.

4. Against that order this Court has been moved in revision. But an appeal has been provided for against such order in O. XLIII, R. 1 (ja). It is argued on behalf of the petitioner that O. XLIII, R. 1 (ja) will not be attracted because of the fact that the application under O. 21, R. 106 has not been disposed of on merits but only on a preliminary point. There is hardly any distinction. The ultimate result is that the application under O. 21, R. 106 was rejected; and such an order is appealable.

5. It is argued by the learned Advocate for the opposite party that the petitioner filed an appeal, being F. M. A. T. 668 of 1981, challenging the order for police help dated 21st Feb. 1981 which was dismissed summarily, and the result is the order of the trial Court merged in the order of the Appeal Court. In the circumstances the petitioner should not be allowed to reopen the matter by an application under O. 21 R. 106, C. P. C. Reliance is placed

on the decision in the case of Smt. Jagat-janani Devi v. Smt. Jyotsna Basu, reported in 1978 Cal HN 537: (AIR 1978 Cal 392).

6. In any view of the matter, the petitioner cannot succeed by way of filing an application for revision which is incompetent. The Rule is accordingly discharged.

7. There would be no order as to costs.

8. Oral prayer for stay of operation of this order is rejected.

Rule discharged.

AIR 1982 CALCUTTA 163

Mrs. PRATIBHA BONNERJEA, J.

Dunia Lal Datta, Plaintiff v. Nagendra Nath Datta and another, Defendants.

Suit No. 651 of 1977, D/- 15-9-1981.

Specific Relief Act (47 of 1963) Sections 31, 34 and 35 — Suit under—Maintainability — Conditions to be satisfied for a suit under S. 31 — Jurisdiction of Court under S. 34 when can be invoked.

A plaintiff in a suit under S. 31 of the Act, has to establish three conditions: (1) That the plaintiff is such a person against whom the instrument is void or voidable; (2) that the plaintiff can entertain a reasonable apprehension that if such an instrument is left outstanding it may cause him serious injury and (3) that the court must adjudge the instrument void or voidable. AIR 1972 All 376, Rel. on. (Para 6)

The plaintiff filed a suit against N and B under Ss. 31, 34 and 35 of the Act for adjudication that the decree passed in a declaratory suit by N against B to which he was not a party was void, inoperative and not binding upon him, for an order that the said registered decree be delivered up and cancelled, and for injunction etc.

Held: The expression "written instrument" in S. 31 means an instrument which has not already been adjudged by any formal court or Tribunal. The first condition is not fulfilled as the decree is not a "written instrument" which is void or voidable against the plaintiff. The second condition also is not fulfilled because the decree cannot be vexatiously or injuriously used against him

due to provisions of S. 35. This decree is not binding on him, he being a stranger to the said suit. Under the circumstances, the question of adjudging the said decree as void or voidable will not arise. Hence no relief could be granted to plaintiff under S. 31. A decree is not an unadjudged document which can be adjudged void or voidable. No suit will lie under S. 31 on the facts and circumstances of the case. (Paras 5, 9)

(ii) The declaratory decree as sought for could not be given under S. 34 also. S. 34 does not contemplate that a declaratory decree would be passed when the facts of the case come under S. 35. The impugned decree in N's suit cannot be used against plaintiff. Therefore such a declaration will be futile. S. 35 fully protects plaintiff and no further declaration is necessary. Further, when the circumstances of the case showed that if the plaintiff could obtain such a declaration that would be a stepping stone for further litigation and will be of no practical effect, it would not be a proper exercise of jurisdiction to pass declaratory decree. (Paras 10, 12, 13)

Cases Referred: Chronological Paras

AIR 1972 All 376	7, 9
AIR 1962 SC 214	10
AIR 1960 Cal 702: 64 Cal WN 616	7
AIR 1960 Mad 1 (FB)	7
AIR 1953 Assam 162	11
AIR 1929 Cal 422	11
AIR 1927 Pat 286	10
AIR 1922 All 349: 20 All LJ 557	12

P. K. Das with Sen, for Plaintiff; Bankim Dutta with H. M. Dutta, for Defendant No. 1.

JUDGMENT :— The present suit was instituted by the plaintiff against the defendants for adjudication that the decree passed in T. Suit No. 451 of 1971 by the learned 9th Bench, City Civil Court at Calcutta and registered on 7-2-1974 was void, inoperative and not binding upon the plaintiff, for an order that the said registered decree be delivered up and cancelled, injunction etc. The circumstances under which the suit was instituted will appear from the short list of dates set out below.

Aug. 1946 — The defendant No. 2 Balai was inducted as a tenant by the defendant No. 1 Nagendra in respect of premises No. 50 Doctor Lane, Calcutta. Nagendra was the owner of this property,

9th Spet. 1946 — A deed of sale was executed by Nagendra in favour of Balai in respect of the premises No. 50 Doctor Lane to avoid creditors. Nagendra alleged that the deed was a benami transaction.

5th June 1971 — T. Suit No. 451 of 1971 was instituted by Nagendra against Balai for declaration that the deed executed on 9-9-1946 in favour of Balai was invalid, inoperative and was never acted upon. The plaintiff in the present suit, Dunialal, was not a party to the said suit.

1971 — Dunialal filed T. Suit No. 676 of 1971 against Balai in the City Civil Court for partition of the premises No. 50, Doctor Lane. Nagendra was not a party to the said suit.

12th Sept. 1973 — A decree was passed in the said T. Suit No. 451 of 1971 on contest declaring the deed dated 9-9-1946 was invalid, inoperative etc.

8th Feb. 1974 — Nagendra again filed another T. Suit No. 176 of 1974 against Balai and Dunialal for their eviction from the premises No. 50, Doctor Lane and for recovery of possession on the allegation that Balai had surrendered the tenancy on 6-1-1974 and had informed Nagendra that Dunialal was in wrongful occupation of the said property. Balai contested the said suit but Dunialal did not enter appearance, did not contest the suit.

2nd Jan. 1975 — In T. Suit No. 176 of 1974 a decree for eviction was passed on contest against Balai and ex parte against Dunialal — the present plaintiff.

Thereafter Nagendra started execution Case No. 21 of 1975 for evicting Balai and Dunialal.

April 1975 — In execution of the decree in T. Suit No. 176 of 1974, Nagendra started another Misc. Case No. 329 of 1975 for possession with the help of police.

11th April 1975 — A partition decree was passed in Dunialal's partition Suit No. 676 of 1971.

21st April 1975 — Another Misc. Case No. 331 of 1975 arose as Dunialal took out an application under O. 9, R. 13 of the C. P. C. for setting aside the ex parte decree dated 2-1-1975 against him in Suit No. 176 of 1974.

16th Sept. 1976 — Dunialal's application under O. 9, R. 13 of the C. P. C. was dismissed.

3rd Jan. 1977 — Dunialal preferred an appeal with an application under Sec. 5 of the Limitation Act against the order of dismissal of his application under O. 9, R. 13 of the C. P. C. and obtained C. R. No. 12 (M) of 1977 and C. R. No. 907 (M) of 1977 both of which were subsequently discharged.

1977 — Dunialal thereafter filed T. Suit No. 597 of 1977 in the City Civil Court for setting aside the ex parte decree in T. Suit No. 176 of 1974.

8-6-1978 — Dunialal's T. Suit No. 597 of 1977 was dismissed for default.

2. In the premises aforesaid the decree for eviction against Dunialal in T. Suit No. 176 of 1974 became final and binding on him. The aforesaid court proceedings are all admitted by the parties to the suit.

3. When the present suit was opened, the contesting defendant Nagendra raised an objection regarding the maintainability of the suit and both the parties to the suit agreed that this preliminary issue should be decided first. The two preliminary issues were framed as follows :—

(1) Is the suit maintainable under Ss. 31, 34 and 35 of the Specific Relief Act of 1963 ?

(2) Is the suit barred by res judicata by reason of the City Civil Court decree dated 2-1-1975 passed in T. S. No. 176 of 1974 ?

4. Let us take the first issue first. Mr. Das, counsel for the plaintiff, submitted that in T. Suit No. 451 of 1971, the present plaintiff Dunialal was not a party and if this decree would remain outstanding, that would cause serious prejudice to him. Hence this decree should be adjudged void and delivered up and cancelled under S. 31 of the Act. He further submitted that the plaintiff would be entitled to this declaration as of right in view of the provisions of S. 35 of the Act. S. 35 of the Act is as follows :—

Section 35 "A declaration made under this chapter is binding only on the parties to the suit, persons claiming through them respectively....."

5. Sections 34 and 35 are under Chapter V of the Act. The provisions of Section 35 obviously relate to the decree passed under S. 34 of the Specific Relief Act. If the decree in T. Suit No. 451 of 1971 was passed under S. 34 of the

Specific Relief Act, 1963, then under S. 35 such a decree will not be binding on Dunialal who was a stranger to the suit. The statute makes the position clear. On the facts and circumstances of this case, is Dunialal entitled to bring a suit under Sec. 31 of the Act? Let us now examine the requirements of Sec. 31 of the Act.

Section 31 (1) "Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury may sue to have it adjudged void or voidable, and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled."

6. The relief as to delivery and cancellation of an instrument is founded upon the administration of the protective justice for fear that the instrument may be vexatiously or injuriously used by the defendant against the plaintiff or it may throw a cloud or suspicion over his title or interest. A plaintiff in a suit under S. 31 of the Act has to establish three conditions:

(1) that the plaintiff is such a person against whom the instrument is void or voidable.

(2) that the plaintiff can entertain a reasonable apprehension that if such an instrument is left outstanding it may cause him serious injury.

(3) that the Court must adjudge the instrument void or voidable.

7. The aforesaid conditions were laid down in AIR 1972 All 376 relying on a Full Bench decision reported in AIR 1960 Mad 1. Will a decree of a competent Court come under the expression "written instrument" in Sec. 31? In (1960) 64 Cal WN 616: (AIR 1960 Cal 702) (Pratabmull Rameswar v. K. C. Sethia) a Division Bench of this High Court had held at p. 628 (of Cal WN): (at p. 709 of AIR):—

"But an award or a judgment of Court is not in this sense a written instrument within the meaning of S. 39 of the Specific Relief Act, the words 'adjudged' and 'delivered up' appear to support this argument, in other words the word 'adjudged' means that where a written instrument such as a written contract has already been 'adjudged' by a Court or Tribunal S. 39 cannot be applied. It is only when a written instru-

ment has not been 'adjudged' by a Court or Tribunal but remains an unadjudged written instrument that S. 39 can be invoked. Similarly the 'delivery' of the written instrument cannot be made to include delivery of an award or judgment of Court to be 'cancelled'. There is no question of delivery or cancellation in such a case because the judgments or awards on which judgments are pronounced are public records and the parties can have them by making the proper application to Court for those copies and which can be set aside according to the law or procedure applicable and not delivered for cancellation as contemplated in S. 39 of the Specific Relief Act. We are inclined to think that Section 39 of the Specific Relief Act cannot be applied in the case of judgments of a Court or an award of a Tribunal although they may come within the general expression 'written instrument'. We consider that the expression 'written instrument' in Section 39 means an instrument which has not already been adjudged by any formal Court or Tribunal."

8. I am in full agreement with this decision which is also binding on me. This decision applies in full force in the present case as S. 31 (1) of the Specific Relief Act 1963 is verbatim reproduction of S. 39 of the repealed Act.

9. Therefore the 1st condition in AIR 1972 All 376 is not fulfilled as the decree in T. Suit No. 451 of 1971 is not a "written instrument" which is void or voidable against the plaintiff. The second condition also is not fulfilled because the plaintiff cannot entertain a reasonable apprehension that the decree in T. Suit No. 451 of 1971, if left outstanding will cause him serious injury because it cannot be, vexatiously or injuriously used against him due to the provisions of S. 35 of the Act. This decree is not binding on him, he being a stranger to the said suit. Under the circumstances, the question of adjudging the said decree as void or voidable will not arise. So the 3rd condition is also not fulfilled. Hence no relief can be given to the plaintiff under S. 31 of the Act. In my opinion, the plaintiff has no right to invoke S. 31 of the Specific Relief Act of 1963. Realising this difficulty, the plaintiff's counsel submitted that he was abandoning prayers for delivery and cancellation under Sec. 31 and would be

satisfied with declaration only. This again cannot be done. A decree is not an unadjudged document which can be adjudged void or voidable. I have no hesitation to hold that no suit will lie under S. 31 of the Act on the facts and circumstances of this case. The plaintiff's counsel then urged that this suit could be treated as a suit under S. 34 of the Act. The provisions of S. 34 are as follows :—

Section 34 "Any person entitled to any legal character or to any right as to any property, may institute a suit against any person denying or interested to deny his title or such legal character or right and the court may in its discretion make therein a declaration that he is so entitled and the plaintiff need not in such suit ask for any further relief."

10. In the present suit the plaintiff did not pray for any such declaration. On the contrary, the documentary evidence of records of Courts which were freely used by both the parties during hearing, clearly proved that in 1974 Nagendra had filed the T. Suit No. 176 of 1974 in the City Civil Court wherein he claimed to be the owner of the premises No. 50, Doctor Lane and alleged that Balai and Dunialal were trespassers and prayed for their eviction from the said property. Balai filed a written statement admitting Nagendra's title over premises No. 50, Doctor Lane but denying that he was a trespasser. Dunialal did not contest the suit. On 2-1-1975, a decree for eviction was passed in the said T. Suit No. 176 of 1974 against Balai on contest and ex parte against Dunialal. Dunialal failed to set aside this ex parte decree in spite of repeated attempts as will appear from the list of dates set out above. This decree has become binding on him. According to Mr. Dutt, counsel for the defendant Nagendra, Dunialal had no title in respect of this property when the present suit was filed in 1977. As he had no interest, he could not invoke the jurisdiction under S. 34 and claim a declaration. He cannot agitate the question of his alleged title to this property in the present suit as that issue would be barred by the principle of res judicata by virtue of the decree in T. Suit No. 176 of 1974. The counsel for the plaintiff Dunialal, however, submitted, that the plaintiff would be entitled to raise this dispute in the present suit in spite of the decree in T. Suit

No. 176 of 1974 as this Court is a superior Court. The principle of res judicata will apply if the Court which passed the decree and the court in which the same dispute is raised subsequently are of concurrent jurisdiction. A decree by lower Court on an issue will not be treated as res judicata, if the same issue is raised before a superior Court. In support he relied on AIR 1962 SC 214 paragraphs 4, 5, 6, 10, 11 and 12. But his submissions are completely irrelevant so far as the present suit is concerned. In the present suit, the plaintiff did not ask for a declaration of his title over premises No. 50, Doctor Lane and did not make any allegation that the decree in T. Suit No. 176 of 1974 was not res judicata. The plaintiff has completely suppressed this fact from Court. His only prayer is that the decree in T. Suit No. 451 of 1971 is void against him. Such a decree would be unnecessary in view of the provisions of Sec. 35 of the Act. Sec. 34 does not contemplate that a declaratory decree will be passed when the facts of the case come under the purview of Sec. 35 of the Act. The decree in T. Suit No. 451 of 1971 cannot be used against him. Therefore such a declaration will be futile. This jurisdiction under Sec. 34 is equitable and discretionary. In AIR 1927 Pat 286 it has been held at page 287 :—

"It is well settled that a court will not make a declaration of an abstract right exclusive of practical utility especially when that declaration may not be productive of any benefit to the party obtaining the declaration."

11. Other authorities on this point are AIR 1929 Cal 422 and AIR 1953 Assam 162.

12. In my opinion, the provisions of Sec. 35 of the Specific Relief Act fully protect the plaintiff in the present suit and no further declaration is necessary. Then why the plaintiff is so keen in getting a declaration from Court that the decree in Suit No. 451 of 1971 is not binding? It appears from the facts of this case that the parties to the suit are veteran litigants and there were several litigations between the parties, concerning the premises No. 50, Doctor Lane. It also appears from the facts of the case and the surrounding circumstances, that if the plaintiff can obtain such a declaration that will be a stepping stone for further litigation. It is well settled that

to allow a declaratory decree to be passed which will be used as a stepping stone for further litigation and will be of no practical effect, is not a proper exercise of the jurisdiction. (1922) 20 All LJ 557 : AIR 1922 All 349.

13. I am convinced looking at the prayers in the plaint, that the present suit cannot be treated as a suit under Section 34 of the Act. It is a suit filed under Chapter IV Sec. 31 of the Specific Relief Act and I have already held that such a suit will not lie on the facts of this case. The present suit is therefore, not maintainable and is liable to be dismissed. In view of my finding on the preliminary issue No. 1, it is not necessary to decide the preliminary issue No. 2. The suit is therefore, dismissed with costs in favour of the appearing defendant.

Suit dismissed.

AIR 1982 CALCUTTA 167

Mrs. PADMA KHASTGIR, J.

Nanajal Madhavji Varma, Plaintiff v. State of Andhra Pradesh, Defendant.

Suit No. 464 of 1980, D/- 3-8-1981.

(A) Constitution of India, Art. 299 (1) — Additional Chief Engineer, Electricity for State of A. P. has no power to enter into contract on behalf of State — Held, on facts, that alleged contract by him was void for non-compliance with Art. 299 (1). (A. P. Financial Code, Vol. 1, Art. 51 (b) P. 20, Expenditure General Principles and Rules, Appendix 4, Item 27) — (A. P. Electricity Department Manual, Vol. 2, Appendix P. 22, Item 46).

The plaintiff alleged a binding contract between him and the State of A. P. on the basis of certain letters between him and the Additional Chief Engineer, Electricity, State of A. P. It appeared that the alleged agreement was not entered into in the name of the Governor of the State of A. P., nor it was signed for and on behalf of the Governor of A. P. nor did it disclose that the person who signed the said document was duly authorised by the Governor of A. P. From the State of A. P., Financial Code, Vol. I under the Expenditure General Principles and Rules under Art. 51 (b) at P. 20 under appendix 4, item 27 and from A. P. Electricity Departmental Manual (Vol. 2) Appendix P. 22 Item 46, it is clear that

the Additional Chief Engineer who had signed the letters had no authority under the said rules to enter into any contract for and on behalf of the State of A. P.

Held, that the alleged contract was void since it did not comply with Article 299 (1) of the Constitution of India. AIR 1977 SC 2149, Foll.; AIR 1971 SC 141 and AIR 1981 NOC 82 (Cal), Disting. (Para 7)

(B) Contract Act (9 of 1872), S. 70 — Contract in contravention of Art. 299 (1) of Constitution — Claim for compensation under S. 70. (Constitution of India, Art. 299 (1).)

A person whose contract is void for non-compliance with Art. 299 (1) of the Constitution is entitled to compensation under S. 70 of the Contract Act. It is, however, his duty to account to the other party for what he has received in the transaction before his right to restitution arises. If he fails to do so his claim for compensation or refund for deposit will be dismissed. AIR 1968 SC 1218 and AIR 1962 SC 779, Foll. (Para 11)

Cases Referred : Chronological Paras
AIR 1981 NOC 82 (Cal) 10
AIR 1977 SC 2149 7
AIR 1971 SC 141 10
AIR 1968 SC 1218 : 1968 All LJ 745 11
AIR 1962 SC 779 13

JUDGMENT:— This suit had been filed by Nanajal Madhavji Varma against the State of Andhra Pradesh for recovery of a sum of Rs. 62,887 p. interest and costs. It is the plaintiff's case that on 19th of Aug. 1958 the Official Liquidator of the Barasat Basirhat Light Railway Co. (in liquidation) published an advertisement in the Statesman in Calcutta inviting tenders for the purchase of moveable properties of the said company including rails on various terms and conditions. The maximum selling price of the said rails was fixed by the Iron and Steel Controller at Rs. 700/- per ton. Under the said terms and conditions the purchaser was to sell the said according to the directions of the Official Liquidator. Thereafter several tenders and offers were received by the said Official Liquidator and on 6th of Oct. 1958 the plaintiff was accepted and confirmed by this Court as the highest bidder. The Iron & Steel Controller by letter dated 24th Jan. 1959 arranged for supply of second hand rails to the parties specified in a list at a price not exceeding Rs. 700/- per tons ex-stockyard.

By letter dated 24th Jan. 1959 the plaintiff was directed by the Iron & Steel Controller to release to the defendant the State of Andhra Pradesh in the name of its Additional Chief Engineer for Electricity P. W. D. Hyderabad division as allottee of 1325 tons of second hand rails of the following kinds:

35 lbs.	=	84 tons
35/41½ lbs.	=	23 tons
41 lbs.	=	1, 218 tons.

Total — 1, 325 tons.

2. By letter dated 28th Jan. 1959 addressed from Calcutta to the defendants Additional Chief Engineer, Electricity, Hyderabad the plaintiff asked the defendant for confirmation of the said sale and to take delivery of the allotted goods. By letter dated 2nd of Feb. 1959 the defendant through the said Additional Chief Engineer, Hyderabad desired to purchase 890 tons of the said goods which were allotted and released to the defendant of the following kind:—

35/lbs/yd.	=	56 tons.
35/41½ lbs/yd.	=	16 tons.
41/lbs/yd.	=	818 tons.

Total 890 tons.

3. The price was agreed to be at Rs. 700/- per ton ex-stockyard to be sent on freight to pay basis and all the materials with the railway receipts were agreed to be sent to the parties. It was agreed that the railway receipts and the bills in duplicate would be presented through the plaintiff's bankers at Vijayawada in the name of the defendant's Superintending Engineer and the entire price would be paid within 14 days from the date of the presentation of the bills and railway receipts through the plaintiff's bankers with sight draft. The other terms and conditions agreed upon by and between the parties would appear from the correspondences referred to by and between the parties. The plaintiff accepted those terms by his letter dated 9th of Feb. 1959.

4. It was the plaintiff's case that from time to time pursuant to the arrangement as aforesaid the plaintiff despatched and supplied to the defendants all the contracted goods and sent bills to and drew sight drafts on the defendant's Superintending Engineer and presented such drafts for acceptance and payment by the defendant being the price of the goods so supplied and accepted and

honoured such drafts except two drafts for the price of a portion of goods. The said two drafts were duly accepted but dishonoured on presentation on due dates. These were in respect of 43 tons 18 CWT 2 lbs for Rs. 31,538.15/- and 43 tons 11 CWT for Rs. 31,268.90/- totalling Rs. 62,807.5p. Those two despatches were made on 17th of April, 1959 and 22nd of April, 1959 respectively. It was plaintiff's case that there was a valid and binding contract by and between the parties under which the said goods were despatched and the defendant having received the materials should make payment for the same. In the alternative it is the plaintiff's case that the plaintiff was entitled to compensation for the supply of the said goods which the plaintiff did not do gratuitously and the defendant having enjoyed the benefit thereof should compensate for the same.

5. The main defence on behalf of the defendant was that there was no concluded agreement by and between the parties as the provisions of Art. 299 (1) of the Constitution were not complied with and as a result there was no valid and binding contract by and between the parties which could be enforced against the defendant. Secondly the plaintiff did not despatch and supply to the defendant all the contracted goods as according to the defendant rails weighing 1196 maunds 16 seers alleged to have been despatched by the plaintiff covered under the railway receipts Nos. 388867 dated 24th July, 1959 never reached its destination. In respect of the other 21 consignments and/or railway receipts after the arrival of the goods they were weighed by and/or on behalf of the defendant and/or the railway authorities and it was found that although railway receipts contained some figures of weights purported to have been sent by the plaintiff, but on actual weighment being made they were found to be far less than the weights shown in the railway receipts by the plaintiff. In respect of 10 consignments and/or railway receipts, no such weighment could be made as the goods were already unloaded and mixed with other goods. Giving full credit to weight of the goods given in the said 10 railway receipts, the defendant only received 35106 maunds 35 seers which would appear from Annexure 'A' to the written statement. Under the circumstances the defendant was under an obligation to pay

only for the 35106 maunds 35 seers whereas the defendant in fact had made payment to the plaintiff in respect of 35405 maunds and 9 seers, in the premises the defendant had made over-payment to the plaintiff in respect of 298 maunds and 14 seers representing a sum of Rs. 7869.28/-. The drafts were accepted by the defendant on the belief that the consignor had mentioned the actual weight of the goods as mentioned in the railway receipts but subsequently when the non-delivery and short-delivery were discovered the defendant withheld payment in respect of the two consignments. Under the circumstances the defendant denied its liability to pay any further sum to the plaintiff. On the contrary it is the defendant's case that because of non-supply of the contracted qualities (quantities?) the defendant had suffered damages and reserved its right to institute a suit for recovery of the sum over-paid to the plaintiff with damages suffered by the defendant. The defendant completely denied that it ever enjoyed the benefits of the entire quantity of goods contracted for. Under the circumstances the defendant denied its liability to make any compensation to the plaintiff to the extent of Rs. 62,807.5/-. So far the railway receipt No. 388867 dated 21st Feb. 1959 was concerned the weight stated in the railway receipts was 1196 maunds and 16 seers, the same was not received at all by the consignee as the said wagon was mislaid and/or could not be traced earlier but it was subsequently discovered to have been delivered elsewhere and not to the consignee. Out of the 32 consignments made by the plaintiff to the defendant the defendant paid for the entire consignment save and except the consignment No. 529778 dated 21st April 1959 stated to contain 1185 maunds and 21 seers and railway receipts No. 529755 dated 16th April, 1959 stated to contain 1195.29 seers which on actual reweighment was found by the defendant to be less than what was shown on the R/R receipts as the actual weight found by the defendant in respect of the said consignments was 80 tons less which would be evident from the documents disclosed by the parties and tendered in evidence.

6. The plaintiff examined Sudhir K. Majhi a general assistant of the plaintiff to substantiate the case as made out in the plaint. It was his evidence that

so far the two outstanding bills were concerned the defendants never raised any objection as to the quantity of the goods for which the price remained unpaid. He had admitted that the defendant had paid for the wagon which never reached its destination against which the defendant did not receive any consignment of goods covered by the said railway receipt. The parties mainly relied on the contemporaneous documents that passed by and between the parties. The plaintiff also examined Nanda Kishore Sinha an assistant of the South Eastern Railway for the purpose of proving certain letters. The plaintiff examined Sri Subimal Ghosh, an assistant from the Iron & Steel Controller Office to prove certain letters only. On behalf of the defendant two witnesses were examined from the railways to prove that a wagon containing the consignments as indicated earlier never reached its destination and also to prove that on weighment by the railways it transpired that R/R containing the stated weight did not tally with the actual weight taken by the railways at the destination.

7. From the series of correspondences that have been referred to by and between the parties and from the letters, stated by the plaintiff to form the agreement by and between the parties, were mostly signed by the Additional Chief Engineer Electricity of the State of Andhra Pradesh and in one of such letters the signatory whose name could not be deciphered signed for and on behalf of the State of Andhra Pradesh. It was the definite case of the defendant that these letters on which the plaintiff relied on for the purpose of coming to the conclusion that there was a valid and binding agreement by and between the parties it would appear that the agreement was not entered into in the name of the Governor of the State of A. P. nor it was signed for and on behalf of the Governor of A. P. nor did it disclose that the person who signed the said document was duly authorised by the Governor of A. P. From the State of A. P. Financial Code, Vol. I under the Expenditure General Principles and Rules under Art. 51 (b) at page 20 under appendix 4, a list of the authorities empowered to enter into contracts on behalf of the Governor had been given. Even for the purpose of any material variation under the terms of an existing contract made on behalf of the Govern-

ment it was directed that the matter should be referred to the Government for orders. From the appendix Item No. 27 it would appear that all contracts, deeds and other instruments connected with the administration and working of Electricity Department must be done by the Chief Engineer, Electricity, Chief Electrical Inspector to Government subject to any limits and conditions fixed by the departmental orders by the Chief Operation Engineers and Chief Construction Engineers and the Superintending Engineer in charge of power systems. In the A. P. Electricity Department Manual Vol. 2. Appendix page 22 under Item No. 46 the details of the persons such as Chief Engineer, Chief Operation Engineer, Chief Construction Engineer, Superintending Engineer have been given with the powers of entering into contracts. The Chief Engineer has been given unlimited power, Chief Operation Engineer has been given powers up to three lakhs. Chief Construction Engineers up to 1 lakh and Superintending Engineer up to Rs. 15,000/- only. Full particulars of such powers and/or limits and/or authorities would appear from Item No. 46 of the appendices page 22. It would be abundantly clear that the Additional Chief Engineer who had signed the letters had no authority under the said rules to enter into any contract for and on behalf of the State of A. P. Under the circumstances the provisions of Art. 299 (1) of the Constitution of India had not been complied with which provides that:—

"299. Contracts — (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power, shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise."

Under the circumstances it appears that the contract did not comply with Art. 299 (1) of the Constitution of India. As a result, there was no valid and binding contract by and between the plaintiff and the defendant. In a case reported in AIR 1977 SC 2149, *The Bihar Eastern Gangetic Fishermen Co-operative Societies Ltd. v. Sipahi Singh* it had been held (at p. 2152) that:—

"The provisions of Art. 299 of the Constitution which are mandatory in character require that a contract made in the exercise of the executive power of the Union or of a State must satisfy three conditions viz.

(i) it must be expressed to be made by the President or by the Governor of the State, as the case may be;

(ii) it must be executed on behalf of the President or the Governor, as the case may be and (iii) its execution must be by such person and in such manner as the President or Governor may direct or authorise. Failure to comply with these conditions nullifies the contract and renders it void and unenforceable. There is no question of estoppel or ratification in a case where there is contravention of the provisions of Art. 299 (1) of the Constitution."

8. It would appear that under the common publication Andhra Pradesh Financial Code, Appendix 4 Vol. 2 Item No. 26 it would appear that in view of the present contract being for Rs. 9 lakhs the Chief Engineer alone had the power to enter into the contract but from the letters dated 28th Jan. 1959, 2nd Feb. 1959 and 9th Feb. 1959 which had been pleaded in para 7, 8 and 9 of the plaint it would appear that these letters were written for and on behalf of the Additional Chief Engineer. Moreover the letter dated 2nd Feb. 1959 was signed not even by the Additional Chief Engineer but by someone on his behalf. Under the circumstances it appears that the Chief Engineer, Electricity of the State of Andhra Pradesh had nothing to do with the said letters. As indicated earlier that the three conditions as set down under Art. 299 (1) of the Constitution are mandatory provisions and they should be complied with for the purpose of forming a valid and binding contract by and between the parties. Under the circumstances the contract was void and it was unenforceable by the plaintiff against the defendant.

9. Lyonel Moore was examined on behalf of the defendant and also proved the shortage in weight and difference between the weight given by the consignor in the railway receipts with the weighments which were made actually by the railway on receipt of the goods which fact would appear from Exhibit 'P' tendered on commission. It was agreed by and between the parties that

the payment would be made on actual weightment basis which would appear from the letter dated 9th March, 1959 appearing at page 56 of Exhibit 'A'. From Page 206 of Exhibit 'A' the letter dated 13th Nov. 1959 it would appear that there had been 80 tons shortage in weight in respect of the total consignments received by the defendant. From the order it would appear that it was agreed that party was entitled to charge Rs. 700/- per ton ex-stockyard and not on the basis of length or section weight. Under Clause 8 it was provided that a clear receipt for each piece and weight should be specifically given. But what the plaintiff tried to do instead of giving the actual weight on tonnage basis, gave the weight on section and length basis. In view of the fact that these rails were second hand rails being used and operated by the Barasat and Basirhat Railway when in existence their actual weight deteriorated due to wear and tear. Under the circumstances calculating the weight on section basis as also length basis was not only contrary to what was agreed upon by and between the parties but that was also erroneous. The price could only be charged at Rs. 700/- per ton on actual weightage and not on the basis of section weight. Although the plaintiff has claimed for two consignments in respect of which goods had been supplied and no shortage has been detected by the Railways as such it would not appear from exhibit 'L' tendered on commission while Lyonol Moore was being examined but it was the case of the defendant as made out in the written statement that such weight was taken by the defendant itself upon receipt of the goods. However, the defendant did not choose to examine any witnesses' on its behalf to substantiate the same but the fact remains that taken all the consignments together the defendant did not receive the total quantity of the goods contracted. The defendant had fully paid for the total quantity of goods supplied by the plaintiffs to the defendant. In fact it was the case of the defendant which would appear from the series of correspondences passed by and between the parties and admitted in evidence by consent of the parties that in effect there had been overpayment made by the defendant to the plaintiff. However, no claim so far had been preferred by the defendant against the plaintiff

for the same. The question of payment for the supplies would only arise after the actual weight was found out on re-weightment. It was an admitted fact which would appear from the correspondence that the plaintiff could charge Rs. 700/- per ton on actual weight basis and not on the basis of section weight or long weight. Under the circumstances it would be extremely unfair to allow the plaintiff to get any unjust enrichment under Sec. 70 of the Contract Act. It is true that so far the plaintiff's claim in respect of the two consignments referred to in the plaint are concerned the goods had been supplied and in view of no evidence being led that there was any shortage in weight it would be admitted to be correct, that the defendant had received the goods as per the consignment but no piece-meal case could be made in respect of the said two consignments in view of the fact that the entire consignments made by the plaintiff to the defendant arose in respect of the same arrangement, which although did not form a contract in view of the violations of the provisions of Art. 299 (1) of the Constitution of India, but they were part of the same transaction.

The whole purpose of giving benefit to a party under Sec. 70 is on the basis of the principles of equity and good conscience when on admitted facts it would appear that there had been shortage of weight in respect of other supplies for which the plaintiff had been fully paid and in respect even of the wagon which was mislaid and the defendant did not get any benefit of the goods sent by the plaintiff in the said wagon against the said railway receipt. The defendant in fact paid for the entire quantity of the goods actually received by the defendant. Under these circumstances it could not be held that the defendant No. 1 had unjustly enriched itself at the cost of the plaintiff, on the contrary it is the plaintiff who had been paid more than what the plaintiff was entitled to. Even after giving credit to the value of the goods as claimed in the plaint there would be a surplus payment to the tune of Rs. 7000/-.

10. Mr. Roy's submission that there had been substantial compliance of Art. 299 sub-clause (1) cannot be accepted although he relied on the case reported in AIR 1971 SC 141 at p. 142 to that effect. In that case it was held

that there was sufficient compliance as the officer entrusted to enter into the contract on behalf of the Government entered into the contract but did not mention that he was so doing in the contract itself on behalf of the Government. Under the circumstances as the Officer concerned had authority to enter into the contract on behalf of the Government, the mere non-mention that the contract was being entered into on behalf of the government did not render the contract invalid as the learned Judges came to the conclusion that there had been substantial compliance with the requirement of law. The principles as laid down in the said case could not be applied to the facts of the present case. In view of the fact that there had been no formal agreement in the instant case nor it was mentioned that the contract was being entered into on behalf of the Government of Andhra Pradesh on the contrary the Additional Chief Engineer under the rules referred to above had no authority whatsoever to enter into any contract for and on behalf of the Governor of Andhra Pradesh. The other case referred to by Mr. P. K. Roy reported in AIR 1981 NOC 82 (Cal) is of no assistance as there it was held that the authority to deal with the original contract would automatically include the authority to enter into any addendums or supplementary contracts. There in that particular case the person had the authority to deal with the original contract but here in the instant case the Additional Chief Engineer Electricity had no authority whatsoever to enter into the contract on behalf of the Governor of Andhra Pradesh. From the facts it would appear that in total the plaintiff supplied 32 consignments to the defendant, out of which one consignment was mislaid and it never reached the destination — Out of the balance 31 consignments no weighing could be made in respect of the 10 consignments which were mixed up with other materials. Out of the balance 21 consignments 17 consignments were weighed by the railways and found to be short in weight. The balance four consignments were weighed by the defendant out of which payment had been made in respect of the two consignments but no payment had been made rather payments were withheld in respect of the balance two consignments. The present suit had been filed for recovery of

the price in respect of the said balance two consignments.

11. Although there was no evidence tendered on behalf of the defendants to indicate that in respect of these consignments, for which this suit had been filed by the plaintiff, there had been any shortage in the weight of the goods than the weight mentioned in the R/R railway receipts, but taking the entire consignment of goods made by the plaintiff to the defendant it would appear that there had been shortage in weight of the rails supplied by the plaintiff to the defendant as a result not only the plaintiff had been paid in toto for the total amount of goods supplied by the plaintiff to the defendant but in fact there had been an over-payment made by the defendant to the plaintiff. Under those circumstances it would be extremely difficult to come to a finding that the defendants had unlawfully or unjustly enriched themselves with the rails supplied by the plaintiff to the defendant. The basis for compensation under Section 70 is not the same as on contractual rights, but it is granted in proportion to the benefit enjoyed by the party for whom a thing was done or to whom a thing was delivered. Under this section a person receiving a benefit is deemed to have impliedly agreed to pay compensation or to return the thing delivered to him. A person whose contract is void for non-compliance with Art. 299 (1) of the Constitution is entitled to compensation under Sec. 70 of the Contract Act. It is, however, his duty to account to the other party for what he has received in the transaction before his right to restitution arises. If he fails to do so his claim for compensation or refund for deposit will be dismissed. In the case reported in AIR 1968 SC 1218 *Mulamchand v. State of Madhya Pradesh* it had been held (at p. 1222) that:

"The provisions of Sec. 175 (3) of the Government of India Act 1935 or the corresponding provisions of Art. 299 (1) of the Constitution of India are mandatory in character and the contravention of these provisions nullifies the contracts and makes them void. There is no question of estoppel or ratification in such a case.

These provisions have not been enacted for the sake of mere form but they have been enacted for safeguarding the Government against unauthorised con-

tracts. They are based on the ground of public policy, on the ground of protection of general public, and these formalities cannot be waived or dispensed with. If the plea of estoppel or ratification is admitted that would mean in effect the repeal of an important constitutional provision intended for the protection of the general public.

The provisions of Sec. 70 can be invoked by the aggrieved party to a void contract. The first condition to be satisfied under the section is that a person should lawfully do something for another person or deliver something to him; the second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third condition is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. If these conditions are satisfied Sec. 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore the thing, so done or delivered.

In a case falling under Sec. 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract, nor ask for damages for the breach of the contract, for the simple reason that there is no contract between him and the other person. So where a claim for compensation is made by one person against another under Sec. 70, the juristic basis of the obligation is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or restitution.

Applying these principles, it is manifest that a person whose contract is void for non-compliance with Art. 299 (1) of the Constitution would be entitled to compensation under Sec. 70 of the Contract Act if he had adduced evidence in support of his claim.

It is well established that a person who seeks restitution has a duty to account to the defendant for what he has received in the transaction from which his right to restitution arises. In other words, an accounting by the plaintiff is a condition of restitution from the defendant.

12. Applying the said test as laid down in the case referred to above it would appear that although a person who seeks restitution has a duty to ac-

count to the defendant for what he received from transaction from which his right to restitution arises which is a condition of restitution and the plaintiff must comply with such condition of accounting to the defendant for the total amount received by him in the transaction before he can claim his right under Sec. 70. In the instant case the plaintiff has failed to account for the total amount of money received from the defendant in the transaction. The plaintiff failed to give any evidence with regard thereto. In the absence of any evidence on this point tendered by the plaintiff the plaintiff is not entitled to restitution or payment in respect of the two consignments for which the present suit has been filed. Under these circumstances the plaintiff is not entitled to any benefit under Sec. 70 of the Contract Act.

13. In the case reported in AIR 1962 SC 779 State of West Bengal v. B. K. Mondal & Sons it was held (at p. 789) that:

"The whole powers of granting relief under Sec. 70 is the relationship arising not because the party claiming compensation has done something for the party against whom the compensation is claimed but because what has been done by the former has been accepted and enjoyed by the latter."

"What Sec. 70 prevents is unjust enrichment and it applies as much to individuals as to corporations and Governments."

14. The underlying principle of granting a relief under Sec. 70 is based on the principle that the defendant must have enjoyed the benefit or use of the goods so supplied. Taking into consideration the entire facts of this case it would be extremely difficult to come to the conclusion that the State of Andhra Pradesh had the full enjoyment and/or use of the materials for which it had made the payments. It is true that there was no evidence that the goods covered by these two consignments had not been received by the defendant but these two consignments cannot be considered disjunctively by segregating the same from the other consignments in respect of which the defendant did not receive the entire quantity of goods mentioned in the Railway receipt.

15. Under the circumstances and in view of the facts and law indicated

above I answer the issues in the manner following:

16. I answer issue No. 1 (a) in the negative. In view of the fact that the three mandatory conditions under Article 299 (1) had not been complied with by the parties as a consequence I answer issue No. 1 (b) in the negative. So far issues Nos. 2 (a) and 2 (b) are concerned the defendant did not dispute the fact of sale by the Official Liquidator in favour of the plaintiff. Under the circumstances I answer issues Nos. 2 (a) and 2 (b) in the positive. In view of no dispute being raised by the defendant I answer issue No. 3 in the positive. I answer issue No. 4 in the negative. I answer issue No. 5 in the negative, as it would appear from the admitted facts that although the plaintiff is stated to have despatched the goods but the defendant did not receive all the goods agreed to be supplied by the plaintiff to the defendant. I answer issue No. 6 (a) in the positive. I answer issue No. 6 (b) in the negative. Out of 21 consignments 17 consignments had been weighed by the railways and found to be short in weight which would be supported by exhibit 'L' tendered in commission at the time of examination of Lyonel Moore. So far the balance four wagons were concerned, although those were weighed by the defendant but the defendant failed to tender any evidence in support of the same. Under the circumstances I answer issue No. 7 in the positive. In view of no claim having been made and no submission having been made in terms of issue No. 8 (a) I need not answer the same. Although no counter-claim had been made in the suit nor any suit has been filed by the defendant for the excess payment made by the defendant but from the correspondence it would appear that the defendant had not been supplied the total quantity of the goods as a result there had been excess payment made by the defendant. As no evidence has been led so far issue No. 9 (a) and 9 (b) is concerned I answer the same in the negative. I answer issue No. 10 (a) in the negative as the defendant had not enjoyed the benefit of all the goods delivered by the plaintiff to the railways. As discussed above I am of the view that the defendant was under no obligation to make any compensation. Hence I answer issue No. 10 (b) in the negative. Issue No. 11 had not been pressed. Under the circumstances

I do not answer the same. So far issue No. 12 is concerned I dismiss the plaintiff's suit with cost.

Suit dismissed.

AIR 1982 CALCUTTA 174

SUDHINDRA MOHAN GUHA, J.

Smt. Usha Das (Roy), Petitioner v. Smt. Arati Kar (Maiti), Opposite Party.

C. R. No. 2303 of 1981, D/- 22-12-1981.

(A) Specific Relief Act (47 of 1963), Secs. 14, 34 — Contract of personal service — Not enforceable — Employee of private School — Removal of — Remedy of employee is in damages and not by way of declaration.

A contract of personal service cannot ordinarily be specifically enforced and a court normally would not give a declaration that the contract subsists and the employee even after having been removed from service can be deemed to be in service against the will and consent of the employer. Where specific obligations are incorporated under a statute equitable considerations can hardly arise. The Managing Committee of a school constituted in accordance with the rules framed under the West Bengal Secondary Education Act 1950 is neither a body corporate nor a statutory body. An employee of such a private school does not acquire a statutory status. Again, on removal, the remedy of such an employee is in damages and not by way of declaration. (Paras. 14, 13)

(B) Civil P. C. (5 of 1908), O. 39 R. 2 — Suit by P (officiating Headmistress of School) against D (duly approved Headmistress) for declaration — Application for injunction — Effect of granting injunction — Great loss to service of D and her salary, while P (suspended teacher) allowed to reap benefit — P would get her usual pay even in absence of injunction — Injunction could not be granted in favour of P. (Para 27)

(C) W. B. Board of Secondary Education Act (5 of 1963), Sec. 22 (3) — Order of Administrator affecting service of officiating Headmistress of School — Her remedy is to prefer appeal to appeal Committee. (Para 24)

Cases Referred: Chronological Paras
AIR 1980 SC 953: 1980 Lab IC 594 15
AIR 1979 SC 979: 1979 Lab IC 789 22
AIR 1978 SC 694: 1978 Lab IC 660 16

AIR 1978 NOC 76: (1977) 81 Cal WN
646 (Cal) 15
AIR 1976 SC 888: 1976 Lab IC 576 14
(1975) 79 Cal WN 672: (1975) 1 Cal
LJ 390 13
AIR 1973 SC 76: 1973 Lab IC 407 22
AIR 1961 Cal 1: (1961) 65 Cal WN 361
(SB) 14
AIR 1961 Cal 31: (1960) 64 Cal WN
842 14
(1966) 70 Cal WN 571 14
AIR 1963 Cal 161 14

S. B. Bhunia and P. K. Samanta, for Petitioner; R. N. Mitra, J. N. Maity, (for No. 5) and J. K. Banerjee, for Opposite Party.

ORDER:— This application for revision arises out of an order dated 29th June 1981 passed by Sri B. Bhattacharjee, Additional District Judge, Midnapore, Misc. Appeal No. 227 of 1980 reversing the order passed by the Munsif, 1st court, Tamluk, rejecting an application for temporary injunction in title suit No. 243 of 1979.

2. This suit was commenced by O. P. No. 1 Sm. Arati Kar (Maity) against the petitioner Sm. Usha Das (Ray) and ors. for a declaration that she is the officiating Headmistress of Tulia Sitala Balika Vidyapith and the resignation by the petitioner defendant No. 2 was final and irrevocable and order of approval of appointment of defendant No. 2 dated 21st Feb. 1978 showing the purported date of the appointment as on 23rd Aug. 1977 was a nullity and invalid and the order of plaintiff's suspension passed by the Administrator was without jurisdiction.

3. Plaintiff's application for temporary injunction was rejected by the Munsif upon the finding that the plaintiff's (petitioners) resignation was duly withdrawn, that the Administrator was legally appointed by the Board and that the Administrator had duly suspended the plaintiff. These findings of Court were reversed in appeal.

4. It is against that order, defendant No. 2 petitioner has come up in revision.

5. Facts, relevant for our purpose and which would appear from the materials on record, may be stated as follows.

6. The petitioner submitted a letter of resignation on 21-9-76 to the Secretary of the School requesting him to release the petitioner with effect from 21-12-76; but this letter of resignation,

annexed to the plaint, is stated to be a false and fabricated one by the Administrator. The petitioner also filed a copy of the letter of resignation. But the Secretary by a letter dated 18-12-76 requested the petitioner to withdraw the letter of resignation within a week. Accordingly by a letter dated 24th Dec. 1976 the petitioner withdrew her resignation and prayed for leave from 22-12-76 to 24-12-76.

7. Thereafter the petitioner on 2-1-1977 made an application for leave on medical ground. In the meeting of the Managing Committee dated 3rd April 1977 the original appointment of the petitioner was approved by the Managing Committee. The Board of Secondary Education appointed the Administrator of the school and he took over the charge on 7th July, 1977.

8. The petitioner reported for duty on 11th Sept. 1977 But Subal Chandra Maity, Secretary of the school, by a letter dated 26th Sept. 1977 intimated that the petitioner's resignation letter was accepted in the meeting of the Managing Committee dated 5-6-1977. But this was communicated after the appointment of the Administrator. It may be mentioned that one Sri Bharat Chandra Maity filed a title suit being T. S. No. 195 of 1978 in the 1st Court of Munsif, Tamluk, for declaration and injunction regarding the present school and regarding the parties to the present litigation. But that was ultimately withdrawn. Be that as it may, the petitioner reported the matter to the Administrator by a letter dated 3-10-77 who sent a full report to the District Inspector. The District Inspector of schools approved the appointment of the petitioner temporarily as Headmistress for two years with effect from 23-8-1976 by a letter dated 22-2-1978. This letter dated 22-2-1978 was made Annexure "I" to the plaint. But the date was said to be interpolated and changed from 23rd Aug. 1976 to 23rd Aug. 1977. Subsequently, the petitioner was appointed Headmistress permanently with effect from 24-8-1978.

9. During the absence of the petitioner, the plaintiff O. P. 1 was asked to act as a "teacher in charge" by an order dated 7th July 1977 annexure "C" to the plaint. The Administrator by a letter dated 25th Mar. 1978 terminated the functioning of the plaintiff as teacher in charge on 27-3-1978, and by an

order dated 25-3-1978 the Administrator directed the petitioner to join on 27th Mar. 1978. By an order dated 11th May 1978 the Administrator asked the plaintiff/O. P. No. 1 to hand over all the documents to the petitioner. Ultimately, the plaintiff was suspended by an order dated 9th Aug. 1978. The suit by the plaintiff was filed on the 20th August 1979. Herein the plaintiff by annexure D gave out that the Administrator by an order dated 6th Sept. 1977, directed her to officiate as Headmistress of the school till the joining of the duly approved Headmistress. This letter was said to be false by the Administrator himself. It is pointed out that in the booklet published by the petitioner (plaintiff) herself the petitioner (plaintiff) described herself as teacher in charge, which she would not have done had she really been appointed as officiating Headmistress from 10-9-1977.

10. Mr. S. B. Bhunia learned Advocate for the petitioner points out from the above mentioned facts that the order of suspension was in force when the plaintiff commenced the suit. But the Appellate Court, according to him, enjoined the approved Headmistress and a suspended teacher was allowed to function. In doing so, the learned Appellate Court observed that the alleged letter of withdrawal by defendant No. 2 petitioner was submitted two days after the expiry of the period of three months. It is argued by Mr. Bhunia that the learned Judge overlooked that before the expiry of three months the Secretary refused to accept and requested the petitioner to withdraw the same within a week from 18-12-1976. So, the petitioner was either to agree or refuse reconsideration. So, the period of three months was extended by a week. In this view of the matter, the letter of resignation cannot be irrevocable and final.

11. The learned Judge held that the suspension order of O. P. No. 1 was bad because it was passed one year after the appointment of the Administrator and R. 8 (3) does not permit such appointment. It is contended by Mr. Bhunia that subsequently D. I. and Board accepted the Administrator as Administrator and asked him to follow up the suspension order by disciplinary proceeding. In Annexure 'U' it is contended that the terms of the Administrator

were extended and he was allowed to continue to 30-10-1981 and thereafter to 31st Dec. 1981. By the impugned order again the learned Judge upheld the validity of the appointment of the Administrator as he permitted him to fill up the post of Headmistress.

12. Lastly, it is contended by Mr. Bhunia that the school is not a statutory authority, the contract of service is a private contract and prospective resignation can be withdrawn at any time before it is accepted by a resolution of the Managing Committee.

13. It is pointed out by Mr. Bhunia with reference to the decision in the case of subh Narayan Sinha v. Hari Singh Havalakha reported in (1975) 79 Cal WN 672 that in India the specific performance of an act rested on personal volition or contract is forbidden under the Specific Relief Act 1877. Where specific obligations are incorporated under a statute equitable considerations can hardly arise. The Managing Committee of a school constituted in accordance with the rules framed under the West Bengal Secondary Education Act 1950 is neither a body corporate nor a statutory body. An employee of such a school does not acquire a statutory status. Again, the remedy of such an employee is in damages and not by way of declaration.

14. A contract of personal service cannot ordinarily be specifically enforced and a court normally would not give a declaration that the contract subsists and the employee even after having been removed from service can be deemed to be in service against the will and consent of the employer. He refers to the decision of the Supreme Court in the case of Executive Committee of Vaish Degree College v. Lakshmi Narain reported in AIR 1976 SC 888. So, it is contended that if the suit itself is not maintainable an order of injunction cannot follow. Next reference is made to the decision of Justice P. B. Mukherji (As his Lordship then was) in the case of Baidyanath Bose v. Smt. Sudha Roy reported in (1966) 70 Cal WN 571. He specifically draws my attention to para 18 of the report at p. 577. This para as it involves important points of law can be reproduced herein :

"This point can also be viewed from another angle. In making an order

under S. 21 of the Specific Relief Act or making a declaration that the plaintiff is still continuing as a teacher of the school under Section 42 of the Specific Relief Act or even granting an injunction to the plaintiff restraining the school committee from interfering with her duties as a teacher the court exercises a discretionary power in the nature of an equitable relief although in India granted by the Statute of Specific Relief Act. Nevertheless the discretion is always with the court. To force a teacher on the Managing Committee where she is not wanted may not in the facts of this case be conducive either to the cause of education, school or even the plaintiff teacher herself. On that ground the court would be justified in not exercising that discretion to grant reinstatement even if it had the power to do so, as it has the power to grant injunction. This is only on the exercise of the Court's discretion in respect of such a relief as reinstatement or injunction where there has been a wrongful dismissal from service. In that view of the matter it will not be necessary to discuss such decisions as *State Medical Faculty of West Bengal v. Kshiti Bhusan Dutt*, (1960) 64 Cal WN 842, at pages 854 to 857 : (AIR 1961 Cal 31 at pp. 37 to 39) the Special Bench decision in *Nripendra Nath Bagchi v. Chief Secretary, Government of West Bengal*, (1961) 65 Cal WN 361, at page 383 : (AIR 1961 Cal 1 at p. 12) which is recently affirmed by the Supreme Court and *Barada Kanta Adhikari v. State of West Bengal*, AIR 1963 Cal 161."

15. Next it is contended by Mr. Bhunia that the plaintiff O. P. No. 1 being appointed as on an officiating basis or on a temporary basis cannot claim any right to the post by way of declaration. He relies on the decision of the Supreme Court in the case of *Union of India v. K. R. Tahiliani* reported in AIR 1980 SC 953. With reference to the decision in the case of *Republic Stores (Trade) v. Jagajit Industries Ltd.* reported in (1977) 81 Cal WN 646 : (AIR 1978 NOC 76), Mr. Bhunia reiterates his points that the plaintiff's suit is barred under S. 34 of the Specific Relief Act and if main relief cannot be granted in the suit the question of granting an injunction cannot arise at all. It is held in the decision referred to above

that no injunction can be granted for the specific performance of a contract which is determinable at the will of the parties,

16. As to the withdrawal of the resignation it is contended by Mr. Bhunia that the petitioner is not a Government servant and that letter of resignation cannot be operative unless accepted by the Managing Committee. In this case the rule of three months, according to Mr. Bhunia, would not be applicable because of subsequent facts and circumstances as to the request of withdrawal by the Managing Committee. According to him the letter of resignation was withdrawn before it finally became operative. Reference is also made for guidance to the decision of the Supreme Court in the case of *Union of India v. Gopal Chandra Misra* reported in AIR 1978 SC 694.

17. In conclusion, it is contended by Mr. Bhunia that under S. 34 of the Specific Relief Act the plaintiff has no legal character to maintain the suit and she has not and cannot claim any further relief to oust the Headmistress the petitioner appointed by the authority by way of injunction. She should have availed of statutory remedy of appeal and cannot come to court. If the plaintiff O. P. No. 1 had any reasons to be aggrieved by the decision of the Administrator she was to file an appeal under S. 22 (3) of the West Bengal Board of Secondary Education Act, 1963. It is argued by Mr. Bhunia that it is somewhat peculiar that the plaintiff did not pray for any order of injunction against the Administrator. It is also contended by him that it was pointed out to the Appellate Court that O. P. No. 1 used a false document to claim that she had been officiating as the Headmistress. But the learned Judge by-passed the issue by holding that there is no difference between teacher in charge and officiating post, overlooking altogether the real point that the plaintiff O. P. No. 1 came to court with unclean hand. According to him, the learned Judge also overlooked the fact that even if officiating the post or being teacher in charge she cannot have right to the post of Headmistress in view of the position of the approval of defendant No. 2 the present petitioner to the post of Headmistress by the District Inspector.

18. Learned Judge held that the suspension order of O. P. 1 is bad because it was passed after one year of the appointment of the Administrator and R. 8 (3) does not permit such an order. But subsequently the District Inspector and the Board accepted the Administrator as the Administrator of the school and asked him to follow up the suspension order by disciplinary proceeding. The injunction order thus stultifies the disciplinary proceeding and interferes with the internal management of the school.

19. As to the balance of convenience and inconvenience it is stated that the approved Headmistress has been enjoined causing great loss to the service and her salary. The suspended teacher on the other hand has been allowed to reap the benefits, and thus prejudging the issue in the suit.

20. Mr. J. N. Maity, learned Advocate for the Administrator, defendant No. 1 practically adopts the arguments advanced by Mr. Bhunia and makes reliance on the decisions discussed above.

21. Mr. J. K. Banerjee, learned Advocate for O. P. No. 1, points out at the outset that O. P. No. 5 has no locus standi to take part in the proceeding, as he was not a party in the original suit. It is pointed out by Mr. Maity that O. P. No. 5 came in place of the Administrator defendant No. 1 in the original suit and he also filed written statement.

22. As to the jurisdiction of this court with reference to the decision of the Supreme Court in the case of Managing Director, Hindustan Aeronautics Ltd., Balanagar, Hyderabad v. Ajit Prasad Tarway reported in AIR 1973 SC 76 and specially referring to para 5 of the report at p. 77 it is argued by Mr. Banerjee that the order of the first Appellate Court may be right or wrong may be in accordance with law or not but one thing is clear that it had jurisdiction to make that order. So that order must not be interfered by this court in revision. Mr. Banerjee also makes reference to the decision of the Supreme Court in the case of State of M. P. v. Lakshmi Shankar Mishra reported in AIR 1979 SC 979 in this connection. But that decision, to my mind, has no application. It is held therein that the period during which one acted in officiating capacity should be taken into account for computing the length of service,

23. Then with reference to Regn. 9 framed under West Bengal Board of Secondary Education Act it is contended by Mr. Banerjee that the plaintiff O. P. No. 1 was under no obligation to prefer an appeal against the decision of the Managing Committee or for the matter of that of the decision of the Administrator, to the appeal committee.

24. It should be remembered that the order of Administrator was against the plaintiff affecting her service. So she should have preferred an appeal to the appeal committee, as required under Sec. 22 and Regn. 9.

25. As to the jurisdiction of this court it appears that the learned Judge failed to exercise jurisdiction vested in him in not appreciating the materials on record and as such exercised jurisdiction illegally or with material irregularity.

26. Again if the order be not reversed, there would be failure of justice and cause irreparable injury to the petitioner. The petitioner has been deprived of her post of Headmistress and thus disentitling her to the regular salary and other benefits and on the other hand O. P. No. 1 would get her usual pay etc. as an Assistant teacher, in case there be no order of suspension, even if there is no order of injunction.

27. In this view of the matter, to my opinion, the impugned order cannot be allowed to stand. It is thus vacated. The order passed by the learned Munsif is restored.

28. The Rule is accordingly made absolute with costs. Hearing fee is assessed at 5 gold mohurs.

Rule made absolute.

AIR 1982 CALCUTTA 178

SUDHINDRA MOHAN GUHA, J.

Rasomay Mitra, Petitioner v. Smt. Lachmi Todi, Opposite Party.

Civil Rule No. 1558 of 1981, D/- 25-11-1981.

Civil P. C. (5 of 1908), S. 47 — Objections under, are applications and are governed by Limitation Act — Limitation prescribed under Art. 137 would govern such applications. (Limitation Act (36 of 1963) Pre., Art. 137). AIR 1928 Cal 865 Foll. (Para 6)

AZ/AZ/A94/82/SAD/SNV

Cases Referred: Chronological Paras

(1981) 1 Cal LJ 1 : 85 Cal WN 120	7
AIR 1980 Cal 280	4
AIR 1968 Cal 380	4
AIR 1961 All 436	4
ILR (1947) 1 Cal 22	5
AIR 1935 All 1016	4
AIR 1928 Cal 865	5

Rabindra Nath Mitra, Subol Chandra Moitra and Miss Aparajita Banerjee, for Petitioner; Saktinath Mukherjee, S. P. Roy Chowdhury and Jayanta Das Gupta, for Opposite Party.

ORDER:— The order dated May 26, 1981 passed by Shri S. K. Mitra, Judge, City Civil Court, Calcutta in Miscellaneous Case No. 971 of 1978 rejecting an objection under S. 47 of the Civil P. C. on the ground of limitation has been challenged under the present Rule.

2. A suit for ejectment being Ejectment Suit No. 530 of 1969 was filed against the petitioner on April 15, 1969 which was decreed ex parte on 4th July, 1969. This decree was put into execution on Aug. 26, 1969 by Ejectment Execution Case No. 611 of 1969. On Nov. 12, 1969 the opposite party filed an application for allowing Police help which was numbered as Misc. Case No. 880 of 1969.

3. On May 6, 1970 the petitioner filed an application under O. 9, R. 13 of the C. P. Code which was numbered as Misc. Case No. 431 of 1970. Misc. Case No. 880 of 1969 for Police help was allowed ex parte on Dec. 21, 1970. The application for setting aside ex parte decree i.e. Misc. Case No. 431 of 1970 was dismissed on contest on Mar. 25, 1972. The appeal against the order being F. M. A. 457 of 1972 was dismissed on contest on April 17, 1979. The petitioner tenant, however, was allowed time till the end of July 1979 for rendering vacant possession. Further proceedings of Ejectment Execution case remained stayed from May 7, 1970 to July 31, 1979. On July 31, 1979 the petitioner came up with the objection under S. 47 of the C. P. Code. This was numbered as Misc. Case No. 971 of 1979. On the following day an application under S. 5 read with S. 14 of the Limitation Act and S. 151 C. P. Code was filed for condonation of delay. By the impugned order the application for

condonation of delay as well as objection under S. 47 was rejected.

4. Mr. R. N. Mitra, learned Advocate for the petitioner contends that the objection under S. 47 of the Code is not an application and as such the provision of Art. 137 of the Limitation Act would not be applicable. It is only by way of abundant caution the petitioner filed an application for condonation of delay. With reference to Civil Rules and Orders Vol. I. Rule 776 it is contended that the objections under S. 47 of the Code has been described as cases and not applications and that the learned Judge was not justified to treat the objection as an application. Reliance is made on the cases reported in AIR 1935 All 1016 (Pokhar Singh v. Tularam) and AIR 1961 All 436. (Nar Singh Datt v. Ram Pratap). It is held therein that no limitation is prescribed for an objection under S. 47, C. P. Code. Objection under that section cannot fall within Art. 181 of the Limitation Act. For an analogy Mr. Mitra refers to the decision of a Division Bench of this Court in the case of Birendra Nath Banerjee v. Smt. Snehalata Devi reported in AIR 1968 Cal 380, wherein it is held that an application for pre-emption under S. 4 of the Partition Act, 1893 can be made at any stage while the suit is pending or in other words before final decree for partition is made. An application claiming pre-emption at any time when the appeal against final partition decree is pending cannot be held barred by limitation on the ground that it has been filed beyond three years of the passing of the preliminary decree. Again in support of the contention that even if the objection be taken to be an application, that being filed in a pending proceeding, will not be attracted under Art. 137 reliance is placed on the decision in the case of Paritosh Kumar Ghose v. Smt. Saraswati Nandi reported in AIR 1980 Cal 280. It is contended by Mr. Mitra that there is hardly any difference between a pending suit and a proceeding for execution.

5. Mr. Saktinath Mukherjee, learned Advocate for the opposite party on the other hand contends that the Division Bench of this Court held that a proceeding under Sec. 47 of the C. P. C. will be governed by Limitation Act. He makes reliance on the decision in the case of

Hafez Uzir Ali v. Nisaimannessa Bibi reported in AIR 1928 Cal 865. It is held therein that an application under S. 47 falls within Art. 181 of the Limitation Act. In a subsequent decision in the case of Basir Ulla v. Nabin Ch. Shaha reported in ILR 1947 (1) Calcutta page 22 another Division Bench was exactly of the same view and at page 30 of the report it is observed by Their Lordships as follows: "From the records of the case it appears, however, that the appellant in the first place claimed relief under S. 47 of the Civil P. C. by filing an application under that section and that this application was subsequently treated by the court as a suit under the provision of S. 47 sub-clause (2) of the Code. This being the case, in our opinion, there can be no doubt that, as regards limitation the Article of the Limitation Act which applied was Art. 181 which relates specifically to application and prescribes a period of three years with effect from the date when the right to apply accrued."

6. With due respect to Their Lordships of the Allahabad High Court I am of the view that it is obligatory on my part to follow the Division Bench decision of this Court. Accordingly, agreeing with the learned trial Judge I would hold that Art. 137 of the Limitation Act would govern an application under S. 47 of the Civil P. C. This application on the ground of limitation, therefore, was rightly rejected.

7. In reply, it is contended by Mr. Mitra that the decree was a nullity and such an objection can be taken at any stage of the execution and even in collateral proceedings. It transpires from the records that such a contention was never raised earlier. Mr. Shyama Prasanna Roy Chaudhury, the learned Advocate for the opposite party relying on the decision in the case of Biswa Bhushan Bose v. Smt. Kusum Agarwalla reported in (1981) 1 Cal LJ page 1, contended that it would not be safe to say that the decree had been passed by a court having no jurisdiction. Whether an objection of nullity can be taken at any stage of the proceeding, it is to be found first that the decree was a nullity. In the absence of such finding I would refrain from making any observation or comment on the arguments advanced by Mr. Mitra on this score.

7. In view of the foregoing findings, the Rule is discharged. Interim orders of this Court are vacated. There will be no order as to costs.

Order accordingly.

AIR 1982 CALCUTTA 180

B. C. RAY, J.

Nil Kamal Bejbaruah, Petitioner v. State of West Bengal and others, Respondents.

Writ Appln. Decided on 18-1-1982.

(A) W. B. Land (Requisition and Acquisition Act (2 of 1948), S. 3 (1) — W. B. Land (Requisition and Acquisition) Rules (1948), R. 3 (a) and (d) — Requisition of premises — Order for — Service of — Persons on whom order is to be served, not available — Copy of such order affixed at their residence as well as requisitioned premises — Order duly served and there was violation of R. 3. AIR 1959 Cal 402 Dist. (Para 8)

(B) W. B. Land (Requisition and Acquisition) Act (2 of 1948), S. 3 (1) — Requisition of premises for establishment of a power distribution centre — Urgent necessity of solving acute problems of insufficient supply of electricity to buildings in area concerned — Requisition is for public purpose — Opinion of authority concerned formed not on extraneous materials but on relevant and germane materials — Requisition order is valid. (Para 9)

(C) W. B. Land (Requisition and Acquisition) Act (2 of 1948), S. 3 (1) — Requisition of Land for establishment of a power distribution centre — Extent of land — Authority concerned is fittest person to decide how much land would be required. (Para 9)

(D) W. B. Land (Requisition and Acquisition) Act (2 of 1948), S. 3 (1) — Requisition of premises for public purpose — Order for — Section itself does not provide for giving any opportunity of hearing — Non-observance of rules of natural justice — Order is not illegal and bad — Owner can make representation to authority concerned. AIR 1971 SC 961 Rel. on. Case law discussed. (Constitution of India, Art. 226 — Natural justice). (Para 13)

Cases Referred :	Chronological	Paras
AIR 1981 SC 818		10
(1980) 84 Cal WN 661		12
AIR 1978 SC 597		9
AIR 1978 SC 851		9
(1974) 78 Cal WN 397		12
AIR 1972 SC 2656		12
AIR 1971 SC 40 : 1971 Lab IC 8		12
AIR 1971 SC 961	11, 12,	13
AIR 1970 SC 150		11
AIR 1959 Cal 402 : 63 Cal WN 101		8

S. D. Banerjee, P. Mukherjee and A. Roy, for Petitioner; S. Gupta with A. Chakraborti, for Respondents; S. Gupta and Mrs. Ruma Pal with Suchit Banerjee, for the C. F. S. C.

ORDER :— The petitioners who claimed to be the owners of the property being premises No. 2, Park Lane, Calcutta has come up before this Court with the instant writ application assailing the validity of the order of requisition made under Section 3 (1) of the West Bengal Land (Requisition and Acquisition) Act, 1948 (West Bengal Act, II of 1948) on the ground that the order of requisition has not been served on the petitioners as required under the Act framed thereunder and that the order was made under colourable exercise of power as there was no formation of opinion and there was no application of mind. The said order has also been challenged on the ground that there was no public purpose for requisition of this land and the said land being previously notified for acquisition and the same being pending the order of the requisition was also illegal and bad.

2. The facts in brief are that the petitioners jointly purchased the property at premises No. 2, Park Lane on or about Aug. 1, 1952 out of their joint funds. The petitioner No. 2 was the first wife of the petitioner No. 1 being married in 1940 under the Special Marriage Act and she obtained a decree of divorce in a suit from the High Court at Madras. A partition suit was instituted on or about Jan. 7, 1980 at the instance of the petitioner No. 2 in the court of the 4th Bench of City Civil Court, Calcutta and on Jan. 8, 1980, on the basis of a compromise decree the petitioner No. 1 was allotted Sch. 'C' property and the petitioner No. 2 was allotted Sch. 'B' property the detail description of which was given in paragraph 4 of the peti-

tion. It has also been stated that after the partition was affected, the petitioner No. 2 had applied on or about Sept. 13, 1980, before the Assessor of the Calcutta Corporation for mutation of her name in respect of her half share in the entire property and such mutation was accordingly granted. It has also been further stated that there is a pucca structure on the said premises No. 2, Park Lane, Calcutta and there is an office accommodation for petitioner No. 1. A Darwan of the petitioner No. 1 is residing in one of the rooms in the said premises. Negotiations between the petitioner No. 1 and the Calcutta Electricity Supply Corporation (India) Ltd., respondent No. 6, for sale of the premises were carried on and the price was settled. A draft agreement was prepared and it was sent with letter dated June 14, 1978 to M/s. Talbot and Company, the land agent of the Calcutta Electric Supply Corporation (India) Ltd. but the said negotiation, however, did not materialise and it was ultimately abandoned on or about Jan. 9, 1979 because of the adamant attitude of the respondent No. 6. A notification being No. 9346 — L. A./K. S./1979 dated June 22, 1979 under S. 4 of the Land Acquisition Act, 1894 (Act 1 of 1894) was published in Calcutta Gazette (Extraordinary) for acquisition of the said land for the alleged public purpose "for construction of House for 'Urdhu Academy'". The land notified for acquisition as mentioned in the said notice was more or less 0.1063 Hectare or 0.2627 acre. A copy of the said notice was annexed as annexure 'C' to the petition. The petitioner submitted an objection against the said proposed acquisition under S. 5 (A) of the said Act and prayed for personal hearing. The objections were heard but the determination on the same was never communicated to the petitioner. As such the petitioner could not know about the results of the said land acquisition proceedings. The petitioner is under the belief that the said proceeding is still pending. During the pendency of the said land acquisition proceedings on or about Oct. 16, 1981 another order of requisition being No. 12/81/11/48 dated Oct. 16, 1981 was purported to be passed by the First Land Acquisition Collector, Calcutta, the respondent No. 3, under S. 3 (1) of the West Bengal Land (Requisition & Acquisition) Act, 1948 (West

Bengal Act II of 1948) for requisition of premises No. 2, Park Lane, Calcutta for the public purpose of establishment of power distribution station. It has been stated that this order has not been served on the petitioners in the manner prescribed by Rules 3 (a) to 3 (d) of the West Bengal Land (Requisition and Acquisition) Rules, 1948. The petitioner No. 1 had received the said order which was handed over to the adjoining Ration Shop owner on his return from Madras on October 22, 1981. A copy of the said notice has been annexed as annexure 'F' to the petition. It has been specifically ordered that the possession of the said premises, would be taken, on Oct. 17, 1981 in terms of S. 3 (2) of the said Act. It has been stated therein that the order was not served on any of the 'Recorded joint owner' and no attempts were made to be served upon them the said order. It has been further stated that the petitioner No. 1 was away in Madras from Oct. 7, 1981 till Oct. 22, 1981 and, on receiving information through telegram dated Oct. 9, 1981 from his darwan, Sri Sitaram Singh he returned back from Madras on Oct. 22, 1981. On returning back from Madras on Oct. 22, 1981 the petitioner No. 1 came to know for the first time from his Darwan that an order had been handed over on the adjoining Ration Shop on or about Oct. 16, 1981 at 8 P. M. and the petitioner No. 1 was further informed by the said Darwan that some persons claiming themselves to be the employees of the Calcutta Electric Supply Corporation (India) Ltd., respondent No. 6, had broken open the lock of the main gate of the premises No. 2, Park Lane, Calcutta at about 11 A. M. on 17-10-1981 and drove out the Darwan by physical force from his room for which the Darwan had lodged a complaint with the Officer-in-Charge, Park Street, Police Station.

3. On these allegations and facts the instant writ application has been moved in this Court with a prayer for a writ of or in the nature of Mandamus commanding the respondents not to give any effect or further effect to the impugned order of requisition dated October 16, 1981 (annexure 'F' to the petition). There was also a further prayer for release of the premises and a prayer for a writ of certiorari directing the respondents to certify and transmit

the records relating to the land acquisition proceedings as well as the requisition proceedings so that the same may be quashed and set aside.

4. On Oct. 30, 1981, the instant Rule was issued and an interim order was made restraining the respondents from changing the nature and character of the premises by way of demolition or new construction till two weeks after the long vacation with liberty to the petitioners to apply for extension of the same upon notice to the respondents. The interim order dated 19-11-1981 was extended till Wednesday next and leave was granted to respondents to file an application for vacating the interim order. Pursuant to the leave two applications for vacating the interim order was filed — (1) one by the Calcutta Electric Supply Corporation (India) Ltd., respondent No. 6 and (2) another on behalf of the respondents Nos. 1, 2 & 3, that is, the State respondents. By order dated 25th Nov. 1981, both these applications along with the Rule were directed to be placed for hearing.

5. Mr. Sankardas Banerjee, learned Counsel, with Mr. Paritosh Mukherjee, learned Advocate appearing on behalf of the petitioner contended in the first place that the order of requisition is illegal and bad being not in compliance with the mandatory provisions of S. 3 of the West Bengal Land (Requisition and Acquisition) Act, 1948 read with the Rules framed thereunder as the order has not been served on the petitioners in their residences nor on the premises purported to be requisitioned. It has been further submitted in this connection that the petitioner No. 1 was away from his residence from Oct. 7, 1981 as he was then in Madras and was there till Oct. 22, 1981. The copy of the order was also not served on 2, Park Lane, Calcutta but it was handed over to the nearby ration shop. As such it has been contended that the purported order of requisition is wholly bad and illegal and the requisition proceedings should not be proceeded with. It has been next submitted that the order of requisition was made in a mala fide manner and it was a colourable exercise of power because the premises in question which was notified for requisition was previously proposed by the respondent No. 6 to the petitioner No. 1 for purchase of the same. Negotiations were carried on

and price was fixed, agreement was prepared but the said transaction could not be materialised due to the adamant attitude of the respondent No. 6 and the negotiation failed in 1979. It has been submitted that in these circumstances there is in fact no existence of any public purpose which necessitates the making of the order of requisition by the Government as has been done here. The order of requisition in question is therefore mala fide and it has been made on a total non-application of mind. The formation of opinion by the respondent No. 3 in this circumstance is also bad as conditions precedent for forming such an opinion and the existence of relevant circumstance are completely absent. It has also been submitted that the formation of opinion though subjective can be challenged on the ground of opinion being formed on a non-application of mind and/or on a consideration of irrelevant and extraneous materials and circumstances. It has been thirdly submitted that the order of requisition is also bad inasmuch as a portion of the said premises were notified for requisition for construction of the House for 'Urdhu Academy' and the said acquisition proceedings had not been abandoned and/or dropped. It has been lastly submitted that the principles of natural justice which is applicable in this case as the purported order of requisition has civil consequences has not been observed as no opportunity of hearing was given to the petitioner before the order was made nor any opportunity of hearing was given to file objections against the purported order of requisition. It has been further submitted that the order though an administrative order affects civil rights of the petitioner and as such the principles of natural justice are applicable. Non-observation of these rules of natural justice renders the proceeding as well as the order invalid and inoperative in law.

6. Mr. Gupta, learned Additional Advocate General appearing on behalf of the State has submitted that the order of requisition has been served as required under the West Bengal Land (Requisition and Acquisition) Rules, 1948 on the petitioners both at his residence at 60, Lake Place, Calcutta as well as on the requisitioned premises No. 2, Park Lane, on 16th Oct. 1981. The allegation that there was no service of the order of requisition as required

under the rules is without any foundation. It has also been submitted by Mr. Gupta that the order of requisition is not made mala fide nor it was made on a total non-application of mind. The land was urgently required for implementation and/or establishment of a power distribution station in order to provide electricity to the tall buildings which are coming up in that area. Though the entire vacant land comprising in premises No. 2, Park Lane cannot be retained by the petitioners under the Urban Land (Ceiling and Regulation) Act, 1976 still in view of the urgency of the need the Government thought it fit to requisition the entire premises instead of proceeding under Urban Land (Ceiling and Regulation) Act, 1976. There is the existence of the public purpose and the premises in question is required to be requisitioned for the said public purpose. It has, therefore, been submitted that the order of requisition is neither mala fide nor the same has been made on a total non-application of mind or on a consideration of extraneous and irrelevant considerations. It has been further submitted by the learned Additional Advocate General that the rules of natural justice have been excluded by the Act inasmuch as it provides for requisition of land and premises for maintaining supplies and services essential to the life of the community which is an urgent and immediate necessity. It has been submitted that the said Requisition Act cannot be held to be bad on this core as objections can be filed by the petitioners after the order is made. Such objections if filed would be duly considered by the concerned authorities. The petitioners had not filed the objection to the impugned order of requisition and as such they are not competent to challenge the order of requisition on the ground of violation of the rules of natural justice. A decision of the Supreme Court has been cited at the bar in this connection. It has been further submitted by Mr. Gupta that the earlier acquisition proceedings initiated under the Land Acquisition Act, 1894 had been cancelled and the Deputy Secretary, Land and Land Revenue Department intimated to the First Land Acquisition Collector, respondent No. 3, about this already and directed him to send a draft notification cancelling the notification published under S. 4 of the Land Ac-

quisition Act. The draft cancellation notification was submitted by the respondent No. 3 through the Commissioner of Presidency Division. Of course, the same has not yet been published. Therefore, the land acquisition proceeding has been dropped already before the issuance of the order under Section 3 (1) of the said Act which is neither illegal nor bad. The requisition proceedings are perfectly valid in law and possession of the requisitioned land has been taken already and the same has been made over to the respondent No. 6, the Calcutta Electric Supply Corporation (India) Ltd. it has been therefore submitted that the instant Rule should be discharged and the interim order should be vacated.

7. The excerpt of the order of requisition dated 16th Oct. 1981 runs as follows: "Whereas in my opinion it is necessary for a public purpose for maintaining supplies and services essential to the life of the community by establishment of a power distribution system to requisition the land described in the schedule below: Now therefore, in exercise of the power conferred by sub-section (1) of Section 3 of the West Bengal Land (Requisition and Acquisition) Act, 1948 (West Bengal Act II of 1948) (read with the authority so vested in me as aforesaid) I do hereby requisition the land mentioned in the schedule below and make the following further orders namely :—

That the land described in the Schedule below shall be placed at my disposal and control on 17-10-1981 at 10-30 A. M. when an officer deputed from this office will take charge and possession of the said land."

8. This order as appears from paragraph 10 of the application for vacating and/or modifying the interim order filed on behalf of the respondents Nos. 1 to 3 and affirmed by the Bimal Kr. Bhat-tacharya, First Land Acquisition Collector, respondent No. 3, was served on the petitioner No. 1, Nil Kamal Bejbaruah at his residence, that is, at 60, Lake Place, Calcutta. It has been stated that the process server of the respondent No. 3 went to the residence of petitioner No. 1 with the said requisition order to serve upon him personally on 16th of October, 1981. But the petitioner No. 1 was not available at his residence and as such the requisition

order was served by affixing the same at the main outer door of the said premises No. 60, Lake Place, Calcutta. The Process Server also went to the premises No. 2, Park Lane on the same day, that is, 16-10-1981 with the order of requisition. The Darwan of the petitioner No. 1 was found available who refused to accept the order after reading the contents of the order and accordingly the said Process Server served the requisition order by affixing the said requisition order at the entrance of the requisitioned premises in presence of one Shyamlal Agarwal who is the owner of a ration shop opposite to the requisitioned premises. In the affidavit-in-opposition sworn by Prabhat Kamal Bez Baruah, son of Dr. Nil Kamal Bez Baruah on 26th November, 1981 it has been stated in paragraph 8 that the Darwan was not in the premises on October 17, 1981 and as such the question of his refusal of accepting the order did not arise at all. It has been stated that the Darwan was not authorised to accept the order nor the obligation on the part of the Land Acquisition authorities, could be discharged by taking alternative mode of service, by affixation in nearby Ration Shop. This has been affirmed as true to the knowledge of the deponent. These averments in the affidavit-in-opposition are not acceptable on the ground that the absence of the Darwan on 17th October, 1981 from the requisition premises cannot be true to the knowledge of the deponent in the absence of any supporting affidavit affirmed by the Darwan himself. Moreover, the statement as made in paragraph 12 in the petition are also not acceptable inasmuch as the petitioner on his own statement left Calcutta for Madras on Oct. 7, 1981 and returned from there on 22nd Oct. 1981. Therefore, the question of non-service of the order at his residence at 60, Lake Place does not arise. Nor he is competent to say that the notice was not served on the requisitioned premises because of his absence from Calcutta at that time. These averments in paragraphs 12 and 13 have been sworn as true to the knowledge of the petitioner No. 1. It is inconceivable how the petitioner who was away from Calcutta at the relevant time can know whether the requisition order was served either at his residence or at the requisitioned premises by the peon on 16th October, 1981

or not and how this fact can be true to his knowledge. No affidavit is forthcoming from the Darwan in question who was actually present at the relevant time at the requisitioned premises. Therefore, this statement cannot be relied upon. It has been urged with great force and persuasiveness that no notice was served on respondent No. 2 who is the divorced wife of the petitioner. It appears from the averments made in paragraph 7 of the petition that the petitioner alone carried on the negotiations for sale of property with the Calcutta Electric Supply Corporation (India) Ltd., respondent No. 6. It also appears from letter dated 14th June, 1978 addressed to M/s. Talbot Co. that the petitioner No. 1 alone is carrying on the negotiations and the draft agreement which has been annexed as annexure 'B' to the petition that the said agreement was purported to be made between the petitioner No. 1 on the one hand and the Calcutta Electric Supply Corporation (India) Ltd. on the other hand and the petitioner No. 2, the divorced wife of the petitioner is a confirming party. This prima facie goes to show that the petitioner No. 1 is carrying on all negotiations as sole owner of the property. Even assuming that the petitioner No. 2, the divorced wife has got some share in the property on the basis of the decree in the partition suit still then from the circumstances stated hereinbefore it is quite evident that the petitioner No. 1 is dealing with this property and that shows he might have been authorised by the respondent No. 2 to do so. The order of requisition, as appears from the report of the peon of respondent No. 3, was served at the main entrance of the requisitioned premises on 17th of Oct., 1981. It also appears from annexure 'D' to the requisition order that the notice was served by the Process Server by affixing the order on the outer door of the residence of the petitioner No. 1 at 60, Lake Place, Calcutta. Rule 3 of the West Bengal Land (Requisition and Acquisition) Rules, 1948 provides four alternative modes of service of which the modes of service specified in 'a' & 'd' are quoted hereinbelow:—

(a) by delivering or tendering a copy thereof, endorsed either by the person authorised by the Act to make the order or by the Collector, to the person on whom the order is to be served or his agent or

(d) by fixing a copy thereof in some conspicuous part of the land to which the order relates and also in some conspicuous place of the office of the Collector."

In this case I have already said hereinbefore that the peon of the respondent No. 3 served the copy of the order both at the residence of the petitioner No. 1 as well as the requisitioned premises. Therefore, even if it is assumed for argument's sake that the copy of the order as required to be served on the petitioner No. 2 has not been served still then the copy of the order being served on the requisitioned premises as provided in R. 3 (d) of the said Rules, there has been in my opinion, no violation or breach of the provisions prescribing the manner of service of orders under R. 3 of the West Bengal Land (Requisition and Acquisition) Rules, 1948. The decision reported in 63 Cal WN 101 : (AIR 1959 Cal 402) Sri Luxmi Janardan Jew v. State of West Bengal, where it has been held that the order of requisition is bad and the requisition proceedings cannot be allowed to continue as the notice were not served upon all the parties do not apply to this case. The order of requisition have been duly served and as such there is no infirmity in the matter of service of the order under S. 3 of the said Act. The requisition proceedings is, therefore, legal and valid. The contentions on this score is therefore overruled.

9. As regards the contention that the order of requisition is mala fide and the same has been made on a closed mind and in the absence of any public purpose it is evident from the order of requisition made under S. 3 of the said Act that the public purpose mentioned in the order is "establishment of a power distribution system." This undoubtedly is a public purpose. It has been stated in paragraph 2 of the application for vacating interim order sworn by Sri Bimal Kr. Bhattacharya, First Land Acquisition Collector, Calcutta, respondent No. 3 that portion of the disputed premises No. 2, Park Lane, was notified for acquisition under S. 4 of the Land Acquisition Act (Act 1 of 1894). This notification was published in the Calcutta Gazette Extraordinary on June 23, 1979 for a public purpose, that is, for construction of house of the Urdu Academy in Ward No. 6 of the Calcutta Municipa-

lity. The objection to the proposed acquisition was filed by the petitioner No. 1 and the same was heard under S. 5 (A) of the said Act. The objection was rejected and approval of the Government was granted. Subsequently the said notification was cancelled by the Land and Land Reforms Department as the said premises was no longer required for the said purpose. The Government after cancelling the said notification directed the respondent No. 3 to send a draft of the cancellation for being published in the Calcutta Gazette. Accordingly, the Land Acquisition Collector, respondent No. 3 cancelled the earlier notification dated June 23, 1979. The said notification, however, has not been published as yet. It has been further stated that as the demand for electricity in the Park Street area is increasing due to the construction of the tall buildings in that area it was considered necessary by the Government for setting up a distribution station to solve the present acute problem for which the Calcutta Electric Supply Corporation (India) Ltd. approached the department of Power (Government of West Bengal) for establishment of a power station in that area. The power department on a consideration of all the aspects of the proposal of the Calcutta Electric Supply Corporation (India) Ltd. recommended for requisition and acquisition of the said premises under Act II of 1948 for establishment of a power distribution station. Thereafter the power Department sent a proposal to the Land & Land Reforms department, the competent authority for requisition and acquisition of the said premises. It has been stated that in view of the extreme urgency for the establishment of the distribution station the order under S. 3 of the Land Requisition and Acquisition Act, 1948 was made in respect of the premises-in-question, that is, no. 2, Park Lane, Calcutta. It has also been stated that the earlier negotiation which were started at the instance of the Calcutta Electric Supply Corporation (India) Ltd., respondent No. 6, for purchase of the premises failed owing to the adamant attitude taken by the respondent (petitioner) No. 1. The order of requisition has not been made mala fide but it has been made on a consideration of the public purpose for which the premises in question is required to be requisitioned. The said order of re-

quisition has also not been made by the respondent No. 3 on a closed mind as tried to be contended. It has been, on the other hand, submitted that the particular premises is required for the purpose of setting up of a power distribution station to solve the acute problem of insufficient supply of electricity to the buildings which are being constructed in the area. There is neither any mala fide nor any absence of public purpose in making the order of requisition. Considering all these facts and circumstances there is no room for contending that the order of requisition is bad as there was no existence of any public purpose and there has been a colourable exercise of power by the respondent No. 3 in making the impugned order. This contention, therefore, cannot be sustained at all. The contention that the order of requisition made under S. 3 of the said Act is bad because the Land Acquisition proceedings were not withdrawn or abandoned is also devoid of any substance as I have already stated hereinbefore. The specified averments made in the application for vacating the interim order to the effect that the notification issued under S. 4 of the Land Acquisition Act for acquisition of this premises for construction of house of 'Urdhu Academy' had been cancelled and as such the said acquisition proceedings are no longer in existence at the time when the requisition order has been made. This position is also well known to the petitioner himself as will appear from the statements made in the letter demanding justice dated 20th October, 1981 which has been annexed as annexure I to the petition. In paragraph 4 of the letter it has been specifically stated that the acquisition proceedings was cancelled and abandoned by the Deputy Secretary, Government of West Bengal, Land and Land Reforms Department by order No. 7922—I-A (II)/I O/ 1079, dated July 10, 1981. Therefore, this contention has no legs to stand upon. The next contention raised on behalf of the petitioner that there is no formation of opinion as required under S. 3 (1) of the said Act inasmuch as the respondent No. 3 did not take into consideration the relevant materials in forming his opinion about the premises being required for a public purpose namely for setting up a distribution station for the Calcutta Electric Supply Corporation, respondent No. 6 and as such the im-

pugned order is wholly illegal, unwarranted and bad. I have already stated hereinbefore that in the writ application it has been specifically stated that there is acute shortage of the supply of electricity in the area and to meet the increasing demand for each day the respondent No. 6 made a proposal to the Government for requisition of premises No. 2, Park Lane, for setting up of a distribution station there and the power department after considering all aspects have found that there was an urgent necessity for requisitioning the land for the particular purpose which is undoubtedly a public purpose. Accordingly the order of requisition was made by the respondent No. 3. In these circumstances, in my opinion, it cannot be said that the opinion was formed by the respondent No. 3 on a consideration of extraneous materials and not on consideration of relevant and germane materials. In view of my above finding it is needless to consider the decision cited at the bar by the learned Counsel for the petitioner. It has been contended on behalf of the petitioner that previously in the notice issued under S. 4 of the Land Acquisition Act, 1894 a portion of the premises was notified for acquisition for the purpose of construction of a house for 'Urdu Academy'. The Deputy Secretary, Government of West Bengal by its communication on 16th July, 1981, to the respondent No. 3 asked for requisition of 7 cottahs of land out of the lands of premises No. 2, Park Lane for setting up of a distribution station by Calcutta Electric Supply Corporation. Subsequently, however, another communication was sent by the Government requesting for requisition of the entire premises No. 2, Park Lane, Calcutta, for establishment of a power distribution station. This has been challenged as bad because only seven cottahs of land is necessary for construction of the power distribution station and as such it has been contended that the requisition order is bad as it purports to requisition the entire premises. This argument, in my opinion, cannot be sustained inasmuch as it is the authority concerned who is the fittest person to decide how much land would be required for the public purpose namely for the establishment of the distribution station of the Calcutta Electric Supply Corporation (India) Ltd., respondent No. 6. This contention, therefore, is devoid of any

merit. The last contention advanced on behalf of the petitioner is that the order under S. 3 (1) of the said Act is wholly bad, illegal and ultra vires inasmuch as no opportunity of hearing was given to the petitioner before the making of the order and/or before the order is made as the order has got civil consequences. The order impugned though an administrative order yet affects the civil rights of the petitioner and it has been submitted that the rules of natural justice, or, in other words, the principles of *audi alteram partem* will apply in this case and the person affected has to be given an opportunity of being heard before the order under S. 3 (1) is made. This being not done the impugned order is liable to be quashed and set aside. To deal with this contention properly it is necessary to set out the relevant provisions of S. 3 of the Land Requisition and Acquisition Act (Act II of 1948):—

"(1) If the State Government is of the opinion that it is necessary so to do for maintaining supplies and services essential to the life of the community or for providing proper facilities for transport, communication, irrigation or drainage, or for the creation of better living condition in rural or urban areas, not being an industrial or other area excluded by the State Government by a notification in this behalf, by the construction or reconstruction of dwelling places for people residing in such areas, the State Government may, by order in writing requisition any land and may make such further order as appear to it to be necessary or expedient in connection with the requisitioning:

Provided that no land used for the purpose of religious worship or used by an educational or charitable institution shall be requisitioned under this section. (1A) A Collector of a district, (an Additional District Magistrate or the First Land Acquisition Collector, Calcutta,) when authorised by the State Government in this behalf, may exercise within his jurisdiction the powers conferred by sub-section (1). (2) An order under sub-section (1) shall be served in the prescribed manner on the owner of the land and where the order relates to land in occupation (of an occupier, not being the owner of the land, also on such occupier)."

The above section does not expressly provide for giving any opportunity of

hearing before making the order of requisition under S. 3 (1) of Act. It is to be considered whether by implication it can be said that the rules of natural justice, that is, an opportunity of hearing to be given will apply to this case. In the case of *Smt. Maneka Gandhi v. Union of India*, AIR 1978 SC 597 the question arose whether impounding a passport in the interest of the general public under S. 10 (3) (c) of the Passports Act, 1967, is ultra vires of Art. 21 of the Constitution of India since it provides impounding a passport without any procedure as required by that Article or if there is some procedure prescribed under that Act it is wholly unreasonable and not in compliance with the requirement of that Article. It was held that a law depriving a person of his personal liberty and prescribing a procedure for that purpose within the meaning of Art. 21 has to stand the test of one or more of the fundamental rights conferred by Article 19 as well as Article 14 of the Constitution of India. It has been held in that connection that "natural justice is a great humanising principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action. Natural justice is only fair play in action. Fair play in action, demands that before any prejudicial or adverse action is taken against a person, he must be given an opportunity to be heard". It has been further observed by Bhagwati, J. who delivered the judgment of the Supreme Court that "the law must, therefore now be taken to be well settled that even in an administrative proceeding, which involves civil consequences, the doctrine of natural justice must be held to be applicable". In the above case though S. 10 (3) (c) of the Passports Act did not provide for giving any opportunity of hearing yet it was held that the principles of natural justice will apply and before making the order impounding a passport opportunity of hearing has to be given. In the case of *Mohinder Singh Gill v. Chief Election Commr., New Delhi*, AIR 1978 SC 851 at p. 881 para 75 it has been observed that "Fair hearing is thus a postulate of decision making cancelling a poll although fair abridgement of that process is permissible. It can be fair without the rules of evidence or forms of trial. It cannot be fair if appraising

the affected and appraising the representations is absent. The philosophy behind natural justice is, in one sense, participatory justice in the process of democratic rule of law.

We have been told that wherever the Parliament has intended a hearing it has said so in the Act and the rules and inferentially where it has not specified it is otiose. There is no such sequatur. The silence of a statute has no exclusionary effect except where it flows from necessary implication. Article 32 vests a wide power and where some direct consequence on candidates emanates from its exercise we must read this functional obligation.

10. This decision has been referred to and relied upon in a recent pronouncement of the Supreme Court in the case of *Swadeshi Cotton Mills v. Union of India* (AIR 1981 SC 818 at pp. 831-32) It has been observed—While considering the provisions of S. 18-AA of the Industries (Development and Regulation) Act (65 of 1951) which provides that the Central Government on being satisfied that the persons in charge of the undertaking have brought about a situation likely to cause fall in production by committing any of the three kinds of acts specified in that provision, it may, by order direct the taking over of sick industry, it has been held that though there is no express provision for giving an opportunity of hearing and immediate action is required to be taken by making an order under S. 18-AA of the said Act, yet this does not exclude the application of the rules of natural justice. It has been further observed "In short, the general principle — as distinguished from an absolute rule of uniform application—seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at the predecisional stage. Conversely, if the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and no full review or

appeal on merits against that decision is provided courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing shorn of all its formal trappings and dilatory features at the pre-decisional stage, unless, viewed pragmatically, it would paralyse the administrative process or frustrate the need for utmost promptitude. In short, this rule of fair play "must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands". The court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications. But to recall the words of Bhagwati J. in the case that it must however, remain, namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise."

11. In this case also the Industries (Development and Regulation) Act, 1951 does not expressly provide for giving an opportunity for hearing before the making of the order under S. 18-AA of the said Act. Moreover it has been provided that immediate action is necessary to be taken under the said section. In S. 3 (1) of the Requisition & Acquisition Act, of course similar provision has been made. In AIR 1971 SC 961. S. M. Nandy v. State of West Bengal the question that was referred to the Supreme Court under Art. 145 (3) of the Constitution was "Whether the West Bengal Land (Requisition & Acquisition) Act, 1948 is ultra vires the Constitution under Art. 19 (1) (f) read with Art. 19 (5). It has been observed: "It is difficult to hold that restrictions imposed by the impugned Act are unreasonable. Fair compensation has been provided for requisitioning, which is determinable by a Civil Court and ultimately by the High Court or the Supreme Court by regarding necessity for requisitioning it must necessarily be left to the State Government. It is true that there is no express provision to make a representation against an order of requisition but there is no bar to a representation being made after an order is served under S. 3 (2) of the Act. We have no doubt that if the representation raises a point which overrides the public purpose it would be favourably considered by the State Government or other Government authorities as the case

may be." This judgment was delivered by a bench of five Judges including Hegde, J. Of course, in this case the question of applicability of the rules of natural justice was not specifically raised nor it was specifically considered. It will not be out of place to mention in this connection that Hegde, J. in the case of A. K. Kraipak v. Union of India (AIR 1970 SC 150) observed (at p. 154). "The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated.....In a welfare State like India it is inevitable that the organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like India it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its validity if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting is judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously."

The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words, they do not supplant the law of the land but supplement it."

12. Similar observation has been made by Hegde, J. in the case of Union of India v. J. N. Sinha, AIR 1971 SC 40. It has been observed by Hegde, J. that rules of natural justice are not embodied rules nor can they be elevated to the position of fundamental rights. Their aim is to secure justice or to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. They do not supplant the law but supplement it. If a statutory provision can be read consistently with the principles of natural justice then the court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice. Following the decision of the Supreme Court in AIR 1971 SC 961 in S. M. Nandy's case it has been held in the case of Sushila Devi Fomra v. State of West Bengal, (1980) 84 Cal WN 661 that the West Bengal Land Requisition

and Acquisition Act, 1948 does not contemplate the giving of notice to and hearing the person affected before making an order under S. 3 of the Act. Such a provision is not implicit in the Act. The only remedy available to the aggrieved person is that he is at liberty to make a representation to the authority concerned after the order is served under S. 3 (2). This judgment was delivered by A. N. Sen, C. J. and M. M. Dutt, J. In another Division bench decision reported in (1974) 78 Cal WN 397 *Narendra Nath Tripathy v. State of West Bengal*, A. C. Gupta, J. as His Lordship then was held that "though the statute does not contain any express provision requiring an opportunity to be given to the owner of the land to make a representation, such a provision should be deemed as implied. If, however, the statute has by necessary implication excluded the application of the principles of natural justice then the authorities would have no power to entertain any representation that may be made after the service of the order of requisition under S. 3 (2) of the Act. Unless of course the observation of the Supreme Court is construed not as an expression of opinion on the applicability of the principles of natural justice requiring the person affected to be given a hearing but as an expression of faith in the reasonableness of the executive Government." It was further held that as observed by the Supreme Court that there was no bar to make a representation after the order under S. 3 (1) of the Act was served on the owner or occupier of the land and as they had not done so they could not now make a grievance. In AIR 1972 SC 2656, *Madan Gopal Agarwal v. District Magistrate, Allahabad* the point for consideration was whether rules of natural justice is applicable in making an order under S. 3 of U. P. (Temporary) Accommodation Requisition Act, 1947 (25 of 1947) S. 3 of the Act reads:

"If in the opinion of the District Magistrate it is necessary to requisition any accommodation for any public purpose, he may, by order in writing requisition such accommodation and may direct that the possession thereof shall be delivered to him within such period as may be specified in the order provided that the period so specified shall not be

less than 15 days from the date of the service of the order;

Provided also that no building or part of a building exclusively used for religious worship shall be requisitioned under this section,

Provided further that no accommodation which is in the actual occupation of any person shall be requisitioned unless the District Magistrate is further of the opinion that suitable alternative accommodation exists for his needs or has been provided to him."

It was held that though the section does not contain an express provision for notice and hearing before the making of the requisitioning order, yet such a provision have to be read there by necessary implication. "The object of the provision is to requisition an immovable property. Requisitioning of the property deprives the owners of the property of the right to hold and enjoy the property as he likes. The right to hold and enjoy the property is a cherished right.....We find it difficult to assume that the legislature would have intended to deprive him of his cherished right without notice and hearing."

13. All these decisions cited hereinbefore, of course, present a great riddle and dilemma as to what would be the proper course to be followed. However, in view of the pronouncements of the Supreme Court in AIR 1971 SC 961 as referred to hereinbefore on this particular act which is binding on this Court as the law of the land, I am unable to hold that the impugned order made under S. 3 (1) of the said Act is illegal and bad as the same was not made without observance of the rules of natural justice. The petitioner may make his representation against the impugned order before the respondent No. 3 and if such representation is made the respondent No. 3 will consider and dispose of the same in accordance with law.

14. For the reasons aforesaid the Rule is discharged without any order as to costs. All interim orders are vacated. The two applications for variation of the interim order are also disposed of in terms of the order made hereinbefore.

Order accordingly.

AIR 1982 CALCUTTA 191

B. C. RAY, J.

In re: Ram Awatar Agarwal and others.

Application decided on 1-3-1982.

(A) Calcutta Municipal Act (33 of 1951), Ss. 414 (3), 560, 561 — Order of demolition of unauthorised structure can be straightway enforced — Giving of another notice to owner and occupier of premises before enforcement not necessary. (Constitution of India, Art. 226).

An order of demolition of unauthorised structures passed by the Commissioner under S. 414 (3) can be straightway enforced and it is not necessary that before the order is executed a further notice has to be given to the owner and occupier of the premises under Ss. 560 and 561 of the Act, as Ss. 560 and 561 have no application to an order made under S. 414 (3). (Para 11)

The provisions for service of the copy of the demolition order on the owner or the persons who are responsible for making such illegal construction, addition or alteration and also on the occupier of the premises which is proposed to be demolished or portion of which is proposed to be demolished and the remedy by way of appeal under S. 414A are the two remedies available under the Act against an order of demolition under Section 414 (3). Considering these provisions it cannot be said that the person affected was deprived of or was denied any opportunity of hearing. (Para 11)

(B) Calcutta Municipal Act (33 of 1951), Ss. 414 (3) Proviso, 5 (51), 187 — Word 'Occupier' — Connotation of — It only means an occupier at the time when demolition order is passed. (Interpretation of Statutes).

The word occupier as referred to in the proviso to sub-sec. (3) of S. 414 only mean an occupier at the time when the order of demolition is made by the Commissioner and does not include an occupier at the time when actually the order of demolition is going to be enforced or executed. To say that word 'occupier' includes an occupier at the time when the order of demolition is enforced will lead to a very anomalous position and it will on the other hand go to baffle the real purpose with which this provision was brought into the statute book. It would be opposed to well known principle of interpretation that an interpretation of a

provision has to be such which leads to harmonious working of the provisions of the Act and which promotes the purposes envisaged in the Act, in other words, the object of the Act and not to frustrate or baffle the same. As such the order of demolition has to be served only on occupiers who occupy the unauthorised premises on the date of the order of demolition. However, mere non-entry of his name by an occupier in the assessment book kept by the Corporation would not disentitle him from being served with the order of demolition by virtue of Section 187 (3). AIR 1944 Cal 159 and AIR 1953 Cal 87, Foll. (Para 11)

Thus, where an order of demolition passed in respect of a building constructed in utter contravention of the provisions of the Act and the Rules was challenged on the ground of non-service of order of demolition on the tenants of the said building, but the tenants put forth nothing to disprove the specific averment made on behalf of the Corporation of Calcutta that all of them came to occupy the premises after the demolition order was made, and knowing fully well the order of demolition, none of the tenants was entitled to be served with the order of demolition. (Para 11)

Cases Referred: Chronological Paras
 AIR 1953 Cal 87 11
 AIR 1944 Cal 159 11

Sankar Das Banerjee, Dipankar Ghosh, Samarjit Gupta and T. K. Sen, for Petitioners.

ORDER:— This application is directed against three demolition orders passed by the Deputy Commissioner, Corporation of Calcutta for demolition of the unauthorised structure i.e. the 14 storied building at 174, Chittaranjan Avenue, Calcutta, on the ground that copies of the order made under S. 414 (3) of the Calcutta Municipal Act, 1951 were not served on these petitioners who are occupants of all these 13 floors of the aforesaid premises and also that there has been a non-compliance of the provisions of Sections 560 and 561 of the said Act. It has also been challenged that there has been a total violation of the principles of natural justice by refusing to give the petitioners who are seriously prejudiced and affected by the impugned orders of demolition dated 15-5-78 and 21-4-81 by not being given any opportunity of filing any objections against the purported orders and of denying any opportunity of hearing of their objections against those orders. On hearing orally the

learned counsel for the petitioners an interim order was made on 17-2-82 to the following effect. The respondents including the Corporation of Calcutta and/or its officers and servants were restrained from taking any step towards demolishing the tenanted portion occupied by the petitioners as well as from disconnecting the water supply in respect of so far as the tenanted portion is concerned at No. 174, Chittaranjan Avenue, Calcutta till 22-2-82 and the petitioners were directed to file the application duly affirmed by Friday, Feb. 19, 1982 on serving a copy of the said application on Mr. Pradip Kumar Ghose, learned Advocate for the Corporation of Calcutta. The application was specially fixed for hearing on 19-2-82 at 2 P.M.

2. Thereafter the petitioners served a copy of the application that has been affirmed by them on the learned Advocate for the respondents. The interim order is continuing.

3. The petitioners who are about 60 in number claimed in this petition that they are occupying all the 13 floors except the first floor which is occupied by the Rajasthan Bank Ltd. as tenants under one Shyam Lal Agarwal who is admittedly the lessee from one Durga Devi Bhakat, the owner of the aforesaid premises. It has been further stated that as regards 10 to 13 floors of the said premises out of these petitioners 17 of them (not specified in the petition) are occupying as tenants in July 1981. It has also been stated that for the first time these petitioners came to know on 16-2-82 from the newspaper report that the building was going to be demolished. They tried to meet the lessee Shyam Lal Agarwal (respondent No. 11) on 16th February, 1982 but could not meet him and on 17th February, 1982 these petitioners however met the respondent No. 11 and they were informed that three purported orders of demolition were passed in gross violation of the principles of natural justice and in gross violation of the statutory provisions and out of these three demolition orders the first one related to demolition of ground floor to 6th floor of the said premises. They were also informed by the respondent No. 11 that the challenge thrown against the first demolition order became unsuccessful up to this Court and as regards the other two demolition orders challenge was made in two appeals being Appeals Nos. 63 and 64 of 1981-82 before the Building Tribunal and stay was obtained which is still in force. In this peti-

tion it has also been stated that one of the tenants i.e., petitioner No. 60 instituted a suit being T. S. No. 192 of 1982 in the City Civil Court, Calcutta on 5-2-82 challenging the demolition order and an interim order was obtained on an application under O. 39, R. 1, C.P.C. restraining the Corporation of Calcutta from proceeding with the work of demolition. The said order is in force even now.

4. On these grounds the instant application has been made and it has been submitted therein that the mandatory provision of S. 414 (3) has not been complied with, namely, no copy of the order of demolition passed by the Corporation has been served on any of the petitioners who are occupants of the said premises. It has also been submitted that there has been no non-compliance of the provision of S. 557 of the Calcutta Corporation Act, 1951 and in view of the stay order issued by the Building Tribunal against the demolition orders passed on 21-4-81 in respect of the demolition of 7th to 13th floors of the said premises the Corporation Authorities are acting wholly illegally in their attempt to proceed with the work of demolition of the aforesaid premises.

5. An affidavit in opposition has been affirmed on 25-2-82 by Shri Achinta Kumar Sarkar, Deputy Commissioner, Corporation of Calcutta, on behalf of respondents Nos. 1 to 6. It has been stated in para 4 of the said affidavit that according to the records of the Corporation of Calcutta the said premises is owned by one Smt. Durga Devi Bhakat, the recorded owner in the Assessment Register of the Corporation. She leased out the same to respondent No. 11 Shyam Lal Agarwal who has been recorded as an occupier as Karta of a Hindu undivided family in the Assessment Register maintained in the office of the Corporation of Calcutta. It has also been stated in para 5 of the said affidavit that none of the tenants i.e. the petitioner is recorded as occupier in the Assessment Register. The petitioners also did not apply for having their names recorded as occupiers in the Assessment Register. During the period of construction of the said building from time to time there has been constant posting of guards and/or police pickets and action has been taken by Municipal Officers with the help of police to arrest persons engaged in unauthorised construction and finally there was an order of demolition made on 15-5-78 when the building

had been raised up to 6th storey. Any one who took possession of the building as tenant did so with full knowledge that the structure was unauthorised. In para 10 the unauthorised structures that has been made has been given in details and it appears that the entire structure from the ground floor to the 13th floor was constructed without any observance of the provisions of the said Act as well as the schedule 16 and other rules framed under the said Act. It has also been submitted that the drainage connection was obtained unauthorisedly in utter violation of the provisions of Rules 59 and 60 of Schedule 16 of the said Act and the building has been condemned by the Fire Service Advisor to the Government of West Bengal who found it to be patently fire hazard virtually a death trap in the event of a sudden outbreak of fire. A copy of the report of the said Fire Officer was annexed as annexure A to the affidavit in opposition. It has been stated in para 12 (1) that an appeal was preferred to the Building Tribunal by the respondent No. 11 against the first order of demolition dated 15-5-78 and similar appeals were also preferred by the respondent No. 11 against the two subsequent demolition orders both of which had been passed on 21-4-81. The appeal against the first demolition order was dismissed by the Building Tribunal on 29-5-81 against which an application under Article 226 of the Constitution of India was made before this Court and the same was dismissed by P. C. Borooah, J. on 22-7-81. Against the said order an appeal was taken before the Appeal Bench of this Court and the same also was dismissed on 16-11-81. Ultimately a special leave petition was taken before the Supreme Court of India and it was also dismissed on 15-2-82. It has been further stated in para 20 of the affidavit in opposition that the respondents denied that any one is occupying 10 to 13 floors of the said premises. It has also been denied that any of the petitioners was in actual occupation of the said premises either in 1977 or in 1978. The petitioners are put to the strict proof of this allegation. It has been said with all emphasis that none of the said petitioners was in occupation of the said premises either in 1977 or in 1978 and in fact no part of the said building was in habitable condition in the year 1977 or till 29th May, 1978 being the date of service of the order u/s. 414 (3) of the said Act. It has been further stated that the construction of 7th to 10th storeys

were made between Sept. 1978 and Nov. 1979 and the construction of 11th to 14th stories were made between Nov. 1979 and Nov. 1980 and as such there could be no question of any one occupying the said building from 7th to 10th stories at the time when the order u/s. 414 (3) was made on 15-5-78.

6. In para 24 of the said affidavit it has been averred that the petitioners have not stated as to exactly when they had been in possession of the said premises. In any event they did so in violation of the provisions of Section 392 of the said Act. It has been further stated that the petitioners took possession long after the passing of the first demolition order which was made on 15-5-78 as at that time operation of the order of demolition remained stayed by the order of the Building Tribunal and no action could be taken to demolish the said structure.

7. An affidavit in reply has been filed affirmed by the petitioner No. 1 Ram Awtar Agarwal. In para 24 of the said affidavit it has been stated that the deponent categorically denied that none of the petitioners was in occupation of the said premises either in 1977 or in 1978 as alleged. It has also been denied that in fact no part of the said building was in habitable condition in the year 1977 or till 29-5-78 being the date of service of the order u/s. 414 (3) of the Act. It has been further stated that as regards construction of ground floor to 6th floor the petitioners have been duly informed by the occupiers of the ground floor and 2nd to 6th floor that the same was ready for occupation as early as in 1977. It has been further stated that as the petitioner No. 1 was interested for occupation either in the 7th or 8th floor immediately after completion of the same he took possession in the 8th floor and he disputed that the construction of 11 to 14 stories were made between November 1979 and November 1980.

8. Mr. Sankardas Banerjee, learned counsel and subsequently Mr. Dipankar Ghose, learned counsel appearing on behalf of the petitioners have submitted firstly by referring to S. 414 (3) of the said Act that the mandatory requirement of service of a copy of the order of demolition passed by the Commissioner, Corporation of Calcutta was not served on the petitioners who are occupiers of the premises. In this connection it has been further submitted that the Act does

not envisage that an occupier whose name has been recorded in the Assessment Register kept by the Calcutta Corporation u/s. 187 is only entitled to have this notice by referring to the definition clause of the word 'occupier' in S. 5 (51) of the Calcutta Municipal Act. It has also been submitted in this connection that S. 187 (3) of the said Act even assuming for argument's sake that it applies to the case of an occupier whose name has been entered in the Assessment Book does not cover the case envisaged in S. 414 (3) i.e. it does not cover an order of demolition made under this provision. It has therefore been submitted that S. 414 (3) which is a provision giving a mandate on the Corporation Authorities to serve a copy of the order has to be followed and the Corporation cannot proceed with the work of demolition on the basis of the impugned orders without complying with this imperative provision of S. 414 (3). The second tier of Mr. Ghosh's submission is that since the provision of Section 414 (3) does not lay down any specific time or period when such an order is to be served therefore the order has to be served not on the date of passing of the order of demolition by the Commissioner of Corporation of Calcutta but on the date when the order is going to be executed. Mr. Ghosh further submits in this connection that there must be two opportunities. One when the order is passed and another opportunity when the demolition order is going to be actually executed. In this connection Mr. Ghosh referring to the provision of S. 560 and S. 561 of the said Act submitted with great persuasiveness that they are to be complied with viz. a further notice is to be given by the Corporation Authorities to the occupants even after service of the order u/s. 414 (3) giving them a reasonable period for carrying out the demolition order and if during that period any objection is filed by the occupants that has to be heard and decided and thereafter the order can be executed. It has therefore been submitted that the impugned attempts on the part of the Corporation of Calcutta to proceed with the demolition work on the basis of the demolition orders are not in accordance with law. Mr. Ghosh also cited a large number of decisions on the question that opportunity of hearing has to be given to a person whose rights are seriously affected by the impugned orders of demolition even if there is no specific provision to that effect in the Act itself unless the said opportunity of hearing is ex-

pressly excluded by the Act. Mr. Ghosh also submitted that the petitioners are all occupants of the premises in question and though their conduct may be very bad that does not in any way prejudice their rights to get remedy or redress. Lastly Mr. Ghosh contended that since there is an order of stay of operation of the order of demolition dated 21-4-81 and the said order is pending even now this Court will not permit the Corporation of Calcutta to proceed with the demolition work.

9. Mr. Pradip Kumar Ghosh, learned Advocate appearing on behalf of the Corporation of Calcutta, has submitted in the first place that the entire building from ground floor to 13th floor was constructed by the lessee Shyamal Agarwal (respondent No. 11) without any compliance with the provisions of the Calcutta Municipal Act, 1951 as well as Schedule 16 providing for the manner of erecting new buildings and the other rules framed under the Act. It has been further submitted by Mr. Ghosh that all the three demolition orders were duly served on the recorded occupier in the Assessment Register kept by the Corporation of Calcutta i.e. respondent No. 11 and the respondent No. 11 challenged the first demolition order right up to the Supreme Court and became unsuccessful in his challenge. It has been further submitted by Mr. Ghosh that the building could not be occupied unless a certificate is issued u/s. 392 of the said Act and also no water connection could be given unless Rules 59 and 60 of Schedule 16 are complied with. The water connection that was taken wholly illegally and unauthorisedly and as such the same was disconnected against which two of the alleged tenant occupants and respondent No. 11 came up before this Court in an application under Art. 226 of the Constitution and the prayer for stay was not granted but a direction was given for supply of water by tanker lorry on payment of charges. For non payment of those charges the supply had been stopped and the said order had not been challenged before the Appeal Bench of this Court. It has therefore been submitted by Mr. Ghosh that no interim order regarding restoration of supply should be made by this Court as in that case there is a chance of conflicting orders by the Benches of this Court. It has been further submitted by Mr. Ghosh that the building is a condemned building and the first floor tenant Rajasthan Bank Ltd. came to occupy this building

sometime in Sept. 1978. Before that no other person came to occupy as tenant of the said building. Mr. Ghosh also submitted that his above submission will be reinforced by the averments made in the petition as well as in the reply to the effect that no date was given as to when exactly each of these petitioners came to occupy the disputed premises. If the petitioners knowing fully well that the premises have been constructed without any compliance of the mandatory provisions of the Act and the rules framed thereunder occupied the premises then by their own conduct they should be deprived of any equitable relief from this Equity Court. Mr. Ghosh also submitted that right flows from the statute and non-observance of the statute in the manner of construction of a building does not entitle the petitioners who claim to be occupants of the building to have any right in respect of their such occupation in respect of the aforesaid premises. The application according to Mr. Ghosh is therefore liable to be dismissed.

10. To decide the important questions that have been raised in this writ application it is imperative to state the background and the circumstances under which the building was constructed and the Corporation Authorities ultimately passed the impugned orders of demolition on 15-5-78 and 21-4-81. The building existing on the premises in question was originally an old building which was five storeyed. It appears that respondent No. 11 after taking lease of the said building from one Smt. Durga Devi Bhakat, the owner of the said premises, submitted one plan for staircase and thereafter he brought a suit being Title Suit No. 1169 of 1977 in the City Civil Court in 1977 and obtaining a stay order the constructions were made without complying with the requirements of the provisions of the Act viz. by applying for sanction as required under the Act and Schedule 16 of the said Act for proceeding with the construction. It also appears that new construction being put up on each storey by demolishing the old structure and the entire building from ground floor to 13th floor has been constructed and there is not a whisper that at any point of time the owner or for that the lessee the respondent No. 11 has ever tried to follow or respect the mandatory provisions of the Act and schedule 16 by submitting a proper plan, getting the same sanctioned and then starting the work of construction. It also appears that from time

to time the Corporation posted guards, police pickets and as appears from paragraph 12 of their affidavit in opposition arrests were made of persons engaged in making such illegal construction from time to time. But unfortunately the construction was carried on and all this action could not dissuade the respondent No. 11 Shyamlal Agarwal from going on with his illegal construction of this premises. It also appears that on 11-5-77 notice u/s. 416 of the Calcutta Municipal Act, 1951 was served on respondent No. 11 by the Commissioner asking him to stop the illegal construction. Again another notice was served on 25-7-77 u/s. 414 but in total defiance and/or contravention of those notices the work was carried on. Ultimately the Corporation was compelled to start demolition proceeding on 13-1-78 and on 15-5-78 the first order of demolition of structure from ground to 6th floor was made by the Deputy Commissioner, Corporation of Calcutta. This notice undoubtedly was served on respondent No. 11 Shyamlal Agarwal and he preferred an appeal u/s. 414A of the said Act before the Building Tribunal. Being unsuccessful he came up before this Court in an application under Article 226 of the Constitution of India and here also the application failed. Then he preferred an appeal and that appeal was also dismissed and ultimately a special leave petition was taken against the order of the appeal court before the Supreme Court of India and there also the leave petition was rejected by the Supreme Court on 15-2-82. In the meantime the respondent No. 11 and two of the tenants came up before this Court against the disconnection of water supply and a prayer for interim order was also made. Certain orders were passed which I have stated earlier by P. C. Borooah, J., whereby direction was given to the Corporation of Calcutta to supply water by water tankers on payment of charges. As the charges were not paid and it appears from the averments that a sum of Rupees 13,000 remaining due to the Corporation of Calcutta on this account water supply by tanker lorries was stopped. In the meantime another chapter began. A title suit has been filed in the City Civil Court, Calcutta by one of the petitioners on 5-2-82 which is before the passing of the order by the Supreme Court on the special leave petition and in that suit an order of stay was obtained as I have stated hereinbefore. This is the short background and chequered career of this case.

11. Now let me consider the legal arguments and/or submissions that have been advanced on behalf of the petitioners. S. 414 provides that the Commissioner if satisfied that the erection of any building has been commenced without obtaining any permission required to be obtained by or under this Act or is being carried on or has been completed otherwise than in accordance with the particulars on which such permission was based he may without prejudice to any action that may be taken under any other provision of this Act, by written notice require the person responsible to demolish such erection, alteration or addition, as the case may be, or to show cause why such erection, alteration or addition should not be demolished or the alteration should not be made. Sub-sec. (2) of the said section also provides that such a notice can be issued by the Commissioner notwithstanding the fact that the valuation of such building has been made under Chapter XI for the assessment of the consolidated rate. Sub-sec. (3) of the said section empowers the Commissioner that if the person responsible fails to demolish such erection, alteration, etc. the Commissioner may order the demolition of erection, alteration, etc. provided that a copy of the order shall be served upon the owner and the occupier thereof and no such action shall be taken until expiry of 30 days from the service of the said order. On a plain reading of this section it is abundantly clear that a duty is cast upon the Commissioner, Corporation of Calcutta, that before passing any order of demolition of any building the Commissioner is to be first satisfied that the work or construction in question has been commenced and/or completed without any permission which is necessary under the provisions of the Act and the construction has been made in utter violation of the terms of the permission granted in a case where such permission has been granted. Secondly, if the Commissioner is so satisfied then he will have to serve notice on the person responsible for doing such work to demolish such erection or alteration or to show cause why such erection or alteration should not be demolished. Thirdly, if the person responsible for such illegal construction or alteration fails to comply with the notice or fails to show cause then the Commissioner will make an order directing the persons responsible for such work to demolish the erection, alteration, etc. and the order has to be served upon

the owner and his occupier and 30 days time will have to be given during which no action would be taken. The first argument of Mr. Ghosh, learned counsel for the petitioners, is that this order u/s. 414 (3) has got two parts. The first part contains the service of the order on the owner as well as on the occupier and the second part is after service of the order and objection raised to the said order and even appeal preferred u/s. 414A fails even then the Corporation cannot straightway enforce its order of demolition. Then the execution part begins and the Corporation has to give another notice asking him to show cause, in other words, giving him an opportunity of hearing and giving him some time so that the occupant is not inconvenienced. In this connection Mr. Ghosh has also referred to S. 560 and S. 561 of the said Act and submits that any requisition or order made by the Corporation under this Act or under any rule or bye-law a reasonable period has to be prescribed in the notice for carrying out such requisition or order and if any objection is filed u/s. 561 such objection has to be placed before the Commissioner for determination and pending determination of such objection the carrying out of the requisition or the order has to be stayed. It has been further submitted that sub-sec. (5) of S. 561 cannot be called in aid in support of his argument that in view of the specific provisions made in S. 414 (3) these provisions will not apply. I am unable to accept this construction of S. 414 (3) of the said Act read with Ss. 560 and 561 of the Act. In my opinion S. 414 (3) clearly enjoins that the copy of the order of demolition made by the Commissioner has to be served upon the owner and the occupier thereof and for a period of 30 days no action can be taken in pursuance of the order of demolition. This is the plain and simple meaning of the provisions of S. 414 (3) of the Act. Any owner or occupier on whom such a copy of the order is served has been further provided with a remedy by way of appeal u/s. 414A of the Act. So the Act clearly provides double remedy against an order passed u/s. 414 (3) of the Act and considering these provisions it cannot be said that the person affected was deprived of or, in other words, was denied any opportunity of hearing. Natural justice, as has been rightly submitted by Mr. Pradip Kumar Ghosh, is undoubtedly applicable in all cases where an order quasi-judicial or even administrative affecting rights of a

party (sic) cannot be made without giving the party affected a reasonable opportunity of making representation against the order and without giving him a reasonable opportunity of hearing and this is exactly what was in the mind of the framers of this particular statute while making the provisions for service of the copy of the demolition order on the owner or the persons who are responsible for making such illegal construction, addition or alteration and also on the occupier of the premises which is proposed to be demolished or portion of which is proposed to be demolished. Not only that, a remedy by way of appeal u/s. 414A has been provided in the statute. In these circumstances I am unable to hold that before the order is executed a further notice has to be given u/s. 560 and 561 of the Act. Considering the case of this particular matter the order of demolition was served on the respondent No. 11 whose name was recorded as occupier and respondent No. 11 as I have stated hereinbefore challenged the order of demolition passed u/s. 414 (3) from the Building Tribunal up to the Supreme Court of India. Therefore, it cannot be said that these provisions do not provide for giving an opportunity of hearing. The other contention of Mr. Ghosh in regard to this that occupier as referred to in the proviso to sub-sec. (3) of Sec. 414 does not only mean an occupier at the time when the order of demolition was made by the Commissioner but it also includes an occupier at the time when actually the order of demolition is going to be enforced or executed. This, in my opinion, if accepted will lead to a very anomalous position and it will on the other hand go to baffle the real purpose with which this provision was brought into the statute book. Therefore, I am unable to accept this interpretation of Sec. 414 (3) of the said Act. It is well known principle of interpretation that an interpretation of a provision (sic) has to be given which leads to harmonious working of the provisions of the Act and which promotes the purposes envisaged in the Act, in other words, the object of the Act and not to frustrate or baffle the same. Sections 560 and 561 in my opinion apply in regard to other requisition or orders not provided in this Act or the rules specifically. Moreover these sections will apply to requisition or order made under this Act or under any rule or bye-law made thereunder, by written notice issued by a municipal authority or by any municipi-

pal officer empowered u/s. 34 in this behalf, etc. Sec. 34 empowers the Commissioner to delegate to any municipal officer or servant any of his powers, duties or functions including those delegated to him u/s. 30 but not those conferred or imposed or vested in him by Sec. 414 (3), etc. So these Sections 560 and 561 have no application to an order made u/s. 414 (3) of the said Act. This will be evident from the provisions of S. 560 (2) and also from Section 561 (5) of the said Act. The other contention which is very material for determination of the question raised in this petition is whether the provision of Sec. 414 (3) has been complied with, in other words, whether copy of the order has been served on the occupants i.e. the petitioners or not. Undoubtedly as I have said already, the provisions of S. 414 (3) cast a duty on the Corporation to serve a copy of the order of demolition not only on the person responsible for making such illegal construction but also on the occupier of the premises and occupier has been defined in S. 5 (51) of the Act as to include not only any person for the time being paying, or liable to pay, to the owner the rent or any portion of the rent of the land or building in respect of which the word is used or for damages on account of the occupation of such land or building and also a rent free tenant. The definition is rather an inclusive definition not an exclusive definition. S. 187 provides for entry of names of occupiers in assessment books kept by the Corporation of Calcutta and sub-sec. (3) of the said section provides the consequences of any occupier having his name not recorded in the assessment register. It has been provided therein specifically that no occupier whose name has not been entered in the assessment book shall be entitled to object that any bill, notice of demand, warrant or other notice of any kind required by the Act to be served on the owner or occupier of any land or building has not been made out in his own name. Mr. Ghosh, learned counsel, has submitted that notice of demand, warrant, bill or other notice does not include an order as envisaged in Section 414 (3) of this Act. In my opinion there is substance in this contention and the decisions that have been placed on this point viz. 48 Cal WN 170: (AIR 1944 Cal 159) and AIR 1953 Cal 87 support the contention of Mr. Ghosh. The next question is whether the petitioners were in actual occupation of the premises at the

time when the impugned orders of demolition were made. It appears from the averments made in the writ petition particularly in para 5 of petition and para 24 of the reply sworn by the petitioner No. 1 Ram Awtar Agarwal no date has been given as to when they came to occupy these floors of the disputed premises though the Corporation has categorically denied that any one of these petitioners came to occupy these floors before occupation of the premises as stated on oath by the Rajasthan Bank Ltd. in Sept., 1978. Furthermore, the petitioners have stated that out of them 17 have occupied 10 to 13 floors in July, 1981. It is also evident from annexure 'E' to the writ application made on behalf of Rajasthan Bank Ltd. that a letter was given by the City Architect, Corporation of Calcutta, on 6-7-81 stating therein that the demolition order was made and the same was made finally as the Tribunal dismissed the appeal filed by respondent No. 11 and Title Suit No. 408 of 1979 in the City Civil Court, Calcutta, challenging the said demolition order was also not proceeded with and a copy of the letter which was given to the Income-tax Department who was admittedly occupying 10 to 13 floors was given to them. It has been stated by the learned Advocate for the Corporation of Calcutta, Mr. Pradip Kumar Ghosh, that thereafter the Income-tax Department gave up possession of these four floors and they remained vacant. The petitioners have stated of course that out of them 17 came to occupy these floors in July, 1981. The question is can it be said in these circumstances that they are not aware that the building was illegally constructed and demolition orders were made and several proceedings were also brought by respondent No. 1? Therefore, in these circumstances sitting in an equity court I am unable to hold that these 17 tenants whose names of course have been carefully omitted to be mentioned specifically in the petition as well as in the affidavit-in-reply are entitled to be served with the order of demolition inasmuch as the order of demolition was passed long before their such alleged occupation of this premises viz. one on 15-5-78 and two others on 21-4-81. As regards the other petitioners there is no averment as I have said already specifying when they actually occupied their respective portions. Therefore, there is nothing to disprove the specific averment made on behalf of the Corporation of Calcutta that all these

other petitioners came to occupy this premises knowing fully well the order of demolition and after the demolition order was made. Moreover, another thing which very much weighed with this Equity Court is if the respondent No. 11 constructs this tall building without any respect for the statutory provisions and without carrying the notice issued u/s. 416 of the Act and the steps taken by the Corporation for posting police pickets, guards from time to time stopping this illegal construction and sometimes arresting persons engaged in such illegal construction and thereafter all attempts being baffled when the building was thus wholly illegally constructed in utter contravention of the provisions of the statute and the rules framed thereunder the Corporation was compelled to make the order of demolition u/s. 414 (3) and serving the order duly on the respondent No. 11 who is in occupation according to the records of the Corporation and who fought for several years since 1978 till Feb. 15, 1982 can it be believed or can a reasonable person believe that these occupants knew nothing about this more so when two of the tenants already agitated against the disconnection of water supply and one tenant has already filed a title suit in the City Civil Court, Calcutta that they were not aware of and that they only became aware of that on 15-2-82 from the newspaper report. As an Equity Court this court cannot lose sight of the background, the facts and circumstances of this particular case to permit an illegal act to continue and this is certainly not in the interest of justice, fair play and equity.

12. Therefore, considering the facts and circumstances of the case and the conduct of the petitioners who claim to be occupants as an Equity Court I am not at all willing to interfere in this matter and to exercise my jurisdiction. This application is, therefore, summarily dismissed.

13. All interim orders are hereby vacated.

14. The application for Rajasthan Bank Ltd. is also rejected.

15. The prayer for stay of operation of this order is refused.

Application dismissed.

AIR 1982 CALCUTTA 199**ANIL K. SEN AND****B. C. CHAKRABARTI, JJ.**

Biswanath Charit, Petitioner v. Damodar Patra and others, Opposite Parties.

Letters Patent Appeal No. 8 of 1974, D/- 3-2-1982.*

(A) Hindu Minority and Guardianship Act (32 of 1956), S. 8 — Powers of natural guardian under — Contract to sell suit property to "A" by mother of minors for legal necessity — No previous permission of Court sought — Contract is in contravention of S. 8 (2) and so not enforceable. (T. P. Act (1882), S. 53A). ILR (1972) 2 Cal 347 reversed on principle.

Defendant No. 1, the mother and as such natural guardian of minor defendants entered into an agreement with plaintiff "A" for self and on behalf of minors to sell the suit property for consideration by accepting an advance to meet certain antecedent debts during illness of her deceased husband and executed registered a Bainapatra stipulating that the mother having herself appointed the certificated guardian of minors would execute the deed of sale within six months and the plaintiff "A" was put into possession of suit property under a Kabuliat. But subsequently the minor defendants and the mother suffered a collusive compromise solenamah decree purporting to surrender possession of the suit land in favour of "B" and refused to execute the sale deed. Suit for specific performance of contract was filed by "A".

Held, that the contract between "A" and mother of minors on their behalf was not enforceable in law though it was competent for the mother to enter into and execute an agreement for sale for the benefit of the minors. (Para 9)

Such an agreement would not be void altogether but only voidable at the instance of the minor if it could be shown to be not for his benefit. But the mere fact that the agreement was not void would not by itself render it straightway specifically enforceable at the instance of the purchaser "A" by the natural guardian. It could have been so enforceable if, as the law stood before the natural guardian mother herself could have fulfilled

the contract by executing the conveyance. But that power had since been made subject to the previous permission of the court. Complying with a decree for specific performance as made in the present case would constitute contravention on the part of the natural guardian of sub-section (2) of S. 8 of the Act and it is settled principle that no court should compel a person to contravene the law.

(Para 9)

The legal position is that such an agreement is enforceable but only upon a previous permission being obtained from the court. Where the natural guardian in exercise of his powers under subsec. (1) of S. 8 of the said Act enters into such an agreement for the benefit of the minor he by necessary implication enjoins himself to take the necessary permission from the court and then execute the conveyance which would not contravene in any manner sub-sec. (2) thereof. ILR 1972 (2) Cal 347 reversed on principle.

(Para 9)

(B) Letters Patent (Cal.), Cl. 15 — Hindu Minority and Guardianship Act (1956), S. 8 — Mother of minors, natural guardian agreeing to sell property to "A" for legal necessity without prior permission of Court — Subsequent compromise to transfer the property in favour of "B" to defeat the agreement with "A" — "B" obtaining decree on basis of that compromise — Compromise found to be collusive — "B" has no locus standi to challenge decree in favour of "A" though it was voidable at the instance of minors.

(Para 10)

Cases Referred: Chronological Paras

AIR 1964 SC 978 9

AIR 1948 PC 95: 75 Ind App 115: 1948

All LJ 226 5, 9

(1912) 39 Ind App 1: ILR 39 Cal 232 (PC) 9

Bankim Banerjee and Pradipta Roy, for Petitioner; Robindra Nath Mitra and B. K. Pal, for Opposite Parties.

ANIL K. SEN, J:— This is an appeal under Cl. 15 of the Letters Patent directed against a judgment and decree dated July, 13, 1971, passed by a learned single judge of this Court in an appeal from appellate decree No. 38 of 1964.* Defendant No. 8 is the appellant before us who lost throughout.

2. This appeal arises out of a suit for specific performance of a contract and injunction. The plaintiff/respondent instituted the suit on the allegation that

*Against judgment and decree passed by single J. of this Court.

defendant No. 1, the mother and as such natural guardian of minor defendant Nos. 2 to 7 entered into an agreement with the plaintiff for self and on behalf of the minors to sell the suit property for a consideration of Rs. 1,275/- by accepting an advance of Rs. 500/- to meet certain antecedent debts during the last illness of her deceased husband, the father of defendant Nos. 2 to 7 and executed and registered a Bainapatra on Dec. 12, 1960; it was stipulated in the agreement that defendant No. 1 having herself appointed the certificated guardian of the minors would execute the deed of sale within six months; that simultaneously the plaintiff was put into possession of the suit land on settlement under a Kabuliat dated 1st Pous 1367 B. S.; but it subsequently appeared that defendant Nos. 1 to 7 suffered a collusive compromise decree in Title Suit No. 578 of 1960 purporting to surrender possession of the suit land in favour of defendant No. 8 for defeating the plaintiff's right; that the defendants Nos. 1 to 7 thus not only refused to execute the sale deed but defendant No. 8 threatened to disturb plaintiff's possession of the suit land. Hence the plaintiff sued for specific performance of the contract for sale and for injunction restraining the defendant No. 8 from interfering with his possession of the suit property.

3. The defendant Nos. 1 to 7 filed a written statement denying the agreement but did not appear further to contest.

4. The suit was contested by defendant No. 8 who not only denied the agreement but further pleaded that such an agreement being contingent upon permission of the court and being otherwise invalid and void is not enforceable. He further claimed that in any event such an agreement is not enforceable against him.

5. The two courts on evidence concurrently found that defendants Nos. 1 to 7 did execute and register the agreement for sale which was for legal necessity and for the benefit of the minors and that the plaintiff was put into possession of the suit property on the basis of a settlement. Both the courts overruled the plea that the defendant No. 8 is a bona fide transferee for consideration without notice. The trial Court found the solemn decree which was entered into a few days after the plaintiff's agreement to be collusive. So far as the contract is concerned, the two courts held that it

was competent for the natural guardian mother to enter into such contract made for the benefit of the minors and though it may be voidable at the instance of the minors, it is not otherwise void or invalid and is specifically enforceable when the minors are not coming forward to avoid it. It was so held on the authority of the decision of Privy Council in the case of Subrahmanyam v. Subba Rao, AIR 1948 PC 95.

6. Defendant No. 8 preferred the above second appeal and other points being concluded by the concurrent findings of the two courts below, the only point that was urged before the learned single Judge was that the law relating to the powers of a natural guardian under Hindu law having been changed on enactment of the Hindu Minority and Guardianship Act, 1956, the decision of the Privy Council relied on by the courts below can no longer apply and such a contract cannot be specifically enforced. It was further contended that on a proper construction of the agreement it should have been held to be contingent and as such not enforceable.

7. Both the points thus raised were overruled by the learned single Judge. On the first point the learned Judge held that by virtue of powers conferred by sub-section (1) of S. 8 of the Hindu Minority and Guardianship Act, 1956, it was competent for the natural guardian to enter into an agreement on behalf of the minors and for their benefit as done in the present case though subject to sub-section (3) thereof which entitles the minors to avoid the same if it is not for their benefit and as such is in contravention of sub-section (1). Hence it was held that the contract is valid and as such specifically enforceable. On the second point, the learned Judge upon construction of the agreement held in agreement with the courts below that the agreement to sell was not contingent upon permission being obtained from court it merely provided how the conveyance was to be executed by the guardian of the minors. The concurrent decree passed by the two courts below was thus affirmed and the second appeal was dismissed by the learned single Judge. Feeling aggrieved the defendant No. 8 has preferred this appeal after having obtained leave under Cl. 15 of the Letters Patent from the learned single Judge.

8. Mr. Banerjee appearing in support of this appeal has fairly conceded that on

the terms of the agreement he cannot dispute the finding of the learned single Judge that the agreement in question cannot be said to be a contingent one. Mr. Banerjee has, however, strongly contended that the learned single Judge had failed to take note of the fact that Hindu Minority and Guardianship Act, 1956, having introduced material change by way of restricting the powers of the natural guardian to effect any mortgage or charge or transfer by sale, gift, exchange or otherwise the immovable property of the minor, no court could specifically enforce an agreement for sale said to have been executed by the natural guardian for and on behalf of the minor. Such a decree, according to Mr. Banerjee, would constitute contravention of S. 8 (2) of the said Act. Mr. Mitter appearing on behalf of the respondent has strongly contested the point thus raised by Mr. Banerjee and he has further contended that in any event the defendant No. 8 is not entitled to challenge the decree in view of the finding of the courts below that the solemnised decree in his favour was a collusive one.

9. The point raised by Mr. Banerjee appears to us to be of some importance. It must be remembered that the decision of the Privy Council in the case of *Mir Sarwarjan v. Fakhruddin*, (1912) 39 Ind App 1 stands revised to a great extent by the view expressed by the Privy Council in the later decision in the case of *Subrahmanyam v. Subba Rao*, 75 Ind App 115: (AIR 1948 PC 95) where the Privy Council approved the following principle enunciated by Pollock and Mulla, namely, "It is, however, different with regard to contracts entered into on behalf of a minor by his guardian or by a manager of his estate. In such a case it has been held by the High Courts of India, in cases which arose subsequent to the governing decision of the Privy Council that the contract can be specifically enforced by or against the minor, if the contract is one which is within the competence of the guardian to enter into on his behalf so as to bind him by it, and, further if it is for the benefit of the minor. But if either of these two conditions is wanting the contract cannot be specifically enforced at all." One must, however, remember that such was the principle enunciated and approved by the Privy Council at a time when under the Hindu Law the natural guardian of a Hindu minor had power in the management of his estate to mortgage or sell any part

thereof in case of necessity or for the benefit of the estate. At that time, the limitations enacted in S. 29 of the Guardians and Wards Act, 1890, were applicable to a guardian appointed or declared by the court and not to a natural guardian. But there has been a material change in the law in this regard introduced by the Hindu Minority and Guardianship Act, 1956. Sec. 8 of the said Act has rendered the powers of the natural guardian substantially the same and subject to the same limitations as are imposed on the powers of a guardian declared or appointed by a court under the Guardians and Wards Act. Sub-sec. (2) has taken away the independent power of alienation originally possessed by the natural guardian under the Hindu Law and forbids mortgage or charge or transfer by sale, gift, exchange or otherwise or even lease for a term exceeding 5 years or for a term extending one year beyond the date on which the minor will attain majority, any part of the immovable property of the minor except with the previous permission of the court. Reflex of such a change on a claim of specific performance of a contract for any transfer coming within that sub-section appears not to have been considered by the courts below. We feel no hesitation in agreeing with and accepting the view that it was competent for the natural guardian to enter into and execute an agreement for sale as in the present case for the benefit of the minors and such an agreement will not be void altogether but only voidable at the instance of the minor if it can be shown to be not for his benefit. But in our view the mere fact that the agreement is not void would not by itself render it straightway specifically enforceable at the instance of the purchaser by the natural guardian. It could have been so enforceable if, as the law stood before, the natural guardian himself could have fulfilled the contract by executing the conveyance. But that power has since been made subject to the previous permission of the court. Complying with a decree for specific performance as made in the present case would constitute contravention on the part of the natural guardian of sub-section (2) of S. 8 of the Hindu Minority and Guardianship Act, and it is settled principle that no court should compel a person to contravene the law. The matter can be looked at from another angle, namely, that even where the court grants such a decree and the natural guardian executes

the conveyance in terms of that decree, that transfer can be set at naught at the instance of the minor merely on the ground that such transfer is in contravention of sub-section (2). No court is expected to pass such an infructuous decree. But the question still remains what would happen to such an agreement, particularly when as has been found in the present case the agreement is within the competence of the natural guardian and is for the benefit of the minor. Would it remain an agreement not enforceable in law? In our view the legal position is that such an agreement is enforceable but only upon a previous permission being obtained from the court. Where the natural guardian in exercise of his powers under sub-section (1) of S. 8 of the said Act enters into such an agreement for the benefit of the minor he by necessary implication enjoins himself to take the necessary permission from the court and then execute the conveyance which would not contravene in any manner sub-section (2) thereof. The decree in such a case, therefore, should be in terms similar to the one as the Supreme Court indicated in the case of Messrs. Chandnee Widyavati Madden v. Dr. C. L. Katial, AIR 1964 SC 978. The decree must direct the natural guardian to seek the necessary permission from the court as contemplated by sub-section (6) of S. 8 and such permission being obtained to effect the conveyance.

10. Though such is the legal position and though the decree as drawn up is not strictly in the said terms when the court directed straightway the defendants Nos. 1 to 7 to execute and register in favour of the plaintiff the deed conveying the suit property yet we are not inclined to interfere with such a decree due to intervening circumstances. More than 21 years have passed since the agreement for sale was entered into. The minors have all ceased to be minors and though more than 3 years have lapsed since their attainment of majority they have not avoided the contract. As a matter of fact they are themselves parties to this suit and they have not contested. In such a situation it will be futile on our part now to modify the decree and direct the natural guardian to seek for necessary permission of the court under sub-section (2) of S. 8 of the Hindu Minority and Guardianship Act, 1956. We also find great substance in the objection raised by Mr. Mitter, namely, upon the findings of the two courts of fact, the defendant No. 8

has no locus standi to challenge the decree since the decree he obtained on compromise from the other defendants had been adjudged to be collusive.

11. In the result, we dismiss this appeal without, however, any order for costs.

B. C. CHAKRABARTI, J.:— I agree.

Appeal dismissed.

AIR 1982 CALCUTTA 202

G. N. RAY, J.

Parshava Properties Ltd. and another, Petitioners v. State of West Bengal and others, Respondents.

Civil Revn. No. 1531 (W) of 1978, D/- 3-2-1982.

(A) West Bengal Taxation Laws (2nd Amendment) Act (20 of 1977), Pre. — West Bengal Urban Land Taxation Act (8 of 1976), S. 4 — Buildings within any category of urban agglomeration of W.B. — Imposition of uniform tax — Amendment Act of 1977 is unconstitutional (Constitution of India, Arts. 14, 285 — Urban Land Ceiling and Regulation Act (1976), Sch. I, Entry 15).

West Bengal Urban Land Taxation Laws (2nd Amendment) Act, 1977 in so far as it amends West Bengal Urban Land Taxation Act, 1976 is unconstitutional and void. Under the Act tax at uniform rate has been sought to be enforced for all buildings situated within any category of urban agglomeration in West Bengal without considering the year of construction, the yield, the capacity to yield income, the use and potentiality of the building, and other circumstances which may appropriately be taken into consideration. (Para 2)

In Sch. I of the Urban Land (Ceiling and Regulation) Act, 1976 various urban agglomerations in different States of India have been mentioned. Entry No. 15 of the said Sch. I enumerates the three urban agglomerations in the State of West Bengal and different areas have been brought within the urban agglomeration and both municipal, non-municipal areas have been included within such urban agglomeration. Many of the areas included in the urban agglomeration in West Bengal are comparatively small places and not developed towns and cities. They are also not equally im-

BZ/BZ/A643/82/SAD/SSG/HN

portant from the standpoint of trading and/or commercial activities. The said areas are also not industrial towns. It is quite evident that the potentiality to earn rent from the buildings situated in various units of the urban agglomeration in West Bengal as referred to in the Entry No. 15 of Schedule I, is not the same. In the circumstances, the imposition of tax on building situated within the said urban agglomeration under 1977 Act cannot be held to be reasonable, (Para 2)

(B) West Bengal Taxation Laws (2nd Amendment) Act (20 of 1977), Pre. — Constitutionality of Act — Act not imposing unreasonable restriction to hold building within urban agglomeration — It cannot, therefore, be said to be violative of Art. 19 of the Constitution. (Constitution of India, Art. 19). (Para 2)

Cases Referred: Chronological Paras
1979 Tax LR NOC 133 (Cal): (1979) 1 Cal LJ 363 1, 2

D. P. Gupta, B. P. Gupta, Samir Chakraborty and A. K. Dey, for Petitioners; Pulak Mondal, for the State.

ORDER:— In the instant Rule the petitioners have asked for appropriate writs commanding the respondents not to give any effect to the West Bengal Taxation Laws (2nd Amendment) Act, 1977, in so far as the same amends the former Act in the matter of payment of land tax or urban land tax by the petitioners in respect of the properties as set out in the writ petition. The petitioners contend that the provisions of the said West Bengal Taxation Laws (2nd Amendment) Act, 1977 is ultra vires Arts. 14 and 19 of the Constitution. The petitioners contend that the West Bengal Urban Land Taxation Act, 1976 and the West Bengal Taxation Laws (2nd Amendment) Act, 1977 in so far as the latter Act amends the former Act and in particular S. 4 thereof makes hostile discrimination offend Article 14 of the Constitution, inasmuch as the tax sought to be imposed by way of amendment is arbitrary and exorbitant without making any provision for passing any liability to or sharing of the same by the tenants. The said Acts, according to the petitioners, will ultimately deprive the petitioners of their capacity to hold and earn profits and income from the property. It is contended by the petitioners that the Act imposes tax not only on the building but on the area of the land occupied by such building and the land appurtenant to such building.

There is no attempt at classification in the provisions of the Act and such lack of classification has created a gross inequality and the Act is also discriminatory in nature and such discrimination is also hostile. The petitioners further contend that the provisions of the Act bear no reasonable nexus with the object the Act seeks to achieve and the levy of urban tax ought to have been based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained. The petitioners contend that for determining the quantum of tax, a flat rate is sought to be imposed and the sole test for such imposition of tax is the area of land occupied by any building and the land appurtenant to such building. The Act has been made applicable in the entire State of West Bengal and whether the building is situated in a large industrial town or in any insignificant village but falling within the same category of urban agglomeration, the tax is sought to be determined by the land occupied by the building and the land appurtenant to such building. It does not depend upon the nature of the structure, the town and locality in which the building is situated, the economic rent which may be obtained from the building, the cost of the building and other related circumstances which may appropriately be taken into consideration in any rational system of taxation of buildings. The buildings which are dissimilarly situated and are unequal have been treated on equal basis. According to the petitioners there is total lack of classification when such classification was necessary, expedient and reasonable in the facts and circumstances of the case. The petitioners contend that although it is a common knowledge that old buildings and buildings situate in a less important place do not fetch as much profit or rent as new buildings or buildings situate in a more important place of business fetch. By the impugned provisions, a flat rate is sought to be imposed for all buildings situated within any category of urban agglomeration irrespective of their date of construction and irrespective of the situation of such agglomeration from the commercial point of view. In support of the said contentions, Mr. Gupta, the learned counsel appearing for the petitioners has relied on a decision of this court made in the case of *State Bank of India v. State of West Bengal* reported in 1979 (1) Cal LJ 363; (1979 Tax LR NOC 133 (Cal)). In

the said decision, the vires of the West Bengal Multi-storeyed Building Tax Act, 1975 was under challenge. In the said case, the vires of the said Act on the ground of Art. 14 was also agitated. It has been held by this Court in the aforesaid decision that the West Bengal Multi-storeyed Buildings Tax Act is a tax on multi-storeyed building in West Bengal and the Act is not a legislation to control multi-storeyed building or anything like that. It has also been held that if the tax in question ignores the vital factors which are germane for imposition of tax on buildings and lands, then the Act in question will suffer from the vice of inequality. Under Ss. 2 (b) and 2 (c) read with S. 3 of the said Multi-storeyed Buildings Tax Act, all multi-storeyed buildings i.e. building on any land in an urban area consisting of five storeys and above have been subjected to the levy of tax at uniform rate without taking into consideration the area where the multi-storeyed building has been constructed, the year of construction, the yield and capacity to yield income, their use and potentiality. To treat all the multi-storeyed buildings of five storeys alike would be to treat unequals in their essential features as equals in the burden of taxation. The act is, therefore, ultra vires, void and unenforceable. Mr. Gupta contends that for the selfsame reasons, the West Bengal Taxation Laws (2nd Amendment) Act, 1977 in so far as it amends the former Act is also unconstitutional and the same offends Art. 14 of the Constitution. Mr. Gupta submits that 'Tax at uniform rate has been sought to be enforced without considering the year of construction, the yield, the capacity to yield income, the use and potentiality of the building.'

2. Mr. Mondal, the learned counsel appearing for the State, however, submits that the provisions of both the Acts are not similar and as such the decision made in the case of State Bank of India v. State of West Bengal is not applicable to the facts and circumstance of the case. Mr. Mondal submits that the tax has been sought to be imposed at flat rate only within the urban agglomeration and not on other buildings. He submits that buildings situated at urban agglomeration have some distinctive features and as such tax has been sought to be imposed at flat rate on such buildings. It is, therefore, not correct to contend that unequals have been treated as equals. I am, however, unable to accept the said

contention of Mr. Mondal. "In Sch. I of the Urban Land (Ceiling and Regulation) Act, 1976 various urban agglomerations in different States of India have been mentioned. Entry No. 15 of the said Sch. I enumerates the three urban agglomerations in the State of West Bengal and different areas have been brought within the urban agglomeration and both municipal, non-municipal areas have been included within such urban agglomeration. Many of the areas included in the urban agglomeration in West Bengal are comparatively small places and not developed towns and cities. They are also not equally important from the standpoint of trading and/or commercial activities. The said areas also are not industrial towns. It is quite evident that the potentiality to earn rent from the buildings situated in various units of the urban agglomeration in West Bengal as referred to in the Entry No. 15 of Sch. I, is not the same. In the circumstances, the imposition of tax on building situated within the said urban agglomeration cannot be held to be reasonable." By no stretch of imagination, the potentiality to fetch rent of a building within the limits of the Calcutta Corporation will be the same as of a similar building situated in Banupur or Panpur, or Narayanpur or Deulpara etc. etc. although all the said places find place in Entry No. 15 of Sch. I comprising the urban agglomeration in the State of West Bengal. It does not however appear that the Act has imposed any unreasonable restriction to hold the building within the urban agglomeration and it cannot, therefore, be said that the Act is violative of Art. 19 of the Constitution. The Rule, therefore, succeeds and is made absolute upon a declaration that the "West Bengal Urban Land Taxation Laws (2nd Amendment) Act, 1977 in so far as it amends West Bengal Urban Land Taxation Act, 1976 is unconstitutional and void."

3. There will be no order as to costs in this Rule.

4. The petitioners will be entitled to withdraw the sum deposited by them in terms of the interim order passed by this Court on 20th March, 1978.

5. Let the operation of the judgment be stayed for a period of four weeks from date as prayed for by Mr. Mondal appearing for the State-respondents.

Order accordingly.

AIR 1982 CALCUTTA 205

S. N. SANYAL, J.

Vikam Chand Kothari, Petitioner v.
Upendra Nath Sarkar, Opposite Party.

Civil Revn. No. 1106 of 1979, D/- 12-2-1982.

West Bengal Premises Tenancy Act (12 of 1956), S. 17 (2) — Suit for eviction on ground of default filed on 11-12-1975 — Application by tenant filed on 9-2-1976 — Tenant stating that he had deposited rent with Rent Controller — In dealing with application it would be necessary to determine whether deposits with Rent Controller were valid deposits or not.

Where on a suit for ejectment and arrears of rent being filed on 11-12-1975 against a tenant who was a monthly tenant according to Bengali calendar on ground that he did not pay rent from Baishakh 1380 B.S. and the rent from Baishakh 1380 B.S. to Jaishtha 1382 B.S. fell in arrears the tenant filed an application on 9-2-1976 under S. 17 (1) for permission to deposit the rent of Poush 1382 B.S. with interest and another application under S. 17 (2) for determination of arrears of rent and invited the attention of the Court to treat the deposits made with the Rent Controller as rents of the suit premises from Baishakh 1380 B.S. to Agrahayan 1382 B.S. as rents already paid. As the tenant invited the Court to treat the rent deposited with the Rent Controller as valid deposits, it would be necessary for the Court to determine whether or not the said deposit of rent with the Rent Controller was valid. The determination of this question is connected with the determination of the rent payable by the tenant.

When the defendant had deposited the admitted arrear and along with it he had filed an application under S. 17 (2), in dealing with the application it would be necessary to determine whether the deposits made with the Rent Controller are valid deposits or not. (1975) 79 Cal WN 1017, Rel. on. (Para 8)

Cases Referred : Chronological Paras

(1975) 79 Cal WN 1017 : (1977) 2 Cal LJ 508 7

(1958) 62 Cal WN 830 6

Nirmal Kumar Nandi, for Petitioner;
Sadananda Ganguli, for Opposite Party.

ORDER:— This application is at the instance of the defendant Vikam Chand Kothari challenging the order dated Dec.

BZ/CZ/A746/82/SMA/SSG—H

14, 1978 by which the learned Munsif, First Court, Krishnagar, rejected the defendant's application under S. 17 (2) of the West Bengal Premises Tenancy Act. The plaintiff-opposite party Upendra Nath Sarkar instituted Title Suit No. 363 of 1975 on Dec. 11, 1975 in the First Court of Munsif, Krishnagar against the petitioner for ejectment and arrears of rent. The plaintiff's case was that the defendant was a monthly tenant under the plaintiff on a monthly rental of Rs. 57/- according to Bengali calendar. The defendant did not pay rent from Baishakh 1380 B.S. and the rent from Baishakh 1380 B.S. to Jaishtha 1382 B.S. fell in arrears. The plaintiff also required the suit premises for his own occupation. The defendant appeared on Feb. 9, 1976 and filed two applications on that day, one under S. 17 (1) of the Premises Tenancy Act, praying for permission to deposit the rent of Poush 1382 B.S. with interest and the other under S. 17 (2) for determination of the defendant's arrears of rent.

2. The learned Munsif dismissed the application under S. 17 (2) holding that the application was a misconceived one and it was not maintainable.

3. The defendant has challenged the said decision of the learned Munsif in the present proceeding before this Court. The learned Advocate for the petitioner has argued that the learned Munsif has failed to exercise his jurisdiction as he did not state the ground on which he held the application to be a misconceived one. There was thus failure to exercise jurisdiction. The learned Munsif raised the question whether the rents deposited by the defendant with the Rent Controller were valid deposits but he did not come to any finding regarding the same. The impugned order is not sustainable in law and the same should be set aside and the learned Munsif should be directed to dispose of the defendant's application in accordance with law.

4. The learned Advocate for the plaintiff-opposite party has contended that according to the defendant there was no dispute regarding the rate of rent and there were no arrears. In the circumstances, the defendant could not file an application under S. 17 (2) of the Premises Tenancy Act. It has been argued that there must be a bona fide dispute and in the absence of any such dispute the defendant had no right to file an application under S. 17 (2) of the Premises Tenancy Act. The learned Advocate for the opposite party has contended that if

the defendant has deposited the rent in time he will get the benefit and the same will be determined at the time of trial.

5. On Feb. 9, 1976 the defendant filed an application under S. 17 (1) of the Premises Tenancy Act for permission to deposit the rent for Poush 1382 B. S. with interest. On the same date, the defendant filed an application for determination of the defendant's dues under S. 17 (2) and for deposit of rent under S. 17 (1) of the Premises Tenancy Act. In this application the defendant stated that he had deposited with the Rent Controller all rents up to Agrahayan 1382 B. S. and there was no arrear of rent outstanding except that of Poush 1382 B. S. for the deposit of which the defendant had applied. The defendant further stated that the Court might determine the defendant's arrears of rent after treating the deposits made with the Rent Controller as rent of the suit premises for the period from Baishakh 1380 B. S. to Agrahayan 1382 B. S. as rents already paid and permit the defendant to deposit Rs. 57/- towards rent of 1382 B. S. with interest. The learned Munsif has rejected the application under S. 17 (2) on the ground that it is a misconceived one and not maintainable.

6. The learned Advocate for the petitioner contends that there was a question whether the deposit of rent with the Rent Controller was valid or not and as such the learned Munsif should have determined what amount was payable by the defendant. The learned Advocate for the plaintiff contends that the application must be a bona fide one as laid down in the decision reported in (1958) 62 Cal WN 830. In the instant case, there is no dispute regarding the rate of rent. The defendant stated that he was not a defaulter and he had already deposited the rent with the Rent Controller up to the period of Agrahayan 1382 B. S. The only prayer of the defendant was to permit him to deposit the rent for Poush 1382 B. S. with statutory interest.

7. The question is whether the defendant raised any dispute as to the amount of rent payable by the application under S. 17 (2). In the case of Hindusthan Industrial Company v. Chandiprasad More, ((1975) 79 Cal WN 1017) it has been held that an application under S. 17 (2) of the West Bengal Premises Tenancy Act must have three elements : (a) There must be a dispute raised as to the amount of rent payable; (b) the tenant must make depo-

sits of all admitted arrears of rent within the statutory period; (c) the said deposits, if any, must be made along with an application praying for determination of the amount of rent payable. The defendant, in the instant case, has invited the attention of the Court to treat the deposits made with the Rent Controller as rents of the suit premises from Baishakh 1380 B. S. to Agrahayan 1382 B. S. as rents already paid. The point thus arises whether this application of the defendant should be considered to be an application under S. 17 (2). Section 22 of the Premises Tenancy Act deals with the question under what conditions rents deposited under S. 21 should be considered to have been validly deposited under that Section for purposes of clause (i) of sub-sec. (1) of S. 13. Section 22 (3) lays down that if the rent is deposited within the time mentioned in sub-sec. (1), and does not cease to be a valid deposit for the reason mentioned in sub-sec. (2), the deposit shall constitute payment of rent to the landlord as if the amount deposited has been valid legal tender of rent if tendered to the landlord on the date fixed by the contract for payment of rent when there is such a contract, or, in the absence of any contract on the 15th day of the month next following that for which rent is payable. In the case of Hindusthan Industrial Co. (supra) it has been held that in order to get the protection under S. 17 in its main part it is necessary for a tenant to re-deposit the rent so invalidly deposited with the Rent Controller or at least raise a dispute and have an adjudication under S. 17 (2) thereof.

8. It thus appears that as the tenant invited the Court to treat the rent deposited with the Rent Controller as valid deposits, it was necessary for the Court to determine whether the said deposit of rent with the Rent Controller was valid. The determination of this question is connected with the determination of the rent payable by the tenant. According to S. 17 (3), if the tenant fails to deposit or pay any amount referred to in sub-section (1) or sub-sec. (2) or sub-sec. (2A) within time, the tenant's defence against delivery of possession is liable to be struck out. So also, in order to get the benefit under S. 17 (4), the question of making deposit or payment as required by sub-sec. (1), sub-sec. (2) or sub-section (2A) will arise. The defendant has deposited the admitted arrear and along with it he has filed an application under

S. 17 (2). In dealing with this application it would be necessary to determine whether the deposits made with the Rent Controller are valid deposits or not.

9. In the result, the Rule succeeds and it is made absolute. The impugned order is set aside. The learned Munsif will dispose of the defendant's application under S. 17 (2) of the Premises Tenancy Act in accordance with law. There will be no order as to costs.

Order accordingly.

AIR 1982 CALCUTTA 207

SUDHINDRA MOHAN GUHA, J.

Sukhlal Mondal, Petitioner v. Bimal Krishna Biswas and others, Respondents.

Civil Rule No. 21 of 1981, D/- 3-9-1981.

Civil P. C. (5 of 1908), O. 39, Rr. 1 and 2 and S. 115 — Suit for declaration that order of suspension of plaintiff was illegal and for permanent injunction — Plaintiff is entitled to temporary injunction if he makes out good case for going to trial — Refusal by Courts below without considering whether plaintiff had good prima facie case — High Court will interfere in revision.

In a suit for declaration that the order of suspension of the plaintiff by the authorities was illegal and for permanent injunction restraining the authorities from proceeding further with the order of suspension, the plaintiff would be entitled to temporary injunction for maintaining status quo till the disposal of the suit if he establishes that he has a good case for going to trial and the suit itself would become infructuous if temporary injunction as prayed for is refused. Refusal by the Courts below to grant temporary injunction without looking into the prima facie case of the plaintiff whether there were good grounds to challenge the legality or otherwise of the order of suspension constitutes material irregularity in the exercise of jurisdiction justifying interference by the High Court in revision under S. 115. AIR 1973 SC 76, Rel. on.; AIR 1976 SC 2621, Ref.

(Paras 9, 10)

Cases Referred : Chronological Paras

AIR 1976 SC 2621 9

AIR 1975 SC 2238 : 1975 Lab IC 1651 10
(1975) 1 All ER 504 : 1975 AC 396 : (1975)

2 WLR 316, American Cyanamid Co. v. Ethicon Ltd. 8

AIR 1973 SC 76 : 1973 Lab IC 407 9

AIR 1970 SC 1494 : 1970 Lab IC 1332 10

LY/AZ/G18/81/GNB/SNV/H

Bholanath Sen, Nitish Bhowmick, Mirza Md. Faruque, for Petitioner; Tapash Chandra Roy, Sunit Kr. Panja, for Administrator and the School; Arun Prokash Sircar and Pulak Ranjan Mondal, for the Board.

ORDER :— This application for revision arises out of an order passed by Sri B. K. Dutta, Additional District Judge, 8th Court, Alipore, affirming the order dated 25th Sept. 1980 passed by the Munsif, 5th Court, Alipore, whereby the plaintiff's application for temporary injunction was rejected.

2. The petitioner as plaintiff commenced a suit being title suit No. 408 of 1980 in the court of Munsif 5th Court at Alipore for a declaration that the appointment of Mr. B. K. Biswas O. P. No. 1 dated 16-5-1980 by the President, West Bengal Board of Secondary Education as Administrator was illegal and void and for a further declaration that the order of suspension of the plaintiff petitioner issued by O. P. No. 1 on 11-8-1980 was also void and illegal. There was also a prayer for permanent injunction restraining the O. Ps. from proceeding further with the order of suspension dated 11-8-1980 and from interfering in any way with the function of the petitioner as the Headmaster of the said school.

3. In the same line there was an application for temporary injunction under Order 39, Rr. 1 and 2 of the Civil Procedure Code read with S. 151 of the Code. It was stated in the plaint that Barisha Vivekananda High School was upgraded and recognised by the Board on 1st of January, 1968. The petitioner is said to be the founder and approved Headmaster of the School. On the complaint made by the rival party enquiries were made into such complaint many a time during 1977-78. On 14-5-1979 the Managing Committee was superseded and one Sri P. K. Chatterjee was appointed Administrator by the Board. The present petitioner was charge-sheeted by him on 21-3-1980 and 26-3-1980. But both the charges were ultimately dropped.

4. On transfer of Sri P. K. Chatterjee, Sri B. K. Biswas, O. P. No. 1 was appointed as Administrator on 13-5-1980. But he took over charge from Sri P. K. Chatterjee on 25-7-1980. Mr. Biswas also issued charge-sheet on 11-8-1980 against the petitioner which is said to be a verbatim reproduction of the previous charge-sheet issued by the Administrator on 4-2-1980.

5. Along with the order of charge-sheet the Administrator issued an order

of suspension with immediate effect. This very order of suspension has been challenged to be illegal and invalid.

6. Learned Munsif on hearing both sides and on consideration of the affidavits sworn by the parties was pleased to reject the petitioner's application for temporary injunction and vacated the ad interim order of injunction granted earlier on 25-9-1980. The petitioner thereafter came in appeal before the learned District Judge, 24 Paraganas. This was registered as Misc. Appeal No. 567 of 1980. This appeal as stated earlier was dismissed by the learned Additional District Judge.

7. It is against this order of dismissal of the said miscellaneous appeal the petitioner has come up in revision. Mr. Bholanath Sen, learned counsel for the petitioner, drawing my attention to Rule No. 28 (9) (VIIa) of the Board of Secondary Education, argues that a teacher or an employee can be suspended where such suspension is in the interest of the Institution. He also places the charge-sheet Annexure E to the application filed in this court wherein the order of suspension was made in the following lines:

"As the charges to be enquired into against Sri Mondal are very serious in nature involving the Head of the teaching staff of the school the undersigned considers it necessary that pending the enquiries Sri Mondal should be placed under suspension and therefore the undersigned hereby placed Sri Mondal under suspension with immediate effect". Thus it is argued by Mr. Sen that the order of suspension was made as it was considered necessary by the Administrator. There is nothing to show that such suspension was in the interest of the Institution. Mr. Tapas Chandra Roy, learned counsel for the O. P. 1 on the other hand contends that order of suspension in the interest of the institution need not be noted in the order of suspension itself. It is a matter of satisfaction to the issuing authority. The order of suspension would not have been issued had that not been in the interest of the Institution. So, this is a debatable point which should be decided in trial.

8. On the materials on record it is contended by Mr. Sen that the plaintiff/petitioner was successful in establishing that there was a prima facie case for going to trial. Reference to the decision in *American Cyanamid Co. v. Ethicon Ltd.* reported in (1975) 1 All ER 504 was made to show that there was no rule of law

that the court was precluded from considering whether, on a balance of convenience, an interlocutory injunction should be granted unless the plaintiff succeeded in establishing a prima facie case or a probability that he would be successful at the trial of the action. All that was necessary was that the court should be satisfied that the claim was not frivolous or vexatious i.e. that there was a serious question in the trial.

9. Mr. Arun Prokas Sircar learned Advocate for the W. B. Board of Secondary Education, O. P. No. 4 adopts the arguments advanced by Mr. Ray. Both of them contend that this court of revision would not interfere with the concurrent findings of both the courts below. They are also of the view that the temporary injunction refused by both the courts should not (sic) be refused by a court of revision. Reliance is placed on the decision in the case of *Municipal Corporation of Delhi v. Suresh Chandra Jaipuria*, reported in AIR 1976 SC 2621. It is held therein by the Supreme Court that the interference by the High Court with the concurrent findings was unjustified as the court had overlooked the principle governing interference under S. 115 of the Civil P. C. Reliance is also placed on the decision in the case of the *Managing Director, Hindusthan Aeronautics Ltd. Bangalore, Hyderabad v. Ajit Prasad Tarway* reported in AIR 1973 SC 76. The Supreme Court held therein that the High Court should not interfere even if the order is right or wrong or in accordance with law or not unless it has exercised the jurisdiction illegally or with material irregularity. In this case there has been material irregularity in the exercise of jurisdiction as the courts below did not look into the prima facie case of the petitioner whether there were good grounds to challenge the legality or otherwise of the order of suspension.

10. Mr. Ray lastly contends that civil court had no jurisdiction to entertain a suit of this nature. The dispute as to the jurisdiction should be taken at the earlier stage. It would not appear that such objection had ever been raised in the courts below. Anyway, Mr. Ray relies on the decision in the case of *The Premier Automobiles v. Kamalakar Shantaram Wadke* reported in AIR 1975 SC 2238 to show the principles on which a civil court under S. 9 of the Code can assume jurisdiction. On the basis of this decision it is contended that if the dis-

pute does not relate to enforcement of any right under the law of the Secondary Education Board of West Bengal, in that case the remedy would lie in the civil court. According to him, the provision for appeal has been provided in the statute itself, under R. 22. Reliance is also placed on the decision in the case of V. P. Gindroniya v. State of Madhya Pradesh, reported in AIR 1970 SC 1494. He specially draws my attention to paragraphs 6, 7 and 8 of the report at p. 1496. The sum and substance of his contention is that as the provision for appeal has been provided in the statute itself the civil court has been ousted of its jurisdiction to entertain a suit of this nature. It should not be overlooked that the present suit was instituted for certain declaration and the validity of the order of suspension has been challenged on the ground of non-compliance with the statutory rule. In the context of the matter the petitioner cannot be said to have chosen a wrong forum. Anyway, these matters require due consideration on the evidence to be adduced by the parties. As the point of jurisdiction was not questioned earlier, I do not propose to bind the lower courts by making any observation at this stage. This much only can be said that the plaintiff has been successful in establishing that he has a good case for going to trial. Again the suit itself would become infructuous if an order of injunction as prayed for is refused.

11. Thus, on hearing of arguments of all the parties concerned and on consideration of entire facts and circumstances of the case and materials on record what I propose to suggest is that all the parties would maintain status quo till the disposal of the suit filed by the plaintiff/petitioner.

12. This revisional application is thus disposed of and the Rule is also disposed of. There will be, however, no order as to costs.

Order accordingly.

AIR 1982 CALCUTTA 209

P. C. BOROOAH, J.

Calcutta Landing and Shipping Co. Ltd., Petitioner v. Collector of Calcutta and others, Respondents.

Matter No. 759 of 1980, D/- 12-8-1981.

LY/BZ/G273/81/TVN/MVJ/H

1982. Cal./14 V G-16

Stamp Act (2 of 1899), Ss. 12 (1) (a) and 63 — Stamp Rules, 1925, R. 17 — Government of West Bengal Notification No. 6714 AST dated 18-7-1941 — Share transfer deed — Company refusing to register transfer inter alia for non-cancellation of adhesive stamps — Company cannot be said to have violated R. 17 of the Rules for attracting penalty under S. 63 — The transferor or the transferee should have initially cancelled the stamps.

Under S. 12 (1) (a) of the Stamp Act and the W. B. Government Notification either the transferor or the transferee was bound to initially cancel the adhesive stamps affixed on the share transfer deeds before presenting them along with the share scrips to the company for registration of the transfer. Where the company refused to register the transfer on the ground inter alia that the adhesive stamps affixed on the deeds were not cancelled, the company could not be held to have violated R. 17 of the Stamp Rules requiring it to cancel such stamps by perforation or otherwise and penalised under S. 63 of the Act. (Paras 6, 7)

Gautam Chakraborty, for Petitioner;
Shyamal Sen, for Respondents.

ORDER :— One D. L. Sen, a shareholder of the petitioner Calcutta Landing & Shipping Co. Ltd. (hereinafter 'the company') sold 9 shares of the said Company to one Phani Bhusan Sarkar, who applied to the company for registration of the said shares and deposited the original share scrips for necessary registration. The Company did not register the transfer on the ground that the signature of the transferor on the transfer deed did not tally with the specimen signature of the transferor maintained by the Company and also because the Adhesive Stamp on the Transfer Deed was not cancelled. Phani Bhusan Sarkar preferred an appeal against the decision of the company Law Board under S. 111 of the Companies Act, 1956. After hearing the contention of the Company, the Company Law Board by an order dated June 18, 1979 accepted the company's contention but referred the matter to the Collector of Stamps, Calcutta for adjudication of duty, penalty etc. under the provisions of the Indian Stamp Act.

2. On January 29, 1980 the company received a Notice bearing Memo No. 6 RS dated January 24, 1980 along with a copy of order dated July 17, 1979 passed by the Collector of Calcutta to the effect

that the Company was directed to pay a penalty of Rs. 50/- under Sec. 63 of the Indian Stamp Act as the Company had failed to cancel the Adhesive Stamp as required under Rule 17 of the Indian Stamp Rules, 1925 read with Government of West Bengal Notification No. 6714 AST dated 18-7-1941. A copy of the order dated July 17, 1979, which is annexed to the petition and marked with the letter 'C', is the subject matter of challenge in this Rule.

3. I have heard Mr. Gautam Chakraborty, appearing on behalf of the Company and Mr. Shyamal Sen, appearing on behalf of the respondents.

4. Section 12 (1) (a) of the Stamp Act reads as follows :

"12 (1) (a). Whoever affixes any adhesive stamp to any instrument chargeable with duty which has been executed by any person shall, when affixing such stamp, cancel the same so that it cannot be used again;"

5. The Government of West Bengal Notification dated 18-7-1941 which amended R. 17 of the Indian Stamp Rules, 1925 and which was referred to by the Collector in the impugned order reads as follows :—

"'Share Transfer' stamps affixed to deeds of transfer of shares, shall, before effect is given to the transfer by the joint stock company concerned, be cancelled by the Company by means of a punch which can perforate either the word "cancelled" or an abbreviation thereof, namely, "canceled" or "cancelled" or the initials of the company, in sufficient prominence to render the Stamps permanently unfit for reutilisation even though the stamps were previously cancelled in accordance with Section 12 of the Indian Stamp Act, 1899. In case a company fails so to cancel the share transfer stamps as provided by this Rule the Company shall be liable to the penalty prescribed by S. 63 of the Indian Stamp Act, 1899."

6. Reading the aforesaid section of the Indian Stamp Act together with the Notification, it is clear that the initial cancellation of the adhesive stamp on the share transfer deed has to be done either by the transferor or the transferee before the transfer deed along with the share scrip is presented to the Company for registration of the transfer. After this is done, then the duty is cast on the Company under the aforesaid Notification to perforate the stamp which has already

been cancelled. As the initial cancellation was not done in the instant case, the company rightly refused to register the shares and the Collector erred in holding that the Company had committed an offence by not perforating the stamp in accordance with the aforesaid Notification.

7. In the circumstances, I make the Rule absolute and quash the impugned order dated 17-7-1979. There will be no order as to costs.

Petition allowed.

AIR 1982 CALCUTTA 210

RAMENDRA MOHAN DATTA

AND C. K. BANERJI, JJ.

Official Trustee, West Bengal, Petitioner v. Lal Chand Mullick, Respondent.

Appeal No. 90 of 1981, Matter No. 2886 of 1980, D/- 17-6-1981.

Limitation Act (36 of 1963), S. 5 — Application for condonation of delay in filing appeal — Application by Official Trustee of West Bengal being one of the trustees of public charitable trust — Official Trustee not guilty of negligence nor responsible for acts of his employees — Held, delay should be condoned in special circumstances of the case and in the interest of trust estate and in the interest of public in general. AIR 1968 SC 222, Foll. (Paras 11, 17, 18, 19)

Cases Referred : Chronological Paras
AIR 1968 SC 222 : 1968 Lab IC 201 19
AIR 1962 SC 361 : 1961 All LJ 815 17

RAMENDRA MOHAN DATTA, J. :—

This is an application under S. 5 of the Limitation Act, 1963 for condonation of delay in filing the appeal from the order of the Court below passed on Jan. 7, 1981.

2. The matter relates to the trust estate created by Raja Debendra Nath Mullick by the deed of trust dated 28th Feb., 1919. It is a public charitable trust. The trust comprises of, inter alia, the premises No. 17 Sooterkin Lane, Calcutta now known as 22, Parulla Sarkar Street. The object of the trust amongst other is for the eradication of leprosy. It is in respect of this trust estate that the order appealed from has been passed by the Court below in favour of a member of the settlor's family for his personal benefit. The Official Trustee of West Bengal is one of the trustees in respect of the said trust estate of Raja Debendra Nath

Mullick. The Official Trustee wants to prefer the appeal herein but is late in doing so by a few days due to default or laches on the part of the dealing assistant.

3. The respondent herein is Lal Chand Mullick. Lal Chand Mullick is a member of the family of the settlor. It appears that he is already a tenant under the appellant Official Trustee in respect of several premises of the said trust estate, namely, premises Nos. 12A to 12F Justice Manmatha Mukherjee Road, 22, Prafulla Sarkar Street and 2 and 2/1 Srinath Babu Lane, Calcutta. The respondent pays a monthly rent of Rs. 707/- to the appellant in respect of the said premises of which he is a tenant including the premises No. 17, Sooterkin Lane now known as 22, Prafulla Sarkar Street, Calcutta.

4. It is stated that the said premises No. 22 Prafulla Sarkar Street is absolutely separated from the land measuring approximately 1100 sq. ft. lying adjacent thereto and numbered as 22/1A, Prafulla Sarkar Street and the tenancy of the respondent Lal Chand, in respect of the said Premises No. 22, Prafulla Sarkar Street, has nothing to do with the said premises No. 22/1A, Prafulla Sarkar Street, Calcutta. The respondent, however, claims that the said premises No. 22/1A, Prafulla Sarkar Street is included in his tenancy under the appellant. The Official Trustee by his letter dated 20th Nov. 1978 stated that the said premises No. 22/1A, Prafulla Sarkar Street is not included in the tenancy of the said premises No. 22, Prafulla Sarkar Street, Calcutta. The relevant part of the said letter being Annexure 'A' to the said petition is set out below :

"To

Sri Lal Chand Mullick,
25/1A, Debendra Mullick St.,
Calcutta.

Dear Sir,

With reference to your letter dt. 26-10-1978 I have to state that you are a tenant of the premises Nos. 12A to F, Justice Manmatha Mukherjee Road, 22, Prafulla Sarkar Street and 2 and 2/1 Srinath Babu Lane at a rent of Rs. 707/- p. m. The premises No. 22/1A, Prafulla Sarkar St. is not included in the tenancy of this office. As such the question of giving permission by the Official Trustee to con-

struct a building on the land at 22/1A, Prafulla Sarkar St. does not arise at all.

Yours faithfully,

Sd/- A. K. Ghosh,

Official Trustees of
West Bengal."

5. On or about 5th Dec. 1980, the application herein was made on behalf of Lal Chand Mullick for an order on the following prayers:

"(a) leave be granted to your petitioner to construct a four storeyed building at the vacant land measuring about 1100 square feet at premises No. 22/1A, Prafulla Sarkar Street, Calcutta at the costs and expenses of the petitioner and according to the proposed plan annexed hereto subject to the compliance of all appropriate laws relating thereto including Calcutta Municipal Act.

(b) The Official Trustees of West Bengal to grant a lease of the said proposed four storeyed building to be constructed at premises No. 22/1A, Prafulla Sarkar Street, Calcutta to the petitioner for a period of 99 years from the date of completion of the construction of the said proposed building with power to the petitioner to sub-let the said building as a part and/or as a whole.

(c) Upon execution of the said Deed of Lease for 99 years in favour of the petitioner, the petitioner do execute a deed relinquishing all rights, title and interest of ownership of the said building in favour of the said Raja Debendra Mullick Trust except as mentioned in the said Deed of Lease to be executed in terms of prayer (b) above.

(d) The petitioner do pay an increased rent of 15% over and above the present rent payable by the petitioner in respect of the said proposed building on and from the date of completion of construction of the said proposed building;

(e) Leave be given to the petitioner to construct 2 floors over and above the existing structure at premises No. 22, Prafulla Sarkar Street, Calcutta, at the cost and expenses of the petitioner.

(f) The Official Trustee of West Bengal do grant a lease of the said proposed two floors to be constructed over and above the existing structure at the premises No. 22, Prafulla Sarkar Street, Calcutta to the petitioner for a period of 99 years from the date of completion of the construction of the said proposed two floors with power to the petitioner to sublet

the said floors as a part and/or as a whole.

(g) Upon execution of the said Deed of Lease for 99 years in favour of the petitioner, the petitioner do execute a Deed relinquishing all right, title and interest of ownership of the said two floors in favour of Raja Debendra Mullick Trust except as mentioned in the said Deed of Lease in terms of prayer (f) above.

(h) The petitioner do pay an increased rent of 20% over and above the present rent payable by the petitioner in respect of the said two floors from the date of completion of construction of the said floors.

(i) Leave be given to your petitioner to carry out the general and essential repairs to the premises No. 22, Prafulla Sarkar Street, Calcutta and the costs for such repair be paid by the Official Trustee of West Bengal to your petitioner out of the funds in his hands.

(j) Cost of and incidental to this application be paid by the Official Trustee of West Bengal to the petitioner.

(k) Further and other order and/or orders be passed direction and/or directions be given as will afford complete relief to your petitioner."

6. The Official Trustee filed an affidavit and opposed the said prayers. The learned Judge after hearing the parties passed an order on 7th Jan. 1981 inter alia, directing certain terms to be included in the lease to be executed between the parties and certain directions were given by the said order. The order is set out in full as follows :

"It is ordered that the said petitioner be at liberty to construct a four storeyed building at the vacant land measuring about one thousand one hundred square feet at the premises No. 22/1A, Prafulla Sarkar Street, Calcutta, at the said petitioners own costs and expenses according to the plan annexed to the said petition subject to the compliance of all appropriate laws and subject to the sanction of the plan by the Corporation of Calcutta and it is further ordered that the said Official Trustee of West Bengal do grant a lease of the said proposed four storeyed building to be constructed at the said premises No. 22/1A, Prafulla Sarkar Street, Calcutta to the said petitioner for a period of ninety-nine years from the date of completion of construction of the said building with power to the said petitioner to sublet the proposed building in part or as a whole. And it is

further ordered that upon execution of the said deed of lease for ninety-nine years in favour of the said petitioner the said petitioner shall execute a deed of relinquishment of all his right, title and interest of ownership in the said building in favour of the Raja Debendra Mullick Trust except as mentioned in the said deed of lease to be executed as aforesaid and it is further ordered that the said petitioner do pay an increased rent of twenty-five per cent over and above the present rent payable by the said petitioner in respect of the said proposed building on and from the date of completion of construction of the proposed building and that the lease to be executed between the parties shall also include escalation term of such rent at intervals of every eleven years by five per cent and it is further ordered that the said petitioner be also at liberty to construct two floors over and above the existing structure at premises No. 22, Prafulla Sarkar Street, Calcutta, at the costs and expenses of the said petitioner and that lease be given by the Official Trustee of West Bengal abovenamed of the said proposed two floors to be constructed over and above the existing structures at the said premises No. 22, Prafulla Sarkar Street, Calcutta, to the said petitioner for a period of ninety-nine years only from the date of completion of the construction of the said proposed two floors with powers to the said petitioner to sublet the said floors as a part and/or as a whole and it is further ordered that upon execution of the deed of lease in respect of the said two floors to be constructed as aforesaid for ninety-nine years in favour of the said petitioner, the said petitioner shall execute a deed of relinquishment of all his right, title and interest as owner of the said two floors in favour of Raja Debendra Mullick Trust except as mentioned in the said deed of lease and it is further ordered that the said petitioner do pay an increased rent at twenty-five per cent over and above the present rent payable by the said petitioner in respect of the said two floors from the date of completion of construction of the said two floors with escalation of rent at intervals of every eleven years by five per cent and it is further ordered that the said petitioner be at liberty to carry out the general and essential repairs to the premises No. 22, Prafulla Sarkar Street, Calcutta and that the costs for such repairs as aforesaid shall be paid by the said Official Trustee of West Bengal to

the said petitioner if any fund is available in his hands. And it is further ordered that the said petitioner do also bear the increased corporation rates and taxes in respect of the proposed new building as also of the proposed two floors to be constructed on the old building and that both the shares of such taxes shall be paid by the said petitioner. And it is further ordered that the costs of and incidental to this application assessed at Rupees three hundred and forty be paid by the said Official Trustee of West Bengal to the said petitioner and it is further ordered that the said Official Trustee do also retain and pay his own costs of and incidental to this application out of the funds in his hand and it is further ordered that the Official Trustee of West Bengal do act on a copy of the minutes of this order signed by an officer of this Court being produced before them."

7. It prima facie appears that, on the face of it, the said order suffers from certain infirmities being contrary to the provisions of the West Bengal Premises Tenancy Act and the said order, if allowed to stand, would be highly prejudicial to the interest of the trust estate as would appear from the minutes of the meeting of the Official Trustee held on 2nd Aug., 1979 which is set out as follows:—

"Meeting held in the Chamber of Official Trustee, West Bengal.

Present:— 1. Sri Roxhomay Mullick

2. Sri Balaj Chand Mullick, representing Sri Durga Charan Mullick,

3. Sri Ajit Kumar Ghosh— Official Trustee.

Official Trustee requests the members present to consider the question of effecting repair to premises No. 22, Prafulla Sarkar Street as requested by Sri Lal Chand Mullick in his letter dated 18-4-79. The members present state that the Official Trustee should not take up the repairs at this stage. They also state that Sri Lal Chand Mullick is utilising the buildings for his own benefit by way of collecting rent from persons inducted by him as tenants in the said buildings. In the circumstances they request the Official Trustee to enquire what amount of rent Sri Lal Chand Mullick is realising from the alleged sub-tenants. Because in terms of the deed rent realised and for any income derived from the buildings should go for charities and that in no case such income should be utilised by any beneficiary for his personal gain. They also request Official Trustee to write

to Sri Lal Chand Mullick to supply the names of the persons inducted in all the buildings under his tenancy and the rents paid by such tenants.

Official Trustee states that in his letter dt. 5-7-79 Sri Lal Chand Mullick has sought the permission by Official Trustee for erecting two more floors over the premises No. 22, Prafulla Sarkar Street. The members present are not agreeable to such proposal at the present moment.

There being no other item to be discussed. The meeting ended at 1 p.m. Engaged one hour from 12 Noon to 1 P.M.

Sd/- A. K. Ghosh

Official Trustee of
West Bengal.
2-8-79."

The Official Trustee sent a copy of the said Minute to Sri Lal Chand Mullick by his letter dated 10-8-79, a copy whereof is set out as follows:

"Sri Lal Chand Mullick,
25/1A, Debendra Mullick Street,
Calcutta-700073.

Dear Sir,

With reference to your letter dated 18; 4-7-79 I have to enclose herewith a copy of the minutes of the meeting held on the 2nd Aug. 1979 in my Chamber with the present senior male members of the family of the settlor of the above-mentioned trust,

Yours faithfully,

Sd/- A. K. Ghosh
Official Trustee of
West Bengal.

Thereafter, the Deputy Official Trustee by his letter dated 27-10-79 addressed a letter to Lal Chand Mullick to the following effect:

"To

Sri Lal Chand Mullick,
25/1A, Debendra Mullick St.,
Calcutta-700073.

Trust Raja D. N. Mullick Charitable Fund.

Re: Premises No. 22, Prafulla Sarkar Street, 12A, Justice Manmatha Nath Mukherjee Road, 2 and 2/1 Sri Nath Babu Lane, Calcutta.

Dear Sir,

Please refer to this office letter No. 2969 dated 19-8-79 with which a copy of the minutes of the proceedings of the meeting held on 2-8-79 was sent to you. But no report as to the names of the sub-tenants of the above-mentioned premises

and rents paid by them to you has yet been received in this office.

I am directed to request you to send the aforesaid report to this office without further delay.

Yours faithfully,

Sd/- R. N. Mitra,

Dy. Official Trustee
of West Bengal.

8. From the above, it appears that even though it was decided in the meeting of the Official Trustee that the prayers of Lal Chand Mullick should not be granted in the interest of the estate yet he pursued the matter and ultimately got the order from the Court below. It appears that the senior male members of the family of the settlor were duly consulted by the Official Trustee and the said members objected to the grant of said prayers of Lal Chand and their complaint was recorded that Lal Chand was utilising the building for his own benefit by way of collecting rent from persons inducted by him as tenants in the said buildings. The names of the sub-tenants were called for but he neither replied thereto nor did he supply those names. In this background he obtained the order from the Court below and the Official Trustee decided that the appeal has to be preferred and sent instructions to the advocate on record to put in a requisition on Jan. 21, 1981. That was after 13 days of the passing of the order. So at the very initial stage the applicant lost 13 days from the period of limitation. On 20th Feb., 1981 the Official Trustee went on leave and joined his office from leave on Mar. 21, 1981. In the meantime on Mar. 2, 1981, the order was completed and drawn up and on Mar. 5, 1981 the certified copy was made ready for delivery by the Department. Accordingly, after deducting the period of time requisite, the time to file the appeal expired on Mar. 22, 1981. The present petition was made ready on Apr. 7, 1981 and on 8th Apr., 1981 it was moved before us.

9. The total period of delay was for about 17 days and the explanation that is required to be given under S. 5 of the Limitation Act is in respect of the period from 22nd Mar., 1981 till 8th Apr., 1981. We gave an opportunity to the applicant Official Trustee to file a supplementary affidavit for explaining the delay for the said period. Pursuant thereto an affidavit has been filed by the Official Trustee as also by the dealing assistant. It appears that the affidavit-in-

reply was also filed by the dealing assistant, Bishnu Prasad Mullick on May 5, 1981. Bishnu Prasad Mullick affirmed the supplementary affidavit on May 21, 1981 in addition to the affidavit already affirmed by him on April 7, 1981, giving further facts as to what had happened to him for which the Official Trustee could not file the appeal in time. The further affidavit as directed by this Bench was affirmed by the Official Trustee himself also on 21st May, 1981.

10. From the order as drawn up it does not appear that the Official Trustee used any affidavit-in-opposition before the Court below but only engaged an advocate to appear on his behalf. But actually such an affidavit was filed by the said Bishnu Prasad Mullick. It appears that the learned Judge gave certain directions in addition to the prayers made by the petitioner. The effect of the order, *prima facie*, appears to be that although the Official Trustee did not consent to the subletting of the premises yet by the Court's directions and orders the same was allowed. It is contended that such directions and orders are contrary to the interest of the estate and the provisions of the West Bengal Premises Tenancy Act, 1956. The allegation of the Official Trustee as against the respondent Lal Chand is that he has illegally sublet the said premises No. 22, Prafulla Sarkar Street, to various persons without the consent of the Official Trustee. The said fact of illegality in subletting the said premises was pointed out at the meeting held on 2nd Aug., 1979 to the Official Trustee by the senior members who are also trustees, namely, Durga Charan Mullick and Rohomoy Mullick. A copy of the said minutes of the meeting was sent to Lal Chand. By a subsequent letter the Deputy Official Trustee also required Lal Chand to furnish the names of the sub-tenants but no reply was received in the office of the Official Trustee in respect thereto.

11. *Prima facie*, there is a clear picture of illegality in respect of the transaction which is highly prejudicial to the interest of the trust estate. It is highly prejudicial to the interest of the public at large for whose cause the income of the estate has to be spent. Instead, by by-passing the orders of the Official Trustee, Lal Chand has been trying to make use of the profits of the estate for his own benefit by depriving the members of the public in respect thereto. In this proceeding we are not to question

how he became a tenant and how he started subletting the same tenanted portion and realising rent for his own use to the detriment of Trust estate. We are now concerned with the proposed tenancy that is sought to be created by the order passed by the Court below. At this stage it is not necessary to make any further comment on the order passed herein except to say that this is a fit case where the Official Trustee should have an opportunity to file the appeal in the interest of the trust estate and in the interest of the public in general.

12. Looking at the background of this case and the facts as disclosed herein, it appears to us that everything is being sought to be legalised, in spite of opposition, by obtaining orders from the Court and in this matter it seems that the dealing assistant has undoubtedly lent a helping hand in allowing the time to file the appeal to pass by. The explanation that he has given is absolutely hopeless. He came to the office but at the same time did not think of looking into this urgent file. His excuse was that he had to go to Alipore Court and from there he had to go back home because of his father's illness. In other words, he was going to office but not looking after his office work entrusted with him. This is nothing but a deliberate attempt on his part to pass over the time for preferring the appeal. He did not bring it to the notice of the Official Trustee as to what was happening in the matter and that the time to prefer the appeal was expiring. He did not even bring it to the notice of the Deputy Official Trustee so that he could come forward and attend to the matter in the absence on leave of the Official Trustee. It is true that no allegation has been made against the dealing assistant to implicate him but it is quite apparent that full advantage has been taken of the absence on leave of the Official Trustee. During the leave taken by the Official Trustee it is not expected that the Official Trustee would always be conscious about the position of each and every file. A big office is being maintained for the purpose of enabling him to know about the urgent matters by putting up the files before him. It appears that his attention was not drawn to the fact that the appeal was going to be barred by limitation. Before going on leave, on 16-2-81 the Official Trustee instructed the dealing assistant Bishnu Prasad Mullick to contact the Advocate on record who had already been instructed to take

steps for obtaining the certified copy of the said order dated 7th Jan., 1981 so that the appeal might be preferred against the said order. The said dealing assistant however contacted the Advocate-on-Record of the appellant, Shri K. K. Basu to take necessary steps on the matter only on March 6, 1981. It is stated that from 7th March, 1981 the said dealing assistant could not join his duties as his father became seriously ill and had to go on leave till 18th March, 1981. This again is very significant. If he was on leave somebody else should have been made aware of the position and the file should have been handed over to another dealing assistant with proper instructions or at least that should have been brought to the notice of the Deputy Official Trustee. Even after joining his office he had to go back home to attend to his ailing father and as such he could not contact the Advocate-on-record until 1st April, 1981. That is the explanation with regard to the said period. That was the reason why he could not be aware of the fact that the certified copy was obtained in the meantime, until 1st April, 1981. It is said that on the next day, i.e. 2nd April, 1981, the Official Trustee was told by the said dealing assistant that the dealing assistant came to know that the certified copy in the above matter was obtained by his Advocate-on-record on 17-3-81. In the petition it is stated that immediately thereafter, that means, after 2nd April, 1981, the Official Trustee instructed the Advocate-on-record to brief the counsel for drafting a memorandum of appeal and a petition for condonation of delay in filing the above appeal. 3rd Apr., 1981 was a Bandh day in West Bengal and as such no counsel could be briefed on that day. On 4th April, 1981, counsel could be briefed to draft the necessary petition and memorandum of appeal and the same was returned by the said counsel on 6th April, 1981 to the Advocate-on-record. On 7th April, 1981 the papers were made ready for filing all this will appear from the petition filed by the Official Trustee.

13. The affidavit-in-reply has been filed by Bishnu Prasad Mullick on behalf of the Official Trustee. In the said affidavit he was reiterated the statements made in the petition.

14. As already observed we directed further affidavits to be filed and pursuant thereto both the Official Trustee and Bishnu Prasad Mullick filed separate affidavits. It is necessary to record Bishnu

Prasad's own version of how he failed to perform his duties. He said therein that he had to go to Alipore Court everyday from 18th March, 1981 to 31st March, 1981 in connection with Execution Case No. 3 of 1962. The said Execution case in Alipore Court involved sale of mortgage property for realisation of decretal dues of the mortgage of the Administrator General of West Bengal amounting to Rs. 3,00,000. The auction sale was being conducted by the learned District Judge, Alipore. He had to appear in the Alipore Court for giving instructions to the Advocate appearing on behalf of the Administrator General. At one stage there was talk of compromise and settlement for payments by instalments and the lawyers engaged in the matter specifically directed the deponent to apprise them of all the facts and circumstances of the case. During that period he used to go back home from Alipore Court after taking steps therein as he was in a very disturbed state of mind and as such there was no scope for him to contact the Advocate-on-record during the said period. The deponent said that he received the information that the certified copy was obtained by the Advocate-on-record on 17th March, 1981. He came back to the office to inform the Official Trustee about the said fact but he had to go to Writers Building in connection with some official work. The said fact could not be communicated to the Official Trustee. On the 2nd April, 1981 he informed the Official Trustee about the said fact that the certified copy had already been obtained by him when he was directed immediately to take steps for preparing the appeal and, accordingly, necessary instructions were sent to the Advocate-on-record on that day.

15. In the further affidavit filed by the Official Trustee it is stated that he was on leave with effect from 20th Feb., 1981 to 19th March, 1981 and he joined his duties on Monday, the 21st March, 1981. 20th March, 1981 was a holiday on account of Doljatra festival. 21st March, 1981 was a Saturday and the office closed at 2 P.M. Much work could not be done except disposing of certain important files and certain routine business. 22nd March, 1981 being a Sunday the office was closed. He stated that on or before going on leave he instructed the dealing assistant Bishnu Prasad Mullick who was looking after the matter to contact the Advocate-on-record to take steps for obtaining the certified copy of the order dated 7th Jan.,

1981 so that the appeal might be preferred against the said order. According to the Official Trustee the dealing assistant contacted the Advocate-on-record on several occasions up to 6th March, 1981 but from 7th March, 1981 he could not join his duties and went on leave on the ground of his father's illness. He joined his duties on 18th March, 1981 and had to go to Alipore Court from office almost every day in connection with Execution Case No. 3 of 1962 till 31st March, 1981 during which period he had to go back home from Alipore Court after taking necessary steps as his father was lying ill and as such even though the Official Trustee had earlier instructed him to contact the Advocate-on-record he could not do so during the said period. The Official Trustee was informed of the fact of obtaining the certified copy by the Advocate-on-record on 17th March, 1981 by the said dealing assistant on 2nd April, 1981. Immediately, he gave instructions to take necessary steps so that the appeal could be filed.

16. We are satisfied that from 2nd April, 1981 till the appeal was made ready on 7th April, 1981 the explanation is satisfactory.

17. With regard to the period from the expiry of the period of limitation till 1st April, 1981 the explanation does not appear to be quite satisfactory. The question before us is whether the said delay in filing the appeal should be condoned or not. The principle has been laid down in several decisions of the Supreme Court, particularly, in *Ramlal v. Rewa Coalfields Ltd.*, AIR 1962 SC 361. The matter relates to a public charity in which public in general is interested and it appears that the public charity has undoubtedly suffered and has been suffering when placed in charge of a dealing assistant whose conduct has been sufficiently highlighted hereinabove to show in what way he has caused tremendous prejudice and hindrance to the filing of this appeal. It appears that full advantage has been taken of the absence of the Official Trustee on leave from Feb. 21, 1981 to Mar. 20, 1981 and the time was allowed to pass. We are of the view that the Official Trustee is not guilty of negligence or inaction in respect of the said period of delay and in a situation like this we should not go to the extent of saying that he is responsible for the acts of his employees. It is not the trustee but the trust itself which would otherwise suffer the consequences.

18. In the facts and circumstances of this case, should this Court stick to the strict procedural principles and allow the illegality to be perpetrated by refusing this application for the delay of a few days due to such unusual circumstances and cause prejudice to the interest of the general public and of the said trust estate?

19. In my opinion, in the special facts and circumstances of this case, as stated hereinabove, the delay from the expiry of the date of preferring the appeal till 1st Apr. 1981 should be condoned. In a few later decisions the Supreme Court has relaxed the principle to some extent considering the special facts and circumstances of such case. In this connection reference may be made to the decision in the case of Sarpanch, Lonand Gram Panchayat v. Ramgiri Gosavi, reported in AIR 1968 SC 222. Accordingly, in this case, since there are special considerations in condoning the delay, after careful consideration, we have come to the conclusion that the delay for the said period should be condoned.

20. We have gone into the facts and analysed the same in details for the purpose of indicating how in a specially ingenious manner in spite of opposition from the seniormost male members of the family of the Settlor and the minutes of the meeting of the Official Trustee, copy whereof was sent to Lal Chand, a situation has been created where the court could appear to be helpless and would be bound to dismiss an application of this nature. It is no doubt true that the dealing assistant is not supposed to be highly paid employee under the Official Trustee but the way he has acted in this matter does not appear to be above-board. He has to be cautioned for his future actions in dealing with other Estate matters as well. It is because of him that so many others have been faced with embarrassment. Accordingly, even though it might cause hardship to him financially yet we are constrained to order that he must bear a portion of the cost of this application personally to the extent of a sum of Rs. 100/- (Rupees one hundred) and the same would be payable within a month from the date hereof. The balance of the cost of this application would be borne and paid by the Official Trustee from out of the funds of the trust estate in his hands, such cost is assessed at a total sum of Rs. 250/-. We make it clear that this token cost has

been awarded against the dealing assistant, Bishnu Prasad Mullick, so that in future he might be more mindful about his duties and might discharge the same with full responsibility attached to his post.

21. The delay is accordingly condoned in terms of prayer (a) of the application and leave is given to file the memorandum of appeal after condoning the delay. Stay of operation of the order dated 7th Jan. 1981 is to continue for a Week in order to enable the Official Trustee to take necessary action in the matter. The Department will accept the Memorandum of Appeal if it is filed by Friday next. The Department do act on a signed copy of the minutes of this order. There will be an order accordingly. The Official Trustee will retain his cost from out of the funds of the estate in his hands. The Official Trustee and all parties do act on a signed copy of the minutes of this order.

C. K. BANERJI, J.:— I agree.

Application allowed.

AIR 1982 CALCUTTA 217

MANASHNATH ROY, J.

Trambaklal Dayalal Kothari, Petitioner v. L. K. Dey and others, Respondents.

Civil Rule No. 3633 (W) of 1974, D/- 30-4-1981.

Court-fees Act (7 of 1870), S. 19-H (3) — Collector must give notice and hear petitioner for probate on due opportunities being given before making proper valuation of property — Held Collector having not taken such steps acted without jurisdiction. (1975) 79 Cal WN 961, Rel. on. (Para 10)

Cases Referred : Chronological Paras (1975) 79 Cal WN 961 8

Shakti Pada Chatterjee, for Petitioner; Ashok Kumar Sengupta with Tapan Kumar Sengupta, for the State.

ORDER:— In this Rule, which was obtained with a corresponding interim order on 21st June, 1974, the petitioner, Trambaklal Dayalal Kothari, has impeached certain orders made by the Probate Deputy Collector, being Respondent No. 1, and the particulars whereof would be available from the facts stated herein-after.

2. One Umedlal Dayalal Kothari also known as Umedlal D. Kothari died at

BZ/CZ/A499/82/MRD/RSK

premises No. 18, Priya Nath Mullick Road, Bhowanipur at Calcutta on 19th June, 1963 and the petitioner in this Rule applied for probate of the last Will and testament of the said deceased in this Court and it has been stated that such probate was granted by this Court in its Original Side. Such probate order was made on 13th Aug. 1964. It was the case of the petitioner that at the time of making the application for the grant of probate as mentioned above, on or about 9th Sept. 1973, the petitioner, who incidentally was a brother of the deceased along with one Himatlal Umedlal Kothari, the son of the deceased, affirmed and filed the Affidavit of Assets showing the value of the estate as left at Rs. 2,57,097.25 paise. The said valuation has been mentioned in paragraph 2 of the petition. It has further been stated that the Probate Duty of Rs. 11,299/- was paid to the Court, at the time of grant of Probate, on due calculation, and the High Court had accepted the valuations as made, to be correct.

3. Thereafter, the Respondent Probate Deputy Collector, issued letters informing that enquiries into the matter of payment of Probate Duty, would be initiated and as such, the said officer wanted to see the original Probate Estate Duty Assessment papers and balance sheet, apart from other records. It is the case of the petitioner that the original Probate and audited balance sheet for the relevant periods, were shown and on or about 17th July, 1973, it was informed that the estate duty assessment had not been completed and as such, the same should not be filed. It has been alleged now, that in spite of the aforesaid facts, the officer concerned ex parte assessed the valuation of the estate, in terms of the notice dated 16th Feb. 1973 and increased the valuation of the estate by Rs. 240,980/- (provisional) and asked the petitioner to amend the valuation and also to pay Rs. 14,735.15 paise. It has of course been stated that the above notice was cancelled and a fresh notice dated 15th Jan. 1974, was issued, whereby the petitioner was asked to amend the valuation by raising the sum of Rs. 2,40,980/- and to pay a sum of Rs. 14,735.15 paise, on account of additional stamp duty in terms of S. 19-H (3) of the Court-fees Act, as amended and also to deposit Rs. 2,473.50 paise by way of penalty under S. 19G of the said Act.

4. Section 19H (3) lays down that the Collector within the local limits of whose revenue jurisdiction the property of the

deceased or any part thereof is, may at any time inspect or cause to be inspected, and take or cause to be taken copies of the record of any case in which application for probate or letters of administration has been made, and if, on such inspection or otherwise, he is of opinion that the petitioner has under-estimated the value of the property of the deceased, the Collector may, if he thinks fit, require the attendance of the petitioner (either in person or by agent) and take evidence and inquire into the matter in such manner as he may think fit, and, if he is still of opinion that the value of the property has been under-estimated, may require the petitioner to amend the valuation. S. 19G postulates that where too a court-fee has been paid on any probate or letters of administration in consequence of any mistake, or of its not being known at the time that some particular part of that estate belonging to the deceased, if any executor or administrator acting under such probate or letters, does not, within six months after the discovery of the mistake or any effects not known at the time to have belonged to the deceased, apply to the said authority and pay what is wanting to make up the court-fee which ought to have been paid at first on such probate or letters, he shall forfeit the sum of one thousand rupees and also a further sum at the rate of ten rupees per cent on the amount of the sum wanting to make up the proper court-fee.

5. It has been contended by the petitioner that the officer concerned, had no power in law, to ask him to amend the valuation and the notice in question was illegal, inoperative, without jurisdiction and bad in law. In fact, it has been stated that an objection to the notice, by a letter was filed and having no response to the said letter and on receipt of the repeated reminders from the Probate Deputy Collector concerned, for the sums as mentioned above, failing which steps for realisation would be taken, another objection by the petitioner, through his lawyer was filed on or about 23rd Feb. 1974, challenging the order as passed or made by the Probate Deputy Collector, the particulars whereof have been mentioned hereinbefore. This letter, it has also been stated, was not appropriately replied to, and on such, the learned lawyer of the petitioner, met the Probate Deputy Collector concerned on diverse dates, when it has been stated that he was assured that due intimation would

be sent. It has been stated that even in spite of the above fact, the officer concerned, by his letter of 19th Apr. 1974, again asked for the payment. It is the case of the petitioner that having received further reminders for the payment of sums as mentioned above, his lawyer, saw the officer concerned on 4th June, 1974, when also, he was informed that as no notice informing the date of hearing of the concerned objection petition has been received by the petitioner or his Lawyer, the said objection petition has been impliedly rejected. As such, the petitioner has stated, that his learned Lawyer wrote another letter to the officer concerned, for necessary redress of his grievances. It has been categorically claimed by the petitioner that in making the ex parte rejection of the petition or in not considering the objection duly, the authority concerned, acted without jurisdiction, illegally, unlawfully and erroneously, apart from being in violation of principles of natural justice.

6. There was an application dated 28th Feb. 1977, for continuation of the interim order as made, in terms of the provision of S. 58 (3) of the Constitution (42nd Amendment) Act, 1976 and such application was allowed on 14th Sept. 1977. While allowing such application, directions were given for filing of affidavit in the main Rule. Even in spite of such directions, duly given, no affidavit-in-opposition has been filed in this proceeding. Mr. Sengupta, appearing for the answering respondents, produced the records and stated that since his clients had not filed the necessary affidavit-in-opposition in time, he will put forward his argument on the basis of the records.

7. There is no doubt the issue of the probate by this Court in its Ordinary Original jurisdiction. The Will of the executor as such, was probated on 13th Aug. 1964 and in 1971, the notice for necessary valuation was issued and in 1974, the ex parte order, as alleged was made, increasing the valuation. The order, making or directing the payment to be made, which the petitioner has claimed to be ex parte one, was dated 15th Jan. 1974 and the same has been annexed as Annexure-B to the petition. The whole question in the instant case would be and that too, on the basis of the pleadings as filed and the argument as advanced, whether the Probate Deputy Collector, was required to give any notice and hear the petitioner, before making valuation of the property.

8. In fact, Mr. Chatterjee, appearing in support of the Rule, claimed that the respondent, Probate Deputy Collector, before coming to his conclusion regarding the valuation of the enhancement of the same should have given the petitioner, an opportunity of being heard. In support of such submissions, Mr. Chatterjee referred to the determinations in the case of Gauri Nath Shastri v. State of West Bengal, (1975) 79 Cal WN 961. In that case, a point arose as to whether under S. 19A of the Court-fees Act, 1870, it was the duty of the Collector, to give notice and hear the petitioner for probate, before making valuation of property and the effect of a threat by the Collector concerned, to impose penalty in case of failure to pay deficit of stamp duty, was also concerned. In that case, it has been observed that S. 31 (3) of the West Bengal Court-fees Act, 1970 corresponding to S. 19H (3) of the Court-fees Act, 1870, cast a duty on the Collector, to give an opportunity to the petitioner for probate, to produce evidence and be heard, before the Collector can require the petitioner to amend the valuation made by him. It has further been observed that S. 31 (3) of the West Bengal Court-fees Act, 1970 contemplates three well defined stages. First, after the Collector has been served with a notice of an application for probate by the Court in which the application is made, it is incumbent upon him to hold an enquiry by inspection or otherwise of the property and records in the said application. If on the materials examined by him, the Collector forms the opinion that the petitioner has underestimated the value of the property of the deceased, then the second stage is reached: he must then require the attendance of the petitioner and enquire into the matter. At this stage, there are two portions, one, as to the manner of the inquiry, which is left to the discretion of the Collector, but a duty is cast upon him to hold an enquiry after giving notice to the petitioner, then, the third stage is that, if after such hearing and enquiry or giving notice to the petitioner, the Collector is still of opinion that the valuation of the property has been underestimated, he must require the petitioner, to amend the valuation to the satisfaction of the Collector. If the petitioner fails to amend the valuation as required by the Collector, the Collector must, under Section 31 (4), move the Court within the prescribed time, to hold an enquiry into the true value of the property, there-

after, the Court should, under S. 31 (5), hold an enquiry as to the true value of the property and the Collector is party to the said application. It has also been observed that S. 31 (6) and (7) of the Act lay down the procedure and finality of the decision and finding of the Court.

9. These apart, in the case as cited, it has been laid down, that a complete procedure for the determinations of the true value of the property, in respect of which an application for probate is made, has been laid down under S. 31 and a duty is cast upon the Collector to hear the petitioner, who is charged with under valuation. It has also been observed that it is no part of the duty of the Collector, to assess the true valuation of the property and ask the petitioner to pay the duty on such valuation and impose penalty on the failure of the petitioner to pay the same. It is only after the true value of the property is determined by the Court, on the application of the Collector and the failure of the petitioner, to pay the deficit stamp duty on such valuation, that a penalty can be imposed under S. 33.

10. As stated hereinbefore, the probate was granted by this Court in another jurisdiction and at that time, no exception regarding valuation was raised or taken by the Probate Deputy Collector. Such authority has certainly, the right to see that revenue does not suffer by any machination of a claimant and as such, such authority, certainly has the right to initiate and enquire into the valuation and to arrive at a conclusion, as to whether proper valuation has been made or there has been under-valuation of the property of the deceased. But, before such decision is arrived at, not only, in terms of the determinations of this Court as mentioned above, but also in terms of the intrinsic requirements of the statute, the Probate Deputy Collector, in the instant case, was required to hear the petitioner on due opportunities being given, so that, he could have satisfied that the valuation as made, was due and proper. Such steps not having admittedly been taken in this case, the Rule in my view, should succeed. As such, the Rule is made absolute. There will be no order as to costs.

11. This will not now prejudice the respondents concerned, to make appropriate valuation of the property of the deceased and to come to a definite conclusion about the valuation of the same,

after duly hearing the petitioner and opportunities to him, to establish his case.
Ordered accordingly.

AIR 1982 CALCUTTA 220

BANERJEE AND B. N. MAITRA, JJ.

Gillapukri Tea & Seed Co. Ltd. and others, Appellants v. Additional Director of Land Requisition & Acquisition & Reforms, Assam and others, Respondents.

A. F. O. O. No. 71 of 1980, D/- 9-11-1981.

Assam Fixation of Ceiling on Land Holdings Act (1 of 1957) (Before amendment by Act 18 of 1976), Ss. 7 (3) and 7 (2) — Appeal lies against order under Section 7 (2) — Hence it must be communicated to objector — Final order and final statement in S. 7 (2) have different meanings. Ori. Order No. 71 of 1980 (Cal), Reversed.
(Para 1)

S. C. Bose, R. N. Bajoria and D. K. Dhar, for Appellants; S. N. Tagore, for Respondents.

BANERJEE, J.:— This appeal at the instance of the company arises out of an order passed by the Hon'ble single Judge discharging the Rule taken out by the petitioners. The Hon'ble single Judge held inter alia that because of the Assam Fixation of Ceiling on Land Holdings Act, 1956 (as amended by Act XVIII of 1976) the right of appeal having been taken away, the application cannot succeed. The Assam Fixation of Ceiling on Land Holdings Act, 1956 came into force on 16th of Jan., 1957. It appears that on 24th of March, 1971 the tea garden of the company came within the A. F. of C. on L. H. Act. After the said date the petitioners filed return under R. 5 (1) of the Rules framed under the Act. It appears that the petitioners filed return as contained in Rule 1 on 7th of April, 1972. On 21st of Sept., 1972 a draft statement was published and the petitioners filed an objection much beyond the prescribed time under S. 7 (2) of the Act on 25th Jan., 1973. Be that as it may, the respondents gave the petitioners, appellants herein, hearing under S. 7 (2) of the said Act and on 5th July, 1973 the petitioners were communicated the final statement and the said communication was made to the Manager of the garden as also to the company having its registered office at Calcutta. The allegations, as contained in the petition, in material particulars have

not been denied in the affidavit filed by the respondents, inasmuch as, it is admitted dates as hereinbefore given and that after the belated objection was made, hearing was given to the petitioners-appellants under S. 7 (2) and final order was passed under S. 7 (3) of the Act. It is further admitted that no communication was made in 1973 regarding the order passed under S. 7 (2) of the Act. Before the amendment in 1976, under S. 7 (3) of the Act of 1956 any person aggrieved by an order of the Collector under the foregoing sub-section, may, within 30 days of the order prefer an appeal to the State Government. Mr. Bose on behalf of the petitioners-appellants contended that as the final order was not communicated to the petitioners, the petitioners' right of appeal, as contained in S. 7 (3) of the Act, could not be availed of. What was communicated to the petitioner by the order dated 5th July, 1973 was one which is final statement and not the final order. On reading the Act (un-amended) in particular S. 7, it is clear that there is distinction between the order under S. 7 and the statement which is also contained in the said Act. It appears from the analysis of S. 7 of the Act that after the draft statement is made and objection is filed and thereafter this objection is to be heard by the competent authority, final order is to be passed by the competent authority and this final order must be communicated to the petitioners or objector and thereafter the objector has right of appeal. After the appeal is disposed of the draft statement under S. 7 (6) of the Act will become final and order will be made regarding the filing of statement and that will have to be published in the office mentioned in sub-sec. (2) of the Act. Therefore, this final order and final statement must be given two different meanings in view of the fact that two different words have been used in two different contexts. In that view of the matter, it appears admittedly that no final order was served on the petitioner-appellants at all. This is also clear as Mr. Tagore has stated that it is not possible for them to say that the final order passed under S. 7 (2) of the Act was served on the petitioners. Mr. Tagore, however, contended in consideration to Mr. Bose's argument that unless final order is served the right of appeal becomes nugatory. Mr. Tagore further contended that in the four corners of the statute no question of service of notice of the final order on the petitioner is con-

templated nor is there such a contingency from the rules framed under the Act. It appears to us, however, that if the petitioner has right to appeal, as rightly said by Mr. Bose, which the petitioner had when order was passed and unless the said order is served, no appeal can be preferred. Mr. Tagore contended that it was the duty of the petitioners to know the date of the final order. It must be stated that S. 7 (2) of the Act provides for hearing by administrative authority, and not a judicial tribunal; but the administrative authority acting quasi-judicially must serve the order which may be passed under S. 7 (2) of the Act against which an appeal lay. It is futile to argue that such an order need not be served, otherwise it is given to the officer concerned who passed the order in file of the Government without serving the same to the petitioners as in the present case and thereby taking away the valuable right of appeal to the State Government. In view of the fact that the final order has not been served on the petitioners the application must succeed to that extent.

2. This appeal is therefore allowed and the judgment and order passed by the Hon'ble single Judge are set aside. The final statement published without service of order which was made final order under S. 7 (2) of the Act on the petitioners therefore cannot stand. The respondents will be at liberty to serve the final order on Mr. Bose's client as soon as practicable and dispose of the matter in accordance with law. We make it clear that we have not gone into the question of retrospective operation of the amendment of the A. F. of C. on L. H. Act, 1976 in this case or the effect of the said Act on the right of appeal. We also make it clear that Mr. Bose wanted to raise the question of ultra vires of violation of Art. 14 of the 1976 Act. But as we have not allowed him to urge this point at this stage and decided this case as the Act stood in 1973, the above question is left open.

3. The respondents are directed to communicate the final order passed in 1973 as soon as practicable.

4. There will be no order as to cost in this appeal.

5. Preparation of formal decree in this appeal is dispensed with.

B. N. MAITRA, J.— I agree.

Appeal allowed.

AIR 1982 CALCUTTA 222

P. K. BANERJEE AND B. N. MAITRA, JJ.

Surjya Kumar Das (Deft.), Appellant
v. Sm. Maya Dutta (Plff.), Respondent.

A. F. O. D. No. 210 of 1978, D/- 22-12-1981.

(A) Hindu Succession Act (30 of 1956), S. 23 — Applicability — Applies even if Hindu dies intestate leaving one male heir and one female heir. (General Clauses Act (1897), S. 13 (2)).

In view of S. 13 (2) of the General Clauses Act, though S. 23 of the Hindu Succession Act speaks of male heirs, it applies even if a Hindu intestate has left surviving him a male heir and a female heir. Where a Hindu owner of a dwelling house dies intestate leaving a son and a married daughter, the female heir (daughter) cannot ask for partition of house unless male heir (her brother) chooses to divide it or asks for its partition. (Para 9)

(B) Registration Act (16 of 1908), S. 17 (2) (vi) — Compromise decree in suit for declaration of plaintiff's title to house — Such decree does not require registration — It operates as estoppel and not as res judicata — Plaintiff's title cannot be challenged in subsequent suit for partition of house. (Evidence Act (1872), S. 115) — (Civil P. C. (1908), S. 11). AIR 1935 Cal 478, AIR 1954 SC 82, AIR 1954 SC 352, Rel. on. (Para 10)

(C) Court Fees Act (7 of 1870), S. 7 (iv) (b) and Sch. II, Art. 17 (va) (W. B.) — Suit for partition of house against co-sharer when moiety shares of parties were declared in previous suit for declaration — Because co-sharer's possession will be plaintiff's possession, suit filed with court-fee of Rs. 15 maintainable. AIR 1942 Cal 180, AIR 1956 SC 548, Rel. on. (Para 11)

Cases Referred: Chronological Paras

AIR 1975 Cal 232: 79 Cal WN 305	8
AIR 1956 SC 548	11
AIR 1954 SC 352	10
AIR 1954 SC 82	10
AIR 1942 Cal 180: 46 Cal WN 561	11
AIR 1937 All 282: 1937 ALJ 120	10
AIR 1935 Cal 478: 39 Cal WN 485	10

A. Banerjee and R. Ghose, for Appellant; J. K. Banerjee, for Respondent.

B. N. MAITRA, J.:— The present suit for partition was filed by one Maya Dutta, daughter of Radha Raman Das alias

Radha Charan Das, a Hindu governed by the Dayabhaga School of Hindu Law. He was the owner of the disputed property, being premises No. 3B Collins Street, Calcutta. The defendant, Surjya Kumar Das, is her brother. On the 4th April, 1969, she instituted the Suit No. 964 of 1969 against her brother in this Court for a declaration that she and her brother belonged to a joint family governed by the Dayabhaga School of Hindu Law and she was the sole and absolute owner of the premises No. 3B Collins Street, Calcutta, and for other reliefs. Ultimately, the parties came to terms and a decree was passed that the parties were governed by the Dayabhaga School of Hindu Law and they were absolute owners of the disputed property to the extent of a moiety share each. In view of the strained relations between them, it has become inconvenient for her to enjoy the property. She called upon her brother to effect an amicable partition. Her brother did not do so and hence the suit for partition and accounts.

2. The defendant filed a written statement alleging, inter alia, that the plaintiff was out of possession for more than twelve years and so, she could not ask for partition without paying ad valorem court fees. The parties were governed by the Mitakshara School of Hindu Law.

3. The learned Judge of the City Civil Court accepted the plaintiff's version and overruled the defendant's contention regarding the provisions of S. 23 of the Hindu Succession Act. He stated that though the previous Suit No. 964 of 1969 was compromised, it was not registered and hence, that decree had no value in the eye of law. The claim for accounts was not allowed. He held that the parties had moiety share each and, a preliminary decree for partition was passed. The propriety of this decision has been challenged by the defendant in this appeal.

4. It has been contended on behalf of the appellant that the decision of the learned Judge is erroneous because he has stated that S. 23 of the Hindu Succession Act can have no application unless the previous owner left more than one male heir. In this case, the previous male owner, viz., Radha Raman, left only one son and one daughter and hence, the provisions of S. 23 of the Act were out of the way. This decision is incorrect. The defendant is the only daughter of Radha Raman and only sister of the defendant-appellant. So, according to the provisions

of S. 23 of the Act, she cannot ask for partition.

5. The learned Advocate appearing on behalf of the respondent has stated that the provisions of S. 23 of the Hindu Succession Act will apply and the decision of the learned Judge in this respect is correct.

6. It has already been indicated that the prayer for accounts was negatived. This has not been challenged. So, the first question arises about the interpretation of S. 23 of the Hindu Succession Act. This section says that where a Hindu intestate has left surviving him both male and female heirs specified in clause I of the Schedule and his property includes a dwelling-house wholly occupied by the members of the family, then notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein.

7. The proviso to that section says that where she is the daughter, she will have a right of residence only if she is unmarried or she has been deserted by or has separated from her husband or is a widow. In this case, the plaintiff is not unmarried or has not been deserted by or has been separated from her husband or is a widow, within the meaning of the proviso to S. 23 of the Act.

8. The provisions of S. 23 of the Act were considered by a Bench of this Court. In the case of Arun Kumar Sanyal v. Gnanendra Nath Sanyal reported in 79 Cal WN 305: (AIR 1975 Cal 232), it has been stated that S. 23 of the Act makes it clear that the object of this section is prevention of fragmentation or disintegration of a family dwelling house at the instance of the female heirs to the hardships and difficulties to which the male heirs may be put.

9. The learned Judge of the City Civil Court states that S. 23 of the Act speaks of male heirs. In other words, that section will apply if a Hindu dies intestate leaving more than one male heir. But that court completely overlooked the provisions of S. 13 (2) of the General Clauses Act, which says that in all Central Acts and Regulations unless there is anything repugnant in the subject or context, words in the singular shall include the plural and vice versa. In the present Central Act, viz., Hindu Succession Act, there

is nothing repugnant in the subject or context. It has been stated in that Bench case that a Hindu may die leaving a son and a number of daughters. If at the instance of any such daughter, the dwelling house is allowed to be partitioned against the wish of the son, he may be put to great hardship. We, therefore, hold that the decision of the learned Judge in this respect is incorrect and the plaintiff (daughter of Radha Raman) cannot ask for partition unless the male heir of Radha Raman (plaintiff's brother) asks for partition of such dwelling house.

10. Then about the observations of the learned Judge that since the previous compromise decree in Suit No. 964 of 1969 was not registered, in view of the case in AIR 1937 All 282, this compromise decree has no value according to the provisions of S. 17 of the Indian Registration Act. Here also, the learned Judge was completely oblivious of the exception engrafted in sub-section (2), clause (vi) of Section 17 of the Indian Registration Act. That clause (vi) of sub-section (2) of S. 17 of the Indian Registration Act indicates that notwithstanding anything in cls. (b) and (c) of sub-sec. (1) of Sec. 17, no question of registration arises in respect of any decree or order of a court except a decree or order expressed to be made on a compromise and compromising immoveable property other than that which is the subject-matter of the suit or proceeding. In the case of Nathram v. Latif in 39 Cal WN 485: (AIR 1935 Cal 478), it has been stated that that clause (vi) applies to a consent decree by which the property in question was dealt with and so it does not require any registration. It has already been indicated that the subject-matter of that suit of 964 of 1969, which was decreed on compromise, was 3B Collins Street, Calcutta, and that is also the subject-matter of the present litigation. In the cases in AIR 1954 SC 82 and AIR 1954 SC 352 it has been stated that such decision operates as estoppel, not as res judicata. So, no further discussion on this is called for because that compromise decree operates as estoppel and plaintiff's title cannot be challenged.

11. Then about the point that the plaintiff was not in actual possession of the disputed property for more than twelve years and so, the suit was not maintainable without paying ad valorem court-fees. This matter is concluded by several Bench decisions of this Court. In the case reported in 46 Cal WN 561: (AIR 1942 Cal 180) presided over by Sir R. C.

Mitter, it has been stated that in a partition suit, it is essential that a plaintiff should be in possession at the date of the suit either actually or constructively. If he is at the material time in possession of a part of the joint property or if he be not in actual possession of any part of the joint property, but his co-sharer (defendant) is in possession and there is no ouster, the suit is maintainable on a payment of court-fee of Rs. 15 because his co-sharer's possession will constructively be his possession. The same view has been taken by Venkat Ram Iyer, J. in the case reported in AIR 1956 SC 548. There is no ouster or of adverse possession. Moreover by the compromise decree in the Suit No. 964 of 1969, moiety shares of the parties were declared. Hence the question of non-maintainability of the suit does not arise.

12. Now the most important question arises, what is to be done in this suit. It has already been held that S. 23 of the Act applies. Consequently, a female heir, viz., the plaintiff, who is the daughter of Radha Raman, cannot ask for partition, unless her brother (defendant) chooses to divide the dwelling house in question. Until such partition is made by the defendant-respondent, she will have to wait to get her share in the property. No further relief can be claimed. This disposes of all the points that may be raised in this appeal.

13. The appeal is allowed. The judgment and decree appealed against be hereby set aside. It is hereby declared that the parties have a moiety share each in the property in question. But in view of the provisions of S. 23 of the Hindu Succession Act, the plaintiff's claim for partition is dismissed for the present.

14. The parties will bear their own costs.

15. At present, it has been contended on behalf of the appellant that the tenant, who resided in a portion of the house, has surrendered his lease. An application has been filed to that effect. The application be kept on the record.

BANERJEE, J.:— I agree.

Appeal allowed.

AIR 1982 CALCUTTA 224

B. N. MAITRA, J.

Jaganath Mondal, Petitioner v. Tarak Ch. Mondal, Respondent.

C. R. No. 599 of 1980, D/- 28-4-1981.

Civil P. C. (5 of 1908), O. 45, R. 5 (1) — Preliminary decree for partition — High Court staying further proceedings of preliminary decree — Opposite party filing execution and purchasing property in auction before communication of stay to executing Court — Held, sale is not invalid as stay of further proceedings of preliminary decree would not include a stay of execution proceedings also. (Para 6)

Cases Referred: Chronological Paras

AIR 1967 SC 1386: 1967 All LJ 593	4
AIR 1953 Cal 116	6
AIR 1953 Cal 467: 57 Cal WN 205	6
AIR 1947 Cal 319: 47 Cal WN 186	6
AIR 1935 Nag 16	5
AIR 1921 Pat 328	5
(1897) 1 Cal WN 226	6

M. N. Ghosh and S. N. Banerjee, for Petitioner; S. N. Mukherjee and Satyajit Banerjee, for Respondent.

ORDER:— The judgment debtor filed an application praying for cancellation of the auction sale regarding the disputed property held on the 5th December, 1977. His allegation was that a preliminary decree for partition was passed and then an appeal filed. This Court issued a Rule staying the further proceedings of the preliminary decree. An interim order was later made absolute. Meanwhile, the decree holder opposite party filed execution and auction purchased the property. The prayer is for cancelling that sale on the ground that the sale held in the case in the face of stay of further proceedings of the preliminary decree, was void and was liable to be set aside.

2. The decree holder opposite party filed an objection.

3. The learned Munsif rejected the application. Hence this revisional application.

4. It has been contended on behalf of the petitioner that law in this respect is well-settled after the Supreme Court decision of *Mulraj v. Murti Raghunathji* reported in AIR 1967 SC 1386 at p. 1388. It has been stated that an order granting a stay of the execution of the decree against which an appeal has been filed takes effect only from the date when the order is communicated. The interim order

GY/HY/D355/81/KJK/SNV

passed by this Court is dated 1st June, 1977. The Rule was made absolute on 1st June, 1978. The sale was held on the 5th December, 1977, that is, after the Rule was issued and the interim order passed. The execution proceeding is only a continuation of proceeding under the decree and is not an independent proceeding. If further proceedings of the preliminary decree have been stayed, that order includes a stay of the execution case as well. Hence the sale is liable to be cancelled.

5. The learned Advocate appearing on behalf of the O.P. has referred to the decision of *Kabiruddin v. Debi Singh* reported in AIR 1935 Nag 16 at page 17 to show that under cl. (3) of R. 5 of O. 41 of Civil P. C. no order for stay of an execution case can be made unless certain conditions are fulfilled, one of which is the furnishing of security. No security was furnished here and hence the execution case was not stayed. The case of *Nena Ojha v. Sarbhoo Dutt Ojha* in AIR 1921 Pat 328 at page 329 has been cited to show that proceedings held in pursuance of a preliminary decree are proceedings in the suit and not in execution. Since only the further proceedings of the preliminary decree were stayed and no stay order was passed regarding the execution case, the prayer for cancellation of the same cannot be allowed.

6. Order 41, R. 5 (1) of the Civil P. C. shows that an appeal shall not operate as a stay of proceedings under a decree or an order, nor shall execution of the decree be stayed because an appeal has been filed. That Rule is divided into two parts, one regarding stay of proceedings under a decree and another regarding execution of such decree. According to cl. (3) of R. 5, no order for stay for execution can be made unless security is furnished and certain conditions are fulfilled. But there are no such limitations when proceedings under the decree are stayed and not the execution case. O. 41, R. 5, cl. (1) refers both to stay of proceedings and of execution of the decree. In this case, only the proceedings of the preliminary decree and not of the execution case, were stayed. Regarding a sale of such nature, the principles of the cases in (1943) 47 Cal WN 186 : (AIR 1947 Cal 319), (1953) 57 Cal WN 205 : (AIR 1953 Cal 467) and AIR 1953 Cal 116 may be referred to. In the case of *Bissesswari v. Horrosunder* reported in (1897) 1 Cal WN 226, it has been stated that an order staying ex-

ecution of a decree against which an appeal is pending is in the nature of a prohibitory order and hence, it takes effect only when it is communicated. If the property is sold before such order is communicated to the court holding sale, such sale is not void and is not a nullity. The Supreme Court has stated that this view is correct. The Supreme Court has further stated that in case of a stay order, as opposed to an order of injunction, the court to which the stay order is addressed does not lose jurisdiction to deal with the execution unless it has knowledge of stay. Even after the order of stay is brought to the court's notice, it has power to set aside proceedings taken between the time when stay order was issued and the time when it was brought to its notice, if it is asked to do so and it considers that it is necessary to take recourse to such action. As stated before, the interim order passed by the Court, that the further proceedings of the preliminary decree be stayed, was communicated to the court below on the 18th June, 1977. But that was an order passed in the suit itself and not regarding the execution of the decree. Consequently, the order passed staying the further proceedings of the preliminary decree cannot include also a stay of the execution case as well. The submissions made on behalf of the petitioner cannot be accepted. The sale held in execution of the decree was therefore a valid one and not a nullity.

7. The Rule is, therefore, discharged. There will be no order as to costs.

Rule discharged.

AIR 1982 CALCUTTA 225

BANKIM CHANDRA RAY, J.

M/s. Dutta and Associates and another, Petitioners v. State of West Bengal and others, Respondents.

Civil Rule No. 10836 (W) of 1981, D/-24-9-1981.

(A) Constitution of India, Art. 226 — Locus standi — Aggrieved person — It need not be shown that his individual or personal rights are affected.

In order to maintain an application for a writ in the nature of Mandamus or in the nature of Certiorari or for any other order or directions under Art. 226 of the Constn., it is not sole test to be satisfied that the person making an application

AZ/CZ/A96/82/JHS

must show that any of his individual or personal rights either conferred by part III of the Constn. or by any statute have been infringed illegally by the purported action on the part of the statutory authority. If a person is shown to have a genuine grievance by an action or inaction of the authority to discharge his public duties enjoined upon him by the Act, in that case such person will be an aggrieved person having locus standi to maintain an application for a writ in the nature of Mandamus and or Certiorari against the purported action or inaction on the part of such public authority. In the instant case the impugned notice issued under S. 106 of the T. P. Act terminating the tenancy of the respondents Nos. 6 & 7 now transposed to the category of petitioners has undoubtedly affected the petitioners inasmuch as on the basis of the agreement of sale they have been inducted into the management of the Tea Estate by the lessors, i. e. the transposed petitioners. The petitioners in such a case are aggrieved persons and the application at their instance is therefore maintainable though their proprietary interest has not been affected by the impugned notice and order of the Collector taking possession of the Tea Estate. It is pertinent to refer in this connection that the lessors who are respondents Nos. 6 & 7 to the petition have been transposed to the category of the petitioners and as such it is no longer open to the State to contend that this application is not maintainable as the petitioners' legal rights have not been affected by the impugned notice terminating the tenancy and the impugned order of the Collector taking possession of the Tea Garden.

(Para 13)

(B) Transfer of Property Act (4 of 1882), S. 116 — Lease of 30 years with renewal clause — Tenant continuing in possession even after expiry of 30 years — Possession will be under renewal clause though option was not expressly exercised — It is not case of holding over under S. 116. AIR 1965 Cal 55, Foll.

(Para 14)

(C) Transfer of Property Act (4 of 1882), S. 106 — Service of notice on tenant — Effect.

The effect of service of a notice under S. 106 on the tenant is an expression of a desire to terminate the tenancy of the tenant after expiration of the period of

notice. This does not mean that after service of notice under S. 106 though the tenancy is determined the tenant can be evicted and or removed from the land under his occupation by the lessor forcibly. The lessor must take recourse to due process of law for ejectment of the tenant, AIR 1924 PC 144, AIR 1961 SC 1570 and AIR 1968 SC 620, Foll.

(Para 15)

(D) Transfer of Property Act (4 of 1882), Ss. 106 and 111 (h) — Agricultural lease commencing on 1-4-1948 — Notice dated 7-10-1980 terminating tenancy on expiry of 14-4-1981 — Notice being not 6 months' notice expiring with end of year of tenancy is invalid.

(Para 15)

Cases Referred: Chronological Paras

AIR 1981 SC 1550	16
1981 Lab IC NOC 179 : 85 Cal WN 788	13
AIR 1977 SC 276 : 1977 Lab IC 52	12
AIR 1976 SC 578	12
AIR 1968 SC 620	15
AIR 1966 SC 828	12
AIR 1965 Cal 55 : 68 Cal WN 1036	14
AIR 1961 SC 1570	15
AIR 1961 Cal 515 : 64 Cal WN 641	15
(SB)	15
AIR 1924 PC 144 : 51 Ind App 293 : 23 All LJ 76	15

R. N. Mitra, Samarjit Gupta, for Petitioners; Amal Kr. Dutta, Alok Kr. Ghosh and Soumen Ghosh, for Respondents; A. P. Chatterji and H. N. Das, for the State,

ORDER :— This application is at the instance of the petitioners M/s. Dutta & Associates, a partnership firm and one of the partners of the said firm Shri Gour Pada Dutta challenging the legality and validity of the notice issued under S. 106 of the Transfer of Property Act determining the lease in favour of the respondents Nos. 6 & 7 Shri Om Prakash Agarwall and Shri Ajit Kr. Agarwall, subsequently transposed as petitioners, granted by the Government in respect of the Tea Garden named Rungneet Tea Estate (Darjeeling) as well as the notice intimating that possession of the said tea garden has been taken over by the Collector, Darjeeling with effect from 15th of April, 1981 on the failure of the lessee to execute long term lease on payment of the Government dues by 14th April, 1981 as required in the said notice under S. 106 of the T. P. Act. The challenge was thrown on the ground that the notice of termination issued under S. 106 of the T. P. Act was not in accordance with law

and as such it did not terminate the lease in favour of the petitioners' vendors and/or assignors, the respondent Nos. 6 and 7 (the transposed petitioners) and the notice of the Collector taking possession of the said tea estate forcibly by executive fiat was wholly illegal and unwarranted.

2. The salient facts of the case as appeared in the averments made in the writ application are as follows. The petitioner No. 1 which is a registered partnership firm having its registered office at Dutta Bhawan, P. O. Siliguri, District Darjeeling, entered into an agreement for sale of Rungneet Tea Estate situated within the District of Darjeeling with the lessors of the said Estate Shri Om Prakash Agarwall and Shri Ajit Kr. Agarwall, the respondents Nos. 6 & 7 for purchase of the said Tea Estate. The said agreement was executed on 29th of March, 1977. On the basis of the said agreement the petitioner firm became entitled to carry on business of the said Tea Estate and to run the management of the said Tea Garden on their own account and they would be liable for all statutory and non-statutory liabilities and costs and expenses etc. relating to and/or arising out of or concerning the said Tea Estate or the business thereof. The petitioner firm was given delivery of possession of the said Tea Estate by the erstwhile owners, the respondents Nos. 6 & 7 (transposed petitioners), since 1977 and since then the petitioner firm was seized and possessed of the said Tea Estate and have been carrying on the business of growing and manufacturing of tea therefrom till the Collector, Darjeeling took possession of the same in April, 1981. It has been stated that the petitioner firm duly paid the consideration money to the lessors, respondents Nos. 6 & 7, for purchase of their leasehold interest and they have also invested a considerable sum of money for the improvement of the said Tea Estate by purchase of manure and pesticides and also for purchase of new plantation in the said Tea Estate. It has also been stated that since 1977 all the plants, machineries, stocks and stores, buildings, furniture, fixtures and fittings of the Tea Estate belonged to the petitioner firm and the petitioner firm used and enjoyed the said Tea Estate without any hindrance or objection, from any quarter. It is stated that the petitioner firm, on the basis of the said agreement, applied for licence for manufacturing of

tea in the said Tea Garden to the Superintendent, Central Excise, Darjeeling, to the knowledge and consent of the Government and licence was issued in their favour on 6th April 1977 authorising them to manufacture tea for a period of 3 years ending on 31st December, 1979 in the said Rungneet Tea Estate. This licence has been annexed as annexure 'A' to the petition. It also appears that the State Government by Order No. 6774-L. Ref. D/- 30-5-62 declared under S. 6 (3) of the West Bengal Estates Acquisition Act that 405.78 acres of land was retainable by the tea garden for its purpose. The rent under sub-sec. (3) of S. 42 of the West Bengal Estates Acquisition Act for the aforesaid area declared retainable was determined on 18-9-74 at Rs. 3635.74 annually; road and P. W. cesses were assessed at Rs. 109.08 each and education cess at Rs. 345.42 paise. It also appears that on 28th of Mar., 1977, the Additional Deputy Commissioner, Darjeeling, respondent No. 3, intimated Shri Om Prakash Agarwall, the respondent No. 6, that the Government had no objection to their handing over the Rungneet Tea Estate by lease or any other form which they might deem proper to M/s. Dutta & Associates (Petitioners), Tea planters and traders, Siliguri. It has also been stated therein that formal sale agreement would not be entered into by the respondents Nos. 6 & 7 with the petitioners till permission for sale had been taken by them from the Additional Deputy Commissioner, Darjeeling. This permission, it has been stated, will only be given if arrears of land revenue and cesses are paid by them. A copy of this letter was sent to the Superintendent, Central Excise, Darjeeling with a note that the Government had no objection to M/s. Dutta and Associates taking over the management of the garden. This has been annexed as annexure 'A' to the affidavit-in-reply on behalf of the petitioner on 24th June, 1981. On 8th Sept., 1977, the petitioner sent a letter to the Deputy Secretary, Land Utilisation and Land Revenue, Government of West Bengal praying for allowing the petitioner to pay the arrears of land revenue on quarterly instalments basis and also for giving necessary permission for transfer of the said Tea Estate in favour of the petitioners by the lessors, the respondents Nos. 6 & 7. This has been annexed as annexure B to the affidavit in reply sworn

on behalf of the petitioner. The respondent No. 6 also on 26th of Nov., 1977, addressed a letter to the Additional Deputy Commissioner, Darjeeling, stating that he and his brother, the respondent No. 7 who are the owners of Rungneet Tea Estate have entered into an agreement on 9th of Mar., 1977 for sale of the said Tea Estate to M/s. Dutta and Associates, the petitioners, and requested him to settle the matter of payment of arrear and current land revenue of the said Tea Estate in instalments with the representatives of M/s. Dutta & Associates and also to accept the payment of such land rent for which they did not have any objection since it was to be borne by them. A copy of this letter has been annexed as annexure B to the petition. On 26th December, 1977 the petitioner sent another letter to the Additional Deputy Commissioner, Darjeeling, making a similar request for permitting them to pay on quarterly instalments of one year all arrears of revenue. This letter is also annexed as annexure B to the Affidavit-in-reply. The Additional Deputy Commissioner, Darjeeling, sent a letter on 10th Feb., 1978 to the petitioner No. 1, stating that the lease could not be transferred in full or in part of the Tea Garden without the formal sanction of the Collector as per lease condition in clause No. 13 in reply to the letter of the petitioner dt. 24th June, 1978, requesting the Additional Deputy Commissioner, Darjeeling, to intimate whether any prior permission from authority was necessary for transfer of the Tea Garden. On 29th of Mar., 1978, the petitioner sent a letter to the Additional Deputy Commissioner, Darjeeling intimating that they be permitted to pay the arrears of land revenue by instalments in the manner already applied for by them. This has been annexed as annexure B to the affidavit-in-reply. On 20th of June, 1979, a letter was sent by the Additional Deputy Commissioner, Darjeeling, to the Manager, Rungneet Tea Estate, Darjeeling intimating that in spite of repeated reminders they had not executed the long term lease of 30 years on payment of requisite number of instalments of rents and cess. It has been further stated therein that if they fail to tender payment of Government dues the following consequences would follow:

(1) Certificate proceedings will be instituted, for recovery of Govt. dues if not already instituted,

(2) The Concession or remission of interest on arrear rent and cesses will automatically be withdrawn.

(3) Credit facilities so far given by the various Banks and other agencies will be advised to be stopped.

3. The petitioner sent a reply to the said letter on 20th of Aug., 1979 stating inter alia that as the rent payable by them in respect of the said Tea Garden had been finally determined and the said determination had been communicated to them, they could not take any steps in that respect. It was also stated therein that they be permitted to pay arrear rents by instalments and as such they requested the Additional Deputy Collector, Touzi department, Darjeeling to intimate them about the total amount of Govt. dues for the said Tea Estate in order to enable them to make payment of the said Tea Estate at an early date. This letter was annexed as annexure D to the petition. No reply was given to the said letter by the respondents and on 7th Oct., 1980, a notice has been issued on the proprietor, Rungneet Tea Estate, Darjeeling, Dutta and Associates, Tea Planters and Traders intimating that the lease of the Tea Garden shall stand determined on the expiry of the current year of tenancy namely on the expiry of 14th of April, 1981 and they are requested to make over peaceful possession of the said Tea Garden to the Junior Land Reforms Officer, Special Land Reforms Circle or Executive Magistrate immediately on the expiry of the 14th April, 1980 failing which they will be deemed as trespassers and will also be liable to pay mesne profits till they are evicted in due course of law besides arrears of rent. On 1st of Nov., 1980, the Manager of the petitioner firm sent a letter to the Collector, Darjeeling requesting him to arrange for renewal of the lease in their favour of Rungneet Tea Estate having Touzi No. 32F and to advise them accordingly. On 18th of April, 1981, the Collector of Darjeeling by a notice addressed to the proprietor/Manager, Rungneet Tea Estate, P. O. Darjeeling has intimated that he does hereby take over possession of the Tea Garden known as Rungneet Tea Estate with effect from 15th April, 1981 as they failed to execute long term lease on payment of the Govt. dues by 14th April, 1981 as required in the notice served upon them under S. 106 of the T. P. Act.

4. It is against the impugned notice issued under S. 106 of the T. P. Act and also the notice issued by the Collector, Darjeeling dt. 16th April, 1981 taking over possession of the Tea Garden from 15th April, 1981 this instant writ application was made and a Rule was obtained. There was also an interim order to the effect that the respondents were permitted to maintain status quo as on 28th April, 1981 as regards possession of the petitioner in respect of the said Tea Estate. This interim order was for a period of 10 days with liberty to pray for extension of the interim order with notice to the respondents.

5. The instant application for extension of the interim order as well as the Rule was taken up for consideration with the consent of learned Advocates of both the parties.

6. An affidavit-in-opposition has been sworn by Sri Ranjit Guha, Assistant Secretary, Land and Land Reforms Department, Government of West Bengal on 4th Aug., 1981. In Para. 5 of the said affidavit it has been stated that by order dt. 30-5-62 the State Govt. declared that an area of 405.78 acres of land in respect of Rungeet Tea Garden was retainable for its purpose. It was also stated therein that the rent of the said land declared retainable in the Tea Garden was determined on Sept. 18, 1974 at Rs. 3635.74 annually road and P. W. Cesses and education cesses were also determined by the authorities concerned. In para. 6 of the said affidavit it has been said that the tenants of the Tea Garden within the meaning of Clause 1 of Schedule F to the W. B. Estates Acquisition Rules, 1954 (hereinafter referred to as the said Rules) should have paid the land revenue and cesses at the above rate from 15th April, 1955 up to the current year of payment. The said recorded tenants neither did pay the aforesaid land revenue and cesses at the above rates nor did they conclude any lease in Form I appended to Sch. F of the said Rules. According to Rule 4 of the said rules, the intermediary shall hold land comprising a Tea Garden only on the terms and conditions set out in Sch. F appended to the said Rules. On the recorded tenants having not paid the aforesaid revenue and cesses and also not having concluded the lease in Form I appended to Sch. F the recorded tenants should be deemed not to have retained the land comprising

the Tea Garden concerned which had vested in the State under S. 4 of the W. B. Estates Acquisition Act, 1953. In the circumstances, alleged transfer of the Tea Garden by the recorded tenants to the petitioner is void ab initio and non est and has no validity in the eye of law since the alleged transferors had no authority to transfer the vested land of the Government. It has also been submitted that, in the eye of law the petitioners are nothing but trespassers. In Para. 8 of the said affidavit it has been further averred that the petitioner firm had no right, title and interest in the Garden. Therefore the question of informing him about the payable amount of rent does not arise. Sri Om Prakash Agarwall was duly informed by the Collector for payment on account of rent and cesses as determined under the W. B. Estates Acquisition Act in due time but without any response from his end. It has also been stated in Para. 10 of the said affidavit that the petitioner firm was never the owner of the tea garden nor was the firm a lessee in respect of the same. The petitioners had no authority to run and manage the tea garden. It has been further stated in para. 11 of the said affidavit that no land revenue and cesses were ever paid in respect of the tea garden in question since 1955-56, i. e., from the date of vesting and no lease was executed for the garden in terms of Cl. 1 of Sch. F to the said Rules or at all. It has been further stated in the said affidavit in para. 14 that the respondents had no right and title to the tea garden, in view of the fact that they not having paid the rent and land revenue and cesses settled under S. 42 (2) of the Act and not having concluded any lease with the Govt. in terms of Cl. 1 of Sch. F to the said Rules, the respondents 6 and 7 must be deemed not to have retained the land comprised in the tea garden. As such any agreement made in respect of the tea garden with the petitioners by the respondents Nos. 6 and 7 is not valid. It has also been stated in Para. 16 of the said affidavit that no approval was ever granted to the petitioners to become a sub-lessee or assignee or transferee of any lease granted by the respondent Nos. 2 and 3. It has been further submitted that as a matter of abundant caution the petitioners though have no right or title to possess the property still the Collector, Darjeeling served a notice under S. 106 of the T. P. Act on the petitioners. The

petitioners therefore are trespassers in the eye of law and the petitioners were not entitled to any notice under S. 106 of the T. P. Act as there was no valid and subsisting lease either in favour of the petitioners or their assignors. It has been further stated that the possession of the Tea Garden was taken over in accordance with law. The other portion of the affidavit are not necessary or relevant for the purpose of determination of this rule and as such they are not mentioned hereinbefore.

7. An affidavit-in-opposition was also affirmed by Sri Anil Kumar Dutta a permanent employee of the Tea Board of India, the respondent No. 4 stating inter alia that one Mr. B. L. Tamang, Amin, ADC's office went on 16-4-1981 with Collector's notice for serving on either to the proprietor or the Manager of Rungneet Tea Estate but both the Manager and the proprietor of the Garden were not present. The Assistant Manager who was found in the factory expressed his inability to receive the notice as he had no authority. Thereafter Sri Rai and other workers came to the office and the Collector's notice was pasted in the notice Board by Mr. Tamang in the presence of the persons therein. The possession of the Garden was thus taken over by the Government and the same was handed over by Sri B. L. Tamang, the representative of the Collector to the officer on special duty of the Tea Corporation and thereafter on the same day the certificate of possession was signed by the Additional Deputy Commissioner, Darjeeling on behalf of the Government and the authorised representative of Tea Corporation, Darjeeling. It has been stated that the Tea Development Corporation, the respondent 4, has spent considerable sum of money in the shape of payment of wages of workers and the staffs and also for purchase of coal, tea chests necessary for carrying on the tea business in the said tea garden.

8. Mr. Rabindra Nath Mitra, the learned Advocate appearing on behalf of the petitioners submitted in the first place that the impugned notice under S. 106 of the T. P. Act, which was addressed to the Proprietor, Rungneet Tea Estate, Dutta and Associates is not a proper and valid notice as contemplated under S. 106 of the Act for two reasons: firstly, the notice does not terminate the tenancy of the respondents Nos. 6 and 7 with the end of

the year of the tenancy as the lease commenced on and from 1st day of April, 1948 and therefore the end of year of the tenancy will be 31st March, of the year in which the lease is terminated. In this case as the notice was given on 10th Oct., 1980, terminating the tenancy of the expiry of the 14th April, 1981, the notice, it is submitted, is not a valid notice terminating the tenancy. Secondly, the lease was not terminated as no notice under S. 106 of the T. P. Act was served on respondents Nos. 6 and 7. It has been next submitted that the provisions of S. 111 (g) of the T. P. Act, cannot be invoked as no notice was given expressing the lessee's intention to determine the lease by forfeiture for violation of any terms of the lease. It has been next submitted that even assuming for argument's sake that the notice under S. 106 of the T. P. Act has been validly issued terminating the tenancy of the respondents Nos. 6 and 7 still then the respondents cannot take possession forcibly as has been done in this case without bringing an action for eviction of the tenants in accordance with law. As this has not been done, it has been therefore submitted that the notice issued by the Collector, Darjeeling, that possession of the Tea Garden has been taken over by executive fiat is wholly illegal and arbitrary and such taking over of possession is liable to be set aside. It has been further submitted that the cause of terminating the tenancy is the non-payment of arrear rents as appears from the notice under S. 106 of the T. P. Act served by the Collector. The petitioner or for that matter the respondents Nos. 6 and 7 (transposed petitioners) being willing to pay the arrear rents the notice is waived and possession cannot be taken on the basis of this notice.

9. Mr. Arun Prakash Chatterjee, learned Standing Counsel appearing on behalf of the State respondents Nos. 1 to 3 has submitted that petitioners 1 and 2 who claimed to be managing the tea estate on the basis of an agreement of sale executed in their favour by the respondents Nos. 6 and 7, the lessees of the tea estate in question, have no locus standi to maintain this writ application as having no legal right in respect of this tea garden and the impugned notice under S. 106 of the T. P. Act and the impugned order taking possession of the said tea estate by the Collector, Darjeeling do not, in any way, affect their right, title or interest in the said tea garden. It has

also been submitted by Mr. Chatterjee, the learned Standing Counsel, that an agreement of sale does not create any title or interest in the property unless a deed of sale has actually been executed in favour of the petitioners by the Agarwalla, the respondents 6 and 7 now transposed as petitioners Nos. 3 and 4. Therefore, this writ application at the instance of the petitioners is not maintainable. Mr. Chatterjee has next contended that the petitioners being not a tenant the notice under S. 106 of the T. P. Act was not required to be served on them for terminating the tenancy. It has also been submitted that the tenancy of the lessees, the transposed petitioner Nos. 3 and 4 ended already by not exercising the option for renewal of the lease and by non-payment of rent. No notice, according to Mr. Chatterjee is necessary to be served for terminating the tenancy as required under S. 106 of the T. P. Act and the impugned notice under S. 106 of the T. P. Act is unnecessary. Mr. Chatterjee has submitted next that the leasehold interest of the petitioners Nos. 3 and 4, the lessees under the Government, vested in the State on the issuance of notification under S. 4 of the W. B. Estates Acquisition Act. Under S. 6 (i) (f) of the said Act the Tea Garden in question, i. e., Rungneet Tea Estate was retained by the intermediaries, respondent Nos. 6 and 7, and there has been a determination under S. 6 (3) of the Act by the appropriate authority determining that an area of 405.78 acres of land are retainable by the tea estate for the purpose of the Tea Garden etc. It has been submitted that after the date of vesting of the intermediary interest of the respondents Nos. 6 and 7 in the said Tea Estate in the State of West Bengal they became direct tenants under the State of West Bengal, the respondent No. 1 only in respect of land determined under S. 6 (3) of the W. B. Estates Acquisition Act to be retainable. Under R. 4 of the W. B. Estates Acquisition Rules 1954 the intermediary having not paid the land revenue as determined by the concerned authorities and having not executed any lease in form No. I appended to Sch. F to the said Rules the recorded tenants should be deemed not to have retained the lands comprising the tea garden concerned and his interest vested in the State under S. 4 of the Act. It has also been submitted that by such non-payment of rent and non-execution of any lease in form No. I the tenancy

automatically came to an end. There was no illegality on the part of the State to take possession of the tea garden and more so when such possession was taken without any opposition from the side of the respondents Nos. 6 and 7 or from their managers after terminating their tenancy by the impugned notice under S. 106 of the T. P. Act. It has, therefore, been submitted that in these circumstances the argument that the possession of the Tea Estate has been taken by the executive fiat without taking recourse to the due process of law is not sustainable and decisions cited to that effect are not also applicable in this case. This Rule, therefore, it is submitted, is liable to be discharged.

10. Mr. Amal Kumar Dutta, the learned Advocate appearing on behalf of the Tea Development Corporation, the respondent No. 4, submitted that the petitioners 1 and 2 did not acquire any right, title or interest in the said tea estate as the Government did not grant permission for assignment of the lease and/or for transfer of the leasehold interest of the leasehold interest of the respondent Nos. 6 and 7 in favour of the petitioners. It has also been submitted that on the basis of the alleged agreement of sale they did not acquire any right, title or interest in the said property and as such they are not competent to challenge the impugned notice under S. 106 of the T. P. Act as well as the order issued by the Collector taking possession of the tea garden. It has been further submitted that the tenancy of the respondents Nos. 6 and 7 was duly determined by the notice under Section 106 of the T. P. Act and possession was taken peacefully of the said tea estate by the Collector and the same was handed over by him to the Tea Development Corporation on 16th April, 1981. The Manager employed by the petitioners has been employed as managers in respect of the tea gardens by the Tea Development Corporation, respondent No. 4 and as such it has been submitted by Mr. Dutta that for suppression of material facts the rule shall be discharged. Some decisions were cited at the Bar on this score.

11. Mr. Soumen Ghosh, learned Advocate appearing on behalf of the respondents Nos. 6 and 7 submitted that respondents Nos. 6 and 7 were the lessees in respect of the Tea Garden under the Govt. and in accordance with the provisions of S. 6 (2) proviso of the W. B.

Estates Acquisition Act they shall be deemed to be tenants on the same terms and conditions as embodied in the lease granted in their favour. It has been further submitted that in Cl. 10 (I) of the Indenture of Lease it has been specifically provided that the lessee shall be entitled to renewal of lease for a further period of 30 years and subsequent renewals for similar periods in perpetuity. Therefore this lease in favour of his clients continues and cannot be taken to be determined by efflux of time or on failure on the part of the respondents Nos. 6 and 7 to execute the lease in the prescribed form No. 1 of Sch. F appended to the W. B. Estates Acquisition Rules as the same is not applicable to this case. It has also been submitted by Mr. Ghosh that the respondents Nos. 6 and 7 on receiving consideration from the petitioners executed an agreement of sale in their favour in respect of this Tea Estate and handed over the management of the Estate the purpose of running of the Tea Estate as well as of manufacture of tea in the said Estate to the petitioners. The final deed of sale could not be completed because of the non-grant of permission by the Collector, Darjeeling to the said transfer. After the close of argument an application was filed by the respondents Nos. 6 & 7 for transposing them to the category of the petitioners in the main writ petition on 2nd Sept., 1981. The said application was heard on 16th of Sept., 1981 and was allowed. Accordingly, the respondents Nos. 6 & 7 were transposed to the category of petitioners.

12. It is pertinent to consider the preliminary question raised as to the maintainability of this rule at the instance of the petitioners 1 and 2 who, it is submitted, having acquired no right, title and interest in the Tea Estate in question are not competent to maintain this application as the impugned notice under S. 106 of the T. P. Act and the order of the Collector, Darjeeling taking possession of the garden do not, in any way, impinge upon any of their legal rights. As such they have no locus standi to come before this writ court. Of course, in coming before the writ court with an application for a writ in the nature of Mandamus or for certiorari or for any other proper writ or order one has to satisfy the court that he has a legal right which is a judicially enforceable right and this right has been affected by an order made by the public authority to his prejudice. This has been

observed in AIR 1977 SC 276 M. S. Jain's case. This view, however, has been widened by the latter pronouncement of the Supreme Court in AIR 1966 SC 828 Venkateswara Rao v. State of Andh Pra and in AIR 1976 SC 578 at p. 581 Jasbhai Motibhai Desai v. Basir Ahmed in para. 12 where it has been held that in order to have the locus standi to invoke certiorari jurisdiction, the petitioner should be an "aggrieved person" and in a case of defect of jurisdiction, such a petitioner will be entitled to a writ of certiorari as a matter of course, but if he does not fulfil that character, and is a 'Stranger', the Court will in its discretion, deny him this extraordinary remedy, save in very special circumstances. This takes us to the further question: Who is an "aggrieved person"? And what are the qualifications requisite for such a status? The expression "aggrieved person" denotes an elastic, and, to an extent, an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. At best, its features can be described in a broad tentative manner. Its scope and meaning depends on diverse variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of the petitioner's interest, and the nature and extent of the prejudice or injury suffered by him. English Courts have sometimes put a restricted and sometimes a wide construction on the expression "aggrieved person". However, some general tests have been devised to ascertain whether an applicant is eligible for this category so as to have the necessary locus standi or 'standing' to invoke certiorari jurisdiction.

13. Following this decision this Court has held in Re: Monoranjan Maity v. District School Board decided on 31-3-1981: (1981 Lab IC NOC 179) that in order to maintain an application for a writ in the nature of Mandamus or in the nature of Certiorari or for any other order or directions under Art. 226 of the Constn. it is not sole test to be satisfied that the person making an application must show that any of his individual or personal rights either conferred by Part III of the Constitution or by any statute has been infringed illegally by the purported action on the part of the statutory authority. If a person is shown to have a genuine grievance by an action or inaction of the authority to discharge his public duties

enjoined upon him by the Act, in that case such person will be an aggrieved person having locus standi to maintain an application for a writ in the nature of mandamus and/or Certiorari against the purported action or inaction on the part of such public authority. In this case undoubtedly the impugned notice issued under S. 106 of the T. P. Act terminating the tenancy of the respondents Nos. 6 and 7 now transposed to the category of petitioners has undoubtedly affected the petitioners inasmuch as on the basis of the agreement of sale they have been inducted into the management of the said Tea Estate by the lessors, i. e., the Agarwalla, the transposed petitioners. The petitioners in such a case are aggrieved persons and this application at their instance is therefore maintainable though their proprietary interest has not been affected by the impugned notice and order of the Collector taking possession of the Tea Estate. It is pertinent to refer in this connection that the lessors who are respondents Nos. 6 and 7 to the petition have been transposed to the category of the petitioners and as such it is no longer open to the State to contend that this application is not maintainable as the petitioners' legal rights have not been affected by the impugned notice terminating the tenancy and the impugned order of the Collector taking possession of the said Tea Garden. Therefore this contention raised on behalf of the State respondents by the learned Standing Counsel is devoid of any merit and hence it is overruled.

14. The next question that poses itself for consideration is whether the notice under S. 106 of the T. P. Act is a valid and proper notice duly terminating the tenancy of the transposed petitioners. To effectually deal with this question it is necessary to consider in this connection what is the nature of the tenancy, that is, whether the transposed petitioners, that is, Om Prakash Agarwalla and Ajit Kumar Agarwalla, the admitted lessees in respect of the Rungneet Tea Estate were holding over under Section 116 of the T. P. Act or not. In the instant case the lease was entered between the Government of West Bengal with the assignor of the transposed petitioners on 24th of Nov., 1948 for a term of 30 years from the 1st day of April 1948. There is also a clause giving option to the lessee to have renewal of this lease for a period of 30 years and to renewals for similar period for perpetuity subject to the rules

and the terms and conditions of this lease and to such clause as the Govt. may from time to time found it necessary to add on the renewal of a lease etc. This has been mentioned in sub-cl. III (I) of Cl. 10 of the Indenture of lease. According to the said terms the lease expired on 31st March, 1978 and the notice of termination of lease was issued by the Collector, Darjeeling only on 7th Oct., 1980 terminating the tenancy. Therefore, it is evident that the transposed petitioners, that is, the Agarwallas have been in possession of the said Tea Estate as a tenant after the determination of the term of the lease. It has been submitted by Mr. Mitra, learned Advocate, appearing on behalf of the petitioners that the lessees remained in possession in accordance with the terms of the renewal clause as tenant on the same terms and conditions as embodied in the Indenture of lease and they are not continuing in possession as a tenant from year to year that is holding over under S. 116 of the T. P. Act. This submission of Mr. Mitra, in my opinion, has to be upheld in view of the decision of this Court in (1964) 68 Cal WN 1036 : (AIR 1965 Cal 55) Satadal Basini v. Lalit Mohan De the facts of which are in pari materia with the facts of this case. It has been observed that when a tenant under a 20 years' lease with a renewal clause, continues his possession after expiry of the said lease his continuance of possession will be deemed to be under the renewal clause though there will not be any express exercise of the said renewal. His rights in the leasehold land would be deemed to have flowed from the registered lease for 20 years and such cases will be outside the mischief of clause of section 2 (5) of the Calcutta Thika Tenancy Act. In the instant case the lease expired on 31st March, 1978 but the Agarwallas, that is, transposed petitioners, remained in possession of the property on the basis of the renewal clause though the option was not expressly exercised. Therefore the possession of the lessors that is the Agarwallas after the expiry of the term of the lease is on the basis of the renewal clause, that is, on the terms and conditions as mentioned in the registered lease for 30 years. It cannot be said that they were holding over the said Tea Garden under the provisions of Section 116 of the T. P. Act.

15. Therefore the transposed petitioners are continuing in possession as

tenants on the said same terms and conditions as specified in the Indenture of lease under the Government of West Bengal. It is next to be considered what is the effect of the service of a notice terminating the tenancy of the transposed petitioners by the impugned notice issued by the Collector, Darjeeling on 7th of Oct., 1980. S. 111 (h) of the T. P. Act provides that a lease of immovable property determines on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other. This provision brings into operation the requirement of S. 106 of the T. P. Act which specifically provides for determination of lease of immovable property for agricultural and manufacturing purposes in the absence of a contract by 'six months' notice expiring on the end of the year of the tenancy. The effect of service of a notice under S. 106 on the tenant is an expression of a desire to terminate the tenancy of the tenant after expiration of the period of notice. This does not mean that after service of notice under S. 106 of the T. P. Act though the tenancy is determined the tenant can be evicted and/or removed from the land, in this case the Tea Garden under his occupation by the lessor, that is, the Government of West Bengal forcibly and the lessor through the Collector of Darjeeling cannot take possession of the Rungneet Tea Estate without taking recourse to due process of law for ejectment of the tenant, that is, the transposed petitioners, from the Tea Garden as has been done in this case. It has been tried to be submitted on behalf of the State that after termination of the tenancy of the lessees, that is, Agarwallas, the State of West Bengal is competent to take possession of the Tea Garden from the Agarwallas who are no better than trespassers after the termination of the tenancy and the Collector, Darjeeling, has rightly taken over possession of the Tea Garden known as Rungneet Tea Estate with effect from 15th April, 1981 on the lessees's (Transposed petitioners) failure to pay Govt. dues by 14th April, 1981 as required by the notice under S. 106 of the T. P. Act. In the case of *Midnapur Zemindari Co. Ltd. v. Naresh Narayan Roy*, (1924) 51 Ind App 293 at p. 293 at p. 299 : (AIR 1924 PC 144), it has been observed that in India persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to

through a Court. The plaintiff was not entitled to get possession by ousting his then co-sharers, Robert Watson & Co, from possession of lands which they were entitled to hold in common as co-sharers. "The Supreme Court in the case of *Bishan Das v. State of Punjab*, (AIR 1961 SC 1570) observed that the petitioners who were alleged to have built a Dharmasala, temple and shops out of the funds of the joint family consisting of himself and the petitioners in 1909 on Govt. lands with the permission of the authority for the benefit of the travelling public, could not be forcibly dispossessed from the same by the Sub-Divisional Officer and possession of the same could not be handed over to the Municipal Committee, Barnala by executive fiat without taking recourse to due process of law. It has been further held that the Dharmasala, temple and shops could not be treated as belonging to the State irrespective of the question whether the trust created was of a public nature. A trustee even of a public trust can be removed by an executive fiat. This view has been reiterated in a subsequent decision of the Supreme Court in AIR 1968 SC 620 at p. 623 in paragraphs 10 and 13 where it has been held that possession cannot be taken forcibly without recourse to due process of law. A lessor is not entitled to use force to throw out his lessee. Therefore, the order of the Collector, Darjeeling dt. 16th April, 1981 taking over possession of the Tea Garden known as Rungneet Tea Estate with effect from 15th April, 1981 is wholly illegal, bad and unwarranted. Another question requires to be considered in connection with the validity of the notice under S. 106 is whether the impugned notice dt. 7th Oct., 1980 issued by the Collector, Darjeeling determining the lease of the Tea Garden in favour of the transposed petitioners on the expiry of 14th April, 1981 is a valid and proper notice according to the provisions of S. 106 of the T. P. Act or not. I have already mentioned hereinbefore that the tenancy on the basis of the Indenture of the lease entered between the parties on 24th Nov., 1948 for a period of 30 years undoubtedly expired on 31st March, 1978, as the lease is for agricultural purposes 6 months' notice was required to be served on the lessee as has been done in this case. This notice has to terminate the tenancy on the expiry of 6 months with the end of a year of the tenancy. The meaning of the words "year

of the tenancy" was considered by a Special Bench of this Court in (1960) 64 Cal WN 641 *Indian Iron and Steel Co. Ltd. v. Baker Ali* where it was held that a year of the tenancy means a year or a period of twelve months according to the calendar of the particular tenancy, starting with its date of commencement or any anniversary thereof. 'A year of the tenancy' in the first instance, a period of twelve months according to the Calendar, governing the particular tenancy commencing with the date of commencement of the said tenancy according to the said calendar. In this case the tenancy commenced from the 1st April, 1948. Therefore the impugned notice dt. 7th Oct., 1980 as mentioned in annexure E to the petition terminating the tenancy of the transposed petitioners on the expiry of the 14th April, 1981 being not a 6 months' notice expiring with the end of the year of the tenancy is invalid and as such the tenancy has not been duly terminated by the said notice and the lease had not been determined in accordance with the provisions of S. 111 (h) of the T. P. Act. Therefore, the tenancy has not been determined by a notice under S. 106 of the T. P. Act. As the transposed petitioners, that is, the lessees are continuing in possession on the basis of the renewal clause as embodied in the Indenture of lease on the terms and conditions mentioned therein such a tenancy cannot be validly terminated under provisions of S. 111 (h) of the T. P. Act as there has been no determination of the period mentioned in the renewal clause. In such circumstances the tenancy being not validly determined the argument of the learned Standing Counsel that the Government or for that the Collector, Darjeeling by issuance of an order dt. April 16, 1981 as mentioned in Annexure D to the petition has validly taken over possession of the Tea Garden known as Rungneet Tea Estate with effect from 15th April, 1981 and handed over possession of the same to respondent No. 4, the Tea Development Corporation is wholly without any substance and not sustainable in law.

16. It has been submitted on behalf of the petitioner that the notice under S. 106 of the T. P. Act is bad as the transposed petitioners, that is, the lessees, were holding the disputed tea garden on the basis of the renewal clause on the terms and conditions embodied in the lease deed and as such the provisions of S. 106 of

the T. P. Act are not applicable to this case and the impugned notice does not determine the tenancy. In this regard reference has been made to a decision of the Supreme Court in AIR 1931 SC 1550, *Smt. Shanti Devi v. Amal Kumar Banerjee*. In this case there was a registered lease in respect of a cinema theatre known as Santi House at Sainthia in the district of Birbhum for a term of four years with a covenant of two renewals of three years each. In 1970 an ejectment suit was brought on the ground that the lease had expired by efflux of time and also pleaded in the alternative that he had sent a notice for determining his tenancy under S. 106 of the T. P. Act. The deponent pleaded that no notice was served on him. The Court below held that the lease was validly determined by a notice to quit and decreed the suit. The High Court reversed that decision of the trial Court as well as of the lower Appellate Court by holding that service of notice under Section 106 of the T. P. Act on the defendant had not been proved and, as such the suit was not maintainable. It was held by the Supreme Court that the lease being for a definite term and, therefore, expired by efflux of time by reason of S. 111 (a) of the Transfer of Property Act, The determination of the tenancy by notice under S. 106 of the said Act was not necessary as there was no allegation by the deponent that he was holding as a tenant under S. 116 of the Act. In this case also the lessees have been possessing the tea garden on the basis of the renewal clause and as such there has been no determination of the lease by efflux of time. Moreover, the notice under Section 106 of the T. P. Act terminating the tenancy was not a valid notice as has been held hereinbefore. This notice therefore, did not determine the lease and the tenancy subsists,

17. It was tried to be contended on behalf of the respondent No. 4 by Mr. Amal Kr. Dutta, learned Advocate that the writ application should be dismissed for suppression of material facts as it has been stated in the petition that the possession of the Tea Garden were still with the petitioners and all the workers of the Tea Estate were employed as the workers of the Tea Estate as usual on 27th April, 1981 when this application was affirmed and moved and on the basis of this averment an interim order of maintaining status quo on that day as

on 24-8-81 was obtained. In support of this submissions he referred to some decisions of this Court. I am not inclined to accept this submission for the simple reason that there was no material suppression of facts in the writ application and the interim order was not obtained on its basis by misleading the Court. On the other hand, there is a specific averment in para. 22 of the petition that on 16th April, 1981 the petitioner was served with the impugned notice informing that the respondent No. 2 took over the possession of the Tea Garden with effect from 15th April, 1981. In the circumstances, it cannot be said that there has been a material suppression of facts.

18. In the reasons aforesaid the contentions raised on behalf of the petitioner having succeeded the Rule succeeds and is made absolute.

Let a writ of Mandamus be issued commanding the respondents to forbear from giving effect or further effect to the notice mentioned in annexure E to the purported petition D/- 10th Oct., 1980 as well as the impugned order of the Collector, Darjeeling D/- 16th April, 1981 as mentioned in annexure G to the petition.

Let a writ of Certiorari be issued directing the respondents to quash and cancel and set aside the impugned notice as well as the impugned order mentioned hereinbefore.

There will, however, be no order as to costs.

Respondent No. 4 is hereby directed to hand over possession of the Tea Estate, locally known as Rungneet Tea Estate, to the petitioners in course of a week from today.

The prayer for stay is refused.

Rule made absolute.

AIR 1982 CALCUTTA 236

CHITTATOSH MOOKERJEE AND
RAMKRISHNA SHARMA, JJ.

Anath Nath Das and others, Appellants
v. Sm. Bijali Bala Mondal, Respondent.

A. F. O. D. No. 385 of 1973, D/- 30-3-1981.*

(A) Succession Act (39 of 1925), S. 63 — Proof of execution — Onus is on propounder to prove due and valid execution of will — Suspicious circumstances sur-

*Against decree of Sri S. Ahmed, Addl. 11th Dist. J., Alipore, D/- 10-3-1973.

LY/CZ/G329/81/HR/RSK

rounding execution must be removed by cogent and satisfactory evidence.

A propounder of the will has to prove the due and valid execution of the will and if there are any suspicious circumstances surrounding the execution of the will, the propounder must remove the said suspicions from the mind of the court by cogent and satisfactory evidence. AIR 1959 SC 443 and AIR 1962 SC 567, Rel. on. (Para 4)

Held, since the suspicious circumstances surrounding the preparation of the will and the execution and attestation had not been removed by the propounder, he was not entitled to obtain probate of the will. (Para 14)

(B) Succession Act (39 of 1925), S. 59 — Testamentary capacity — Burden of proof — Testator both aged and sick at time of executing will — Suspicious circumstances surrounding attestation and execution — Evidence as to registration showing that it was done in perfunctory manner — Held, notwithstanding registration of will burden was on propounder to prove testamentary capacity since registration did not dispel doubts about genuineness of will. AIR 1962 SC 567, Ref. (Para 11)

Cases Referred:	Chronological	Paras
AIR 1965 SC 354		4
AIR 1962 SC 567		4, 11
AIR 1959 SC 443		4

S. K. Kundu, for Appellants; S. C. Roy, for Respondent.

CHITTATOSH MOOKERJEE, J.:— Upendra Nath Das was a resident of Paharpore Road, Garden Reach, 24 Parganas. On 11th Jan., 1970 Upendra died. He had married twice. His first wife had predeceased Upendra. Three sons and one daughter begotten by his first wife and also his second wife, Sarala Bala, four sons and two daughters, who were issues of his second marriage were alive at the time of the death of Upendra. Sarala Bala Dasi, the widow of Upendra, had filed an application in the court of the learned District Judge, 12th Court, 24 Parganas for granting probate to the last will and testament of Upendra dt. 3rd Jan., 1970. The testator by the said alleged will had purportedly provided that after his death his second wife, Sarala Bala, Panchugopal, Rabindra and Sibnath, his three sons by his second wife, would get his property at Z-143, Paharpore Road, Garden Reach in equal shares and in absolute right. Sarala Bala was enjoined to perform the marriages of the two

minor daughters out of the income of the property and, if necessary, by selling some properties. His surviving sons and daughters by his first wife were not given any legacy under the will of Upendra. Sarala Bala was appointed as the executrix of the will of Upendra.

2. The present appellants who were sons of Upendra by his first wife, had entered caveat, *inter alia*, contending that the will in question was a forged one and that at the material time Upendra had no testamentary capacity and that the will was not duly executed and attested. Thereupon, the court below followed the procedure of contentious cases.

3. The learned Additional District Judge, 11th Court, Alipore upon consideration of the evidence has decreed the suit in favour of the plaintiff and has directed that Sarala Bala be granted probate to the last will of Upendra Nath Das. Being aggrieved thereby, the appellants have filed the present appeal.

4. In our view, the learned Additional District Judge has erred in law in approaching from a wrong legal standpoint the question whether the propounder had satisfactorily proved that the disputed will was duly executed by Upendra and was attested according to law. The learned Additional District Judge also wrongly placed the burden of proof upon the defendants to establish that Upendra had no testamentary capacity or that he did not execute the will. It has been the consistent view of the courts that as the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters. But there is one important feature which distinguishes will from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of a solemnity in the decision of the question as to whether the document propounded is proved to be last will and testament of the departed testator. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be

justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy and unless it is satisfactorily discharged, the courts would be reluctant to treat the document as the last will of the testator. A propounder of the will has to prove the due and valid execution of the will and if there are any suspicious circumstances surrounding the execution of the will, the propounder must remove the said suspicions from the mind of the court by cogent and satisfactory evidence (*vide* the observations of Gajendragadkar, J. in *H. Venkatachala Iyengar v. B. N. Thimmajamma*, AIR 1959 SC 443, *Purnima Debi v. Khagendra Narayan Deb*, AIR 1962 SC 567 and *Ramchandra Rambox v. Champabai* (AIR 1965 SC 354)). The judicial decisions have also laid down that all the circumstances which would be regarded as suspicious cannot be precisely defined or exhaustively enumerated. That would be a question of fact in each case. Appearance of the signature, the condition of the testator's mind at the relevant time, the nature of the dispositions made in the will which appear to be unnatural, improbable or unfair, are some of the examples of suspicious circumstances which the court would insist being removed before the document could be accepted as the last will of the testator. When a propounder takes a prominent part in the execution of the will, the same may be treated as a suspicious circumstance attending the execution of the will.

5. In our view, the plaintiff had failed to remove the suspicious circumstances surrounding the execution and attestation of the will of Upendra. Although, according to the statements made in the alleged will, Upendra was aged 77 and was still active and sound in body and mind, it has transpired that Upendra was seriously ill and it had appeared to the propounder. Sarala Bala, that her husband might die. D.W. 1, Prabhat Das, who was an attesting witness, stated that at the relevant time Upendra was unconscious. According to Anath, D.W. 3, a son of Upendra, his father had died as a result of asthma and attack of cold. He was under medical treatment and Sarala Bala admitted that Upendra had executed the

will lying on his bed and as his fingers trembled, he did not sit up and sign but put his left thumb impressions in the document. P.Ws. 1 and 2 claimed that sitting in his bed Upendra had affixed his thumb impressions. The propounder and her witnesses denied the evidence on the defendants' side that at the material time Upendra was unconscious and had no mental capacity. It is also admitted that the will was executed and registered on 3rd Jan., 1970 and on 11th Jan., 1970 Upendra had died. The plaintiffs did not examine the physician who had been treating Upendra during his last illness. Thus, they did not give any medical evidence about the physical condition and the state of mind of Upendra at the time of the alleged execution of his will.

6. There were other suspicious circumstances regarding the due execution and attestation of the will by which the surviving sons and daughters of Upendra begotten through his first wife were excluded from inheritance. The court below itself has observed that the provisions of the will were unnatural. There was no evidence to establish the allegation made in the alleged will of Upendra that his sons by his first wife had beaten him and that they had ill-treated Upendra and his second wife. Sarala Bala the second wife of Upendra, in her evidence did not make any such allegation of misbehaviour or ill-treatment against the sons of Upendra by his first wife. Panchanan Chakraborty, P.W. 2 who was described as a neighbour and had attested the will had deposed that he had asked Upenbabu as to why he was not giving property to his sons by his first wife. Upendra allegedly told Panchanan that as they had misbehaved with him and had assaulted him, they had been disinherited. But Panchanan, P.W. 3, admitted that he had not seen Upendra being assaulted or being admitted into a hospital. Therefore, the purported reasons given in the will for excluding Upendra's sons by his first wife were not established and the provisions in the will appeared to be unnatural.

7. The facts and circumstances relating to the preparation of the will of Upendra were also very suspicious. Abdul Karim Ali (P.W. 1) who was previously a Mukteer and now an advocate had allegedly drafted the will of Upendra and he had also attested the left thumb impressions of Upendra in the will. P.W. 1, Abdul Karim Ali, claimed that he practised in the criminal court since 1957.

Previously, he had no acquaintance with Upenbabu (meaning the testator). According to P.W. 1, Prabhat Das, a relation of Upenbabu had contacted him. Although Prabhat Das was an attesting witness to the will, he deposed as a witness in the case on behalf of the defendant. Sarala Bala, the second wife of Upendra, P.W. 2, however, claimed that her husband told her about one month before his death that he would execute a will. She claimed that she had arranged for drafting and registration of the will. She herself went to court and arranged for registration of the will. Although she denied that he had instructed P.W. 1 to prepare the will she claimed that on the date of the registration she had called P.W. 1. She had paid the fees of P.W. 1 and also had borne the expenses of the registration of the will. She called P.W. 1 to draft the will. She told P.W. 1 that Upendra will execute his will in their favour and not in favour of her sons by his first wife. Thus, Sarala Bala, P.W. 2, herself stated that she had taken a leading part in the matter of drafting and registration of will under which she was one of the beneficiaries and she was also the executrix of the will. Further, there were serious contradictions between the evidence of P.W. 1 and P.W. 3 as to who had instructed P.W. 1 to draft the will of Upendra. P.W. 1, Abdul Karim Ali, did not mention that it was Sarala Bala who had approached and had given him instructions and also paid his fees.

8. The evidence of P.W. 1 about the drafting and the execution of the will does not appear to be trustworthy. P.W. 1 claimed that according to Upen's instruction received at the latter's house, he had drafted the will and the draft was typed. The draft of the will or the notes made by P.W. 1 were not produced in the court below. There was no explanation for their non-production. P.W. 1 could not even recall the name of the typist who had typed the draft and the final copy of the will. According to P.W. 1, one Kundu used to type his papers. Ratan Gopal Kundu who had signed as the typist of the said will was not examined as a witness. In the absence of any explanation an adverse presumption ought to be drawn up for not examining him. P.W. 1 claimed that he went to Upen's place with the typed draft. But in cross-examination he admitted that the drafted will was handed over to Prabhat Das for explaining the same to Upendra. In his examination-in-chief, P.W. 1 had

stated that the will was executed in the presence of witnesses, Registrar and the other witnesses. He had then stated "on that day I did not read over and explain the document to Upendra again". But during his cross-examination, PW 1 claimed that he had read over the document to the executant at the time of execution. The other witnesses of the plaintiff do not corroborate him. Thus, there was no reliable evidence that either the draft will or the final copy of the same were even read over and explained to Upendra.

9. Another very suspicious circumstance was, that, although Upendra was admittedly a literate person, the Will was not signed by him. But at the right hand corner of each page of the will there were the alleged left thumb impressions of Upendra attested by PW 1, Abdul Karim Ali. Upendra had neither signed nor affixed his left thumb impression below the concluding sentence of the will. Although it was recited therein ".....in sound health, in good faith, in full possession of senses, without other request on my own accord, I do sign, execute duly according to law his will in the presence of the witnesses after acquainting myself of all the contents of this will and having the same read over". PW 1, Abdul Karim Ali and PW 2, Panchanan Chakraborty, deposed that the fingers of Upendra trembled. He could not sign and put his left thumb impressions on the document. We have already observed that the propounder did not examine the medical practitioner who had been treating Upendra during his last days. It would not be prudent to place reliance upon the evidence adduced on the side of the propounder regarding the circumstances under which Upendra could not sign the will but only put his left thumb impression. PW 1 has admitted that he did not endorse the said fact in the document nor did he advise that Upendra should be medically examined before his will was executed by putting left thumb impression of Upendra.

10. Another curious fact about the execution of the will was that although PW 1 had attested the left thumb impression of Upendra appearing in each page of his alleged will, PW 1 did not attest the left thumb impression of Upendra said to have been affixed at the time of the presentation of the will before the District Registrar on commission. The said left thumb impression was at-

tested by Prabhat Das, DW 1, who, according to PW 1, had approached him for drafting Upen's will. DW 1, Prabhat was an attesting witness and his affidavit was annexed to the application for probate. Prabhat, DW 1, in his evidence in court, however, stated that Upen, who was his paternal uncle, had lost his senses before his death. For 15 days he had remained senseless. He could not move his limbs and could not also speak. No doubt, Prabhat Das, DW 1, appeared to be an extremely unreliable person and hardly any reliance can be placed upon his testimony. But at the same time, we find that the will of Upendra was attested by witnesses upon which no reliance can be placed and the alleged presentation of the will for registration was also made with the help of such an unreliable person. The onus of proof was upon the plaintiff and, therefore, in this state of evidence we are bound to say that the plaintiff has not removed the suspicions attaching to the execution and attestation of the will of Upendra and the registration thereof. When the court's conscience is not satisfied, the probate applied for ought to be refused.

11. In the facts of this case the court below was not justified in observing that the document being registered, the onus was on the opposite party (meaning the defendants) to prove that the testator had no testamentary power at the time of the execution. The Supreme Court in *Purnima Debi v. Khagendra Narayan Deb* AIR 1962 SC 567 observed that if a will has been registered, that is a circumstance which may, having regard to the circumstances, prove its genuineness. But the mere fact that a will is registered will not by itself be sufficient to dispel all suspicion regarding it where suspicion exists, without submitting the evidence of registration to a close examination. If the evidence as to registration on a close examination reveals that the registration was made in such a manner that it was brought home to the testator that the document of which he was admitting execution was a will disposing of his property and thereafter he admitted its execution and signed it in token, thereof, the registration will dispel the doubt as to the genuineness of the will. But if the evidence as to registration shows that it was done in a perfunctory manner, that the officer registering the will did not read it over to the testator or did not bring home to him that he was admitting the execution of a will or did not satisfy

himself in some other way (as, for example, be seeing the testator read in the will) that the testator knew that it was a will the execution of which he was admitting, the fact that the will was registered would not be of much value. Registration may take place without the executant really knowing what he was registering.

12. In the instant case, there were serious discrepancies in the evidence of PWs 1 and 2 regarding the presentation of the will for registration. PW 1 falsely claimed that he had presented the will on behalf of Upen for registration before the District Registrar. According to the endorsement in the Will, the will was presented by Upen, who had affixed his left thumb impression and the same was attested by Prabhat, D.W. 1, and not by P.W. 1, Abdul Karim Ali. There was also material discrepancy in the evidence of P.W. 1 and P.W. 2 regarding the time of registration. According to the endorsement made in the will, it was presented for registration at 2 P.M. of 3rd Jan., 1973. According to P.W. 1, the will was registered at about 4 or 5 P.M. Panchanan Chakraborty, P.W. 2, claimed that he was called at about 12-30 P.M. to attest the will. When he went there, P.W. 1, Prabhat Das, Panchu, Upen's wife, one unknown person and a chap-rashi were present. The left thumb impressions, according to P.W. 2, were put on the document at about 4 P.M. At the same time, P.W. 2, deposed that Upen put his left thumb impressions on the will at 1 P.M. and that the will was not registered in his presence. During cross-examination P.W. 2 claimed that 2/3 days later he came to know that the will had been registered. If the evidence of P.W. 1, Abdul Karim Ali, is to be believed immediately after its execution and the attestation, the will was presented for registration. Therefore, we fail to understand how P.W. 2, Panchanan, could claim that the will was not registered in his presence. In the absence of any evidence on this behalf the trial Court was not justified in observing that the unknown gentleman mentioned by P.W. 2, was the District Registrar. Further, there was no endorsement in the will that the same had been read over and explained to Upendra and that it was brought home to him that the document of which he was admitting execution was a will. There was also no evidence that the Dist. Registrar had satisfied himself that the executant knew that the document was a will,

Therefore, we conclude that the registration of the will appeared to have been done in a perfunctory manner and that therefore registration of the will was not of much value. The District Magistrate was not examined as a witness in the case and he did not endorse upon the will that the same had been read over and explained to the executant. Therefore the Court below was wrong in holding that the will was executed in the presence of the District Registrar.

13. In our view, there were other material infirmities in the matter of execution and attestation of the will. Panchanan, P.W. 2, was described as a neighbour of the deceased Upendra. But he admitted that he had no intimacy with Upen. He could not say how many sons and daughters Upen had by his first wife or by his second wife. According to P.W. 2 himself, at about 12-30 P.M. he was called to attest the will and he did (not?) claim any prior knowledge about Upendra's intention to make a will or about the preparation of the draft. Therefore, he appeared to be a chance-witness. In view of the other contradictions mentioned hereinbefore the presence of P.W. 2 at the time of the execution of the will was not believable. Monoranjan Das, who was one of the four attesting witnesses, was not examined as a witness in the case and no explanation was given by the plaintiff for his non-examination. We have also noted that Prabhat Das, who, according to P.W. 1, took a leading part in the making of the will of Upendra had deposed in court as the defendants' witness. We have already observed that P.W. 1, Abdul Karim Ali, did not appear to be a trustworthy witness. Although he claimed to have both attested the left thumb impressions of Upen and also affixed his signature as a witness in the will. His name appears as the last attesting witness. It may be further pointed out that P.W. 1 materially contradicted P.W. 2 when he stated that the left thumb impressions were put at the time of the execution of the will and the District Registrar was present when the will was executed. All the witnesses and P.W. 1 himself signed in the presence of the District Registrar. The court below was not justified in overlooking these contradictions by observing that the contradictions related to facts of which P.W. 1 spoke from his memory. In our opinion, these contradictions strike at the root of the evidence of P.W. 1.

14. For the foregoing serious infirmities, we conclude that the plaintiff had failed to prove that at the date of the execution of the alleged will, Upendra had testamentary power and that with full knowledge of its contents Upendra had consciously executed the same. Due attestation of the will has not been also proved. The suspicious circumstances surrounding the preparation of the will and its execution and attestation have not been removed by the plaintiff. In these circumstances, the plaintiff was not entitled to obtain probate of the alleged will of Upendra.

15. We, therefore, allow this appeal, set aside the judgment and decree of the trial court and dismiss the suit. In the circumstances of the case, each party would bear their respective costs throughout.

16. No order is passed on the application. The application is disposed of without any order as to costs.

R. K. SHARMA, J.:— I agree.

Appeal allowed.

AIR 1982 CALCUTTA 241

DIPAK KUMAR SEN, J.

Sarda Debi, Plaintiff v. Pacific Garments, Defendant.

Suit No. 478 of 1981, D/- 7-12-1981.

High Court Rules and Orders — Calcutta High Court Original Side Rules, Chap. 13A, R. 4 — Summons returnable on 1-9-81 served on defendant on 25-8-81, i.e. seven clear days' notice not given — Defendant appearing on returnable date but not raising objection about short notice — Objection raised only at time of hearing plaintiff's application for final judgment against defendant in suit — Objection is not sustainable — Defendant not having taken objection till final hearing, will be deemed to have waived objection and period of notice shall be treated as abridged. AIR 1972 Cal 372, Ref.; AIR 1945 Cal 341, Disting.

(Paras 13, 14)

Cases Referred: Chronological Paras

AIR 1972 Cal 372 11, 12

AIR 1969 SC 1267 11

AIR 1945 Cal 341 9, 13

ORDER:— Sarda Debi, the plaintiff, instituted this suit against Pacific Garments the defendant, on or about the 29th of

June, 1981, claiming, inter alia, a decree for Rs. 52,937.50 P. interest and costs.

2. The plaintiff's cause of action as appearing from the plaint is, inter alia, that the plaintiff lent and advanced to the defendants, a sum of Rs. 50,000 by a cheque dated the 8th April 1980, solely for the purpose of the business of the defendant. It was agreed that the defendant would repay the said sum with interest at the rate of 15% per annum.

3. On or about the 2nd Jan., 1981, the defendant made over to the plaintiff a cheque for Rs. 50,000 on Canara Bank towards repayment of the said loan. The said cheque was dishonoured by non-payment.

4. The present application of the plaintiff is on a summons dt. the 24th Aug., 1981 returnable on the 1st Sept., 1981 the plaintiff prays that a final judgment be passed against the defendant for the amount claimed in the suit with interest and costs.

5. It is a matter of record that the summons was served on the Advocate on record of the defendant on the 25th Aug. 1981. On the returnable date i.e. the 1st Sept. 1981 the defendant appeared and the matter was adjourned till 15th Sept. 1981. Directions were given for filing of affidavits within the adjourned date. Thereafter the matter was adjourned from time to time. Several directions were obtained in the meantime extending the time for filing of affidavits. The matter was finally heard on the 18th Nov., 1981.

6. Madhushri Gupta, a partner of the defendant has affirmed an affidavit on the 24th Nov. 1981, which has been filed in opposition to this application. It is admitted in this affidavit that the plaintiff had lent and advanced to the defendant the said sum of Rs. 50,000. It is also admitted that the defendant issued a cheque in full and final settlement of the dues of the plaintiff, which was dishonoured. It is, however, alleged that the defendant was informed by the plaintiff of such dishonour, the defendant paid to the plaintiff Rs. 50,000 in cash without receipt. It is alleged further that the said payment was made in cash on the promise of the plaintiff to grant a proper receipt which the plaintiff failed to do.

7. In a further affidavit affirmed on the 25th Nov. 1981 Madhushri Gupta alleges that the plaintiff is a regular and professional money-lender without hold-

BZ/CZ/A493/82/HR/RSK

1982 Cal./16 VI G—16

ing a valid licence under the Bengal Moneylenders' Act. It is contended that, as such, the transaction is illegal, null and void and not binding on the defendant. It is contended further that the application is otherwise not maintainable.

8. At the hearing, learned Advocate for the defendant reiterated the aforesaid contentions of the defendant and also submitted that this application of the plaintiff was not maintainable inasmuch as the plaintiff's summons was not made returnable after giving seven clear days after service of the said summons as required under R. 4 of Chap. XIII A of the Rules of the Original Side of this Court. Learned Advocate contended further that under R. 46 of Chap. XXXVIII of the said Rules the Court no doubt has power to enlarge or abridge the time appointed by the said Rules, but so far as the enlargement is concerned the same might be allowed after the expiration of the time. But so far as the abridgement of time was concerned, the same could only be decided initially and not after the summons had been returned.

9. In support of her contentions learned Advocate for the defendant cited Province of Bengal v. Midnapore Zamindari Co. Ltd., reported in AIR 1945 Cal 341 where a Division Bench of this Court held that the terms of S. 80 of the Code of Civil Procedure were imperative and admitted of no exception or implication and non-compliance of the provisions of the said section would be fatal to the suit and that a suit filed before the expiry of the period of notice must be held to be premature.

10. Learned Advocate for the plaintiff has contended to the contrary. He submitted that in the instant case there was no question of the plaintiff holding a licence at the time when the loan was advanced inasmuch as the said loan was a commercial loan and at the material time the Bengal Moneylenders' Act had not been extended to cover commercial loans. The Bengal Moneylenders' Act was amended sometime in Feb. 1981 after which, commercial loans were brought within the purview of the said Act.

11. Learned Advocate also contended that the Court had sufficient power to either extend or abridge the time fixed by the Rules for the ends of justice and in support thereof cited the case of Shri Iswar Jagannath Deb Jew v. Fatik Chandra Seal, reported in AIR 1972 Cal 372. Here the learned Judge sitting sing-

ly construed R. 46 of Chap. 38 of the High Court Rules, Original Side and observed as follows at p. 375:—

"After all rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence or inadvertence or infraction of the rules of procedure. This is a salutary principle and this principle has been recognised by the Supreme Court in AIR 1969 SC 1267 at p. 1268".

12. Learned Advocate for the defendant contended in reply that in Shri Iswar Jagannath Deb Jew (supra), the learned Judge found as a fact that the notice covering the period contemplated in the Rules had been given and, as such, the learned Judge was not called upon to decide whether the Court would have power to abridge the time if the period was short and the observations of the learned Judge should be treated as obiter.

13. The point to be considered first is whether this application should be dismissed in limine inasmuch as the summons was not made returnable without giving seven clear days' notice to the defendant. In the facts it appears that the defendant did appear on the returnable date and obtained directions for filing its affidavit in opposition. Time to file such affidavit was extended more than once, and the affidavit in opposition was filed ultimately more than two months after the returnable date. Therefore it appears that the defendant was not at all prejudiced by not having seven clear days' notice. It is not the case that on the returnable date before the defendant could appear, the plaintiff obtained a summary decree. If the defendant had complained on the returnable date that the notice was short, the returnable date could be formally extended covering the shortage. The defendant not having taken any objection to the shortness of the notice till the final hearing will be deemed to have waived its objection thereto. The decision in Province of Bengal (AIR 1945 Cal 341) (supra) does not appear to have any application in the facts of this case inasmuch as, under the C.P.C., the Court has no power either to abridge or enlarge the time fixed by S. 80 of the Code. Time fixed by the Rules can be enlarged or abridged under the Rules themselves.

14. For the reasons above, the contention of the defendant as to the shortness of the period of notice of the summons cannot stand. It is directed that the

period of the notice should be treated as abridged.

15. On merits, the defendant, has raised an issue on the Bengal Moneylenders' Act. Whether the amendment of the Bengal Moneylenders' Act will have any effect on the transaction will have to be finally determined in the suit and cannot be decided summarily here.

16. Payment which has been alleged by the defendant and denied by the plaintiff will also have to be adjudicated on evidence at the trial though the defendant's case appears to be little weak inasmuch as the defendant is not in a position to produce any receipt or other document in support of the payment alleged by it.

17. For the reasons above, the defendant is given leave to defend the suit on furnishing security for Rs. 25,000 to the satisfaction of the Registrar, Original Side. Such security should be furnished within one week after the Court reopens after the winter vacation.

18. In the event security is not furnished by the defendant as directed there will be an order in terms of prayer (a) of the summons and costs.

19. In the event security is furnished, there will be cross order for discovery of the security. Inspection forthwith thereafter and the suit is directed to appear in the appropriate Prospective List for hearing three months hence.

20. Liberty to mention. Costs in the cause.

21. All parties and the Department to act on a signed copy of the minutes of the order on the usual undertaking.

Ordered accordingly.

AIR 1982 CALCUTTA 243

S. N. SANYAL, J.

Sm. Kusum Rani Biswas, Petitioner v. Sanyasi Biswas and another, Opposite Parties.

Civil Revn. No. 761 of 1979, D/- 1-3-1982.

(A) West Bengal Land Reforms Act (10 of 1956), S. 8 — Application for pre-emption under — Question whether disputed land is agricultural or non-agricultural has to be gone into — Lower Court not considering this question — Held court failed to exercise its jurisdiction.

In an application for pre-emption under S. 8 the court has to determine the character of the disputed land i.e. whether it is agricultural or non-agricultural, with reference to the user of the land. (1978) 1 Cal LJ 532; (1979) 83 Cal WN 87 and (1979) 2 Cal LJ 526, Rel. on. (Para 4)

Where in an application under Sec. 8, the court did not took into consideration the entries in the record of rights regarding the nature of the disputed plots and the admission of the applicant that the suit land was non-agricultural, the court clearly failed to exercise its jurisdiction and the judgment of the court was, therefore, liable to be set aside.

(Para 4)

(B) West Bengal Land Reforms Act (10 of 1958), S. 8 — Application for pre-emption under — Plea that purported transfer giving rise to application under S. 8 was benami — Court not considering it although specifically raised — Held, it amounted to failure to exercise its jurisdiction. AIR 1947 Cal 410, Rel. on.

(Para 5)

Cases Referred: Chronological Paras
(1979) 83 Cal WN 87: (1978) 2 Cal LJ 466 2, 4
(1979) 2 Cal LJ 526: (1980) 1 Cal HN 240 2, 4
(1978) 1 Cal LJ 532 2, 4
AIR 1947 Cal 410 5

Shyamacharan Mitter and Syamaprosanna Roy Chowdhury, for Petitioner; Harinarayan Mukherjee, for Opposite Party No. 1.

ORDER:— The opposite party No. 1 Sanyasi Biswas filed an application under S. 8 of the West Bengal Land Reforms Act for pre-emption on the ground that he was a contiguous owner of the disputed land which was transferred by opposite party No. 2, Tukubala Biswas, to the petitioner Kusum Rani Biswas. The learned Munsif dismissed the application on the ground that Sanyasi Biswas had failed to prove that he was a contiguous owner of the disputed portion sought to be pre-empted. The appeal preferred by Sanyasi Biswas was allowed by the learned Additional District Judge who came to the finding that appellant Sanyasi Biswas a raiyat and he was in possession of land adjoining the disputed holding out of which the disputed three plots were transferred. The petitioner Kusum Rani Biswas has challenged the said decision of the learned Additional District Judge in the present revisional application.

2. Mr. S. C. Mitter, learned Advocate for the petitioner, has submitted that the learned appellate Court failed to exercise jurisdiction as the court did not consider the entries in the R.S. records and the admission of P.W. 1, Sanyasi Biswas, that the land was non-agricultural. Mr. Mitter contends that as the land was non-agricultural the provisions of S. 8 of the Land Reforms Act were not applicable. In support of his contention Mr. Mitter relies on the case of *Mishri Show v. B. N. G. Institution*, (1978) 1 Cal LJ 532, *Eyachhin Ali Naskar v. Gopal Gazi*, (1979) 83 Cal WN 87, *Kamaleswar Singha v. Bijoli Bhattacharya*, (1979) 2 Cal LJ 526. Mr. Mitter has further contended that the document sought to be pre-empted, namely, the document (Ext. B) dated Aug. 3, 1974 is not a kobala but only a deed of release as Tukubala Biswas was benamdar of her husband Rabindranath Biswas. Mr. Mitter submits that Kusum Rani purchased from Rabindranath Biswas by the kobala, Ext. B (1), dated March 18, 1974. But as it transpired subsequently that a benami document had been executed by Rabindra in favour of his wife Tukubala (Ext. B (2)) on March 15, 1974 it was thought advisable to have a deed of release from Tukubala. Mr. Mitter argues that all these questions are material for the purpose of decision of the application for pre-emption and the learned courts below failed to exercise their jurisdiction.

3. Mr. Harinarayan Mukherjee, learned Advocate for the opposite party No. 1, has submitted that the contentions raised by Mr. Mitter cannot be urged in the present revisional application as no objection was raised by the petitioner Kusum Rani before the trial court as well as before the appellate Court regarding the land being non-agricultural. It has further been contended that Rabindra had already sold to Tukubala and, as such, Kusum Rani did not derive any interest by the kobala, Ext. B (1). Kusum Rani's interest accrued only when the disputed document was executed by Tukubala in her favour and Sanyasi Biswas being the contiguous owner of the disputed land was entitled to pre-empt.

4. After hearing the learned Advocates for the parties and considering the materials before me I am of opinion that the Rule should be made absolute. The learned trial court dismissed the application only on the ground that opposite party No. 1 Sanyasi Biswas had failed to establish that he was the owner of land

adjoining the disputed holding. Another contention which was raised before the learned trial court, namely, whether the disputed document was a deed of release or not was not considered. The learned appellate Court allowed the application under Section 8 of the Land Reforms Act reversing the finding of the learned Munsif and holding that petitioner-appellant was a raiyat possessing land adjoining the disputed holding. The learned appellate Court, however, did not take into consideration the entries in the record of rights regarding the nature of the disputed plots and the admission of P.W. 1, Sanyasi Biswas, that the suit land was non-agricultural. In view of the decisions reported in (1978) 1 Cal LJ 532, (1979) 83 Cal WN 87 and (1979) 2 Cal LJ 526, the character of the disputed land, that is, whether it is agricultural or non-agricultural, is to be determined with reference to the user of the land. In this connection, the evidence of P.W. 1, Sanyasi Biswas, regarding the nature of the land will also be relevant. The learned courts below committed jurisdictional error in not considering these aspects of the question.

5. Another contention of Mr. Mitter is that the courts below failed to exercise jurisdiction as the petitioner Kusum Rani raised the objection that the disputed document executed by Tukubala was not a deed of transfer but only a deed of release. Referring to the decision in *Balai Chand Mondal v. Nibaran Chandra Dass*, AIR 1947 Cal 410, Mr. Mitter has argued that in hearing an application under S. 8 of the Land Reforms Act the question of benami can be gone into. In *Balai Chand's* case, referred to above, it was held that in a pre-emption proceeding under S. 26F of the Bengal Tenancy Act the question of benami or fictitious transfer can be gone into. The question that the transfer was fictitious and the transferee held the property for the transferor himself was decided and the said decision would operate as *res judicata* in a subsequent suit by the transferee for the declaration that the transfer was benami. This decision is in respect of S. 26F of the Bengal Tenancy Act. But the principles would also be applicable to an application under S. 8 of the Land Reforms Act and in such a case the real nature of the purported transfer giving rise to the application under S. 8 of the Land Reforms Act may be gone into in a proceeding under S. 8 of the Land Reforms Act. There was jur-

isdictional error on the part of the learned courts below in not dealing with this question which was specifically raised by the petitioner Kusum Rani Biswas in her petition of objection.

6. In the result the Rule be made absolute without costs. The judgments of both the courts below be set aside and the matter be remitted to the learned trial Court for decision in accordance with law.

Rule made absolute.

AIR 1982 CALCUTTA 245

B. C. RAY, J.

M/s. Nag Book House and another, Petitioners v. State of West Bengal and others, Respondents.

C. R. No. 12253 (W) of 1981, D/- 17-2-1982.

(A) West Bengal Board of Secondary Education Act (5 of 1963), Ss. 19-A (3) (h), 27 (2) (as amended by Act 32 of 1979) — Powers of Board — Circular by Board totally prohibiting individual publishers from printing and publishing text books on mathematics in any form whatsoever as per syllabi prescribed by Board — Held, violative of Art. 19 (1) (g). (Constitution of India, Arts. 19 (1) (g), 226). (Education — Secondary Board — Publication of text books — Powers as to).

The Circular published by the Board totally prohibiting individual publishers from printing and publishing text books on mathematics in any form whatsoever according to the prescribed syllabi for students for classes VI and VII reading in secondary schools recognised by the Board is violative of the fundamental right guaranteed under Art. 19 (1) (g) of the Constitution to practice any profession or to carry on any trade or business, because the impugned circular purports to create an unreasonable restriction on this fundamental right and as such it is void and so it is liable to be quashed and set aside. (Para 11)

The Board themselves undoubtedly can monopolise the trade of printing and publishing text books to be read by the pupils in secondary schools under the Board according to the syllabi prescribed by it. But this does not either expressly or impliedly confer upon the Board power to forbid printing and publication of text books by any other publisher or author according to the prescribed syl-

labi for students reading in secondary schools. These books if written cannot be treated as text books nor the printers or publishers thereof can claim any right to have them treated as text books and to allow them to be read by the pupils of the secondary schools as text books. Nevertheless, if students or schools are desirous of keeping these books or buying these books and reading them it cannot be prevented. (Para 11)

(B) West Bengal Board of Secondary Education Act (5 of 1963), S. 19-A (3) (g) (as amended by Act 32 of 1979) — Copyright Act (1957), S. 13 — Syllabi prepared by Board merely prescribed guidelines to be followed by text book writers — It does not subsist any copyright. (Education — Secondary Board — Syllabi prepared by Board — Does not subsist copyright).

The syllabi prepared by Board merely prescribing the guidelines which are to be followed by the text books writers cannot be termed as an original work having some quality or character of its own different from the raw material used. The syllabi that has been prescribed by the Board being not a product of labour, skill and capital and not having an independent character and quality of its own the question of subsisting any copyright in it does not arise. (Para 12)

(C) Constitution of India, Art. 226 — Writ petition — Locus standi — Circular published by Secondary Education Board affecting and infringing individual publisher's fundamental right under Art. 19 (1) (g) — Individual publisher is competent to maintain writ petition. (West Bengal Board of Secondary Education Act (5 of 1963), Ss. 19-A (3) (h), 27 (2).) (Para 13)

Cases Referred : Chronological Paras

AIR 1970 Madh Pra 261	11
AIR 1967 All 91 : 1966 All LJ 550	11
AIR 1931 Cal 233 : 34 Cal WN 540	11
AIR 1924 PC 75 : 22 All LJ 473	11

R. N. Mitra, Moloy Bose, D. K. Halder and B. G. Chatterji, for Petitioners; A. P. Chatterjee and S. P. Banerjee (for Nos. 3 and 4) and P. K. Basu, (for Nos. 1 and 2), for Respondents.

ORDER :— The petitioner No. 1 is a registered partnership firm which has been carrying on the business of printing, publishing and selling of approved text books of different classes in the different schools recognised by the West Bengal Board of Secondary Education. This busi-

ness is carried on under the name and style of "Nag Book House." The petitioner No. 2 is one of the partners of the said business. The West Bengal Board of Secondary Education issued guidelines for authors of text books on mathematics containing instructions regarding syllabus that has to be followed in respect of text books on Arithmetics and Geometry in classes VI and VII. The said guidelines describing the syllabus in respect of Arithmetics and Geometry to be followed by the writers on text books on the said subjects for being read by the pupils of the schools recognised under the Board. Thereafter a Circular No. Syll/79/9 dated 23rd Nov. 1979 was issued by the Secretary, Board of Secondary Education, West Bengal to the heads of all Junior and High Schools recognised by the Board notifying that the syllabi in Mathematics for Classes VI to X had been revised and the new syllabi for classes VI and VII would be introduced in place of the existing syllabi already published in Board's Brouchure under reference from the academic sessions 1981 onwards. The syllabi for classes VIII and IX will be introduced in place of the existing syllabi already published in Board's brouchure under reference from the academic sessions 1982, 1983 respectively. Another circular being circular No. Syll/80/9 dated 12th Aug. 1980 was sent by the Secretary of the Board to the heads of all Junior and High Schools recognised by the Board intimating that the new syllabus in mathematics will be introduced from the academic session 1981 only in class VI and not in class VII. The new syllabi for classes VIII, IX and X will be introduced in place of existing syllabi from the academic sessions of 1982, 1983 and 1984 and 1985 respectively.

2. Text books were prepared according to the syllabus prescribed from time to time by the authorities concerned and sent to the intending publishers and/or authors asking them to submit text books written and/or printed as per the said syllabus to the authorities for approval. The authorities used to fix up dates within which text books were to be submitted for approval as well as prescribed fees for the purpose. The authors and/or publishers after preparing the text books according to the syllabus and/or guidelines used to submit the same to the authorities concerned well in advance so that the text books could be put to market before the academic session concerned. After the submission of the text books

so prepared by the authors and the publishers the same were to be scrutinised by experts appointed by the authorities to ascertain whether the same had been prepared strictly according to the syllabus and the guidelines prescribed by the authorities. The text books after being recommended by the experts were formally approved by the authorities and thereafter the names of the text books were sent to the Heads of the Institutions for circulation. Such approval was also to be notified in the official Gazette. In case any mistakes and/or defects noticed by the experts the Authors and/or Publishers were to rectify the same after having followed the entire procedure and resubmit the same for its approval in the same manner and that too well in advance. The authorities have the absolute right either to reject any text book submitted for approval if the same were not up to the mark or to approve the same. This procedure was followed by the Government as well as University of Calcutta before the constitution of the Board of Secondary Education, West Bengal. After the constitution of the Board of Secondary Education similar procedure was followed until the issuance of new circular mentioned hereafter.

3. On 18th Nov., 1981, the Secretary, Board of Secondary Education, West Bengal issued a circular No. 95/81 intimating that the syllabi in Mathematics for Classes VI and VII has been prescribed by the Board by its circulars Nos. Syll/79/19 dated 23-11-1979 and Syll/80/9 dated 12-8-1980. It has been further stated in the said circular that the Education Department of the Government of West Bengal have undertaken the responsibility of publishing the mathematics text books for Class VI from the year 1981 and of distributing the same free of cost among the students all over the State of West Bengal. The West Bengal Board of Secondary Education have undertaken, with the approval of the Government of West Bengal, the preparation, publication and sale of text books in Mathematics for Class VII for the Secondary Schools recognised by the Board from the academic session 1982. From the academic session 1982, no book in Mathematics for Classes VI and VII other than the text books published either by the Government of West Bengal or by the Board as aforesaid, shall be prescribed in any secondary schools recognised by the Board. It has also been mentioned therein: "And, that no individual publisher shall be entitled

to publish text books in Mathematics in any form whatsoever, as per the said syllabi."

4. It has also been stated that the petitioners came to know from the notification dated 23-11-1981 this purported circular. It has been stated that this circular has completely frozen the text books on Mathematics for Classes VI and VII written by Sri Keshab Chandra Nag and published and printed by the petitioners thereby causing substantial loss to them. It has been stated that the petitioners have invested a huge sum of money for printing and publishing the text books on Mathematics for its use by the students of Secondary Schools under the Board and the impugned circular which purports to make total prohibition of the publishing and selling of these books published by the petitioner has caused serious prejudice as well as financial loss to the petitioner. It has further been stated that in view of the circular dated 23rd Nov., 1979 prescribing the syllabus for Mathematics the petitioners invested a huge sum of money in printing and publishing books on Mathematics for Classes VI and VII on the basis of the syllabus prescribed by the West Bengal Board of Secondary Education. It has, therefore, been submitted that the Board is estopped from acting contrary to the said circular by way of promissory estoppel. It has also been submitted that the impugned circular dated 18th Nov. 1981 is violative of Art. 14 of the Constitution as it discriminates between one publisher and another publisher similarly placed inasmuch as the petitioners have come to learn that the Board is entering into trading activities through Messrs. MacMillan Company Ltd. who is another publisher for the books for Class VII and above. It has been further submitted that the impugned circular is illegal and ultra vires inasmuch as it purports to interfere with the fundamental rights of carrying on by the petitioners their occupation as well as in practising their profession of printing and publishing books guaranteed in Art. 19 (1) (g) of the Constitution of India. As such the said circular is liable to be quashed and set aside. It has been further submitted that the impugned notification is also violative of the principles of natural justice inasmuch as before the issuance of the said circular and notifying the same in the Gazette no opportunity of hearing was given to the petitioners whose fundamental rights

have been seriously affected by the purported circular.

5. On these allegations and averments the instant Rule was issued on 9th Dec. 1981 and there was an interim order to the effect that the respondents were restrained from interfering with the rights of the petitioners to print, publish and sell books written by Keshab Chandra Nag in Mathematics during the disposal of the Rule.

6. An affidavit-in-opposition on behalf of respondents Nos. 3 and 4 sworn by Sri Jyotirbhusan Dutta, Deputy Secretary (Academic) West Bengal, Board of Secondary Education was filed on 7th Dec. 1981. In paragraph 4 of the said affidavit it has been stated that the West Bengal Board of Secondary Education constituted under the West Bengal Board of Secondary Education Act, 1963, has been empowered to provide for secondary education to the students and also it has been vested with the task of supervising the various institutions and schools recognised by the Board for imparting secondary education to the students reading in the schools under the Board. In the exercise of such powers of supervision and control over secondary education the Board have always the power to approve and select text books for the students and in fact text books in compulsory subjects could be used in any institution or school recognised by the Board only after being approved by the Board of Secondary Education. It has also been stated that after the amendment of the provisions of S. 27 of the said Act the Board has been conferred with greater powers in this respect. Clause (d) of sub-sec. (2) of S. 27 confers in particular the power to undertake, if necessary, with the approval of the State Government, the preparation, publication, or sale of text books and other books for use in recognised institutions. This Act was further amended by West Bengal Act XXXII of 1979 and S. 19A was inserted in the parent Act by S. 8 of the said Amendment Act. Sub-sec. (3) of Section 19 which has specified the duty of the Executive Committee of the Board clearly provides in cl. (h) of the said subsection that the Executive Committee of the Board can undertake with the approval of the State Government the preparation, publication or selling of text books and other books for use in recognised institutions. It has been submitted that on the basis of this provision the Board has undertaken the monopoly publication of

text books for different classes in Secondary Schools. For several years past the Board has monopoly publication of text books in English for Classes VI to X and it has now decided to undertake, with the approval of the State Government, monopoly publication of text books in Mathematics for Classes VII as well as for class VI. It has been further stated that the action of the Board in undertaking monopoly publication of books on Mathematics for class VII is not in conflict with the petitioner's right enshrined in part III of the Constitution. It has been further stated that the last two riders of the circular dated Nov. 18, 1981, to the effect that no book in Mathematics for Classes VI and VII other than the text books published by the Government of West Bengal or by the Board shall be prescribed in any recognised school and no individual publisher shall publish any text books in Mathematics in any form are not wholly illegal nor these two instructions violate the petitioner's right to carry on trade. It has also been stated that in the facts of the case there is no principle of promissory estoppel because of publishing and printing of books in accordance with the syllabus circulated under the circular dated 23rd Nov. 1979 as text books in a secondary institution for classes VI and VII in Mathematics written according to the syllabus must have to get prior approval of the Board.

7. An affidavit-in-reply has been filed reiterating the statements and submissions made in the writ petition.

8. Mr. R. N. Mitra, learned Advocate appearing on behalf of the petitioners has contended that the impugned circular dated 18th Nov. 1981 issued by the Secretary, West Bengal Board of Secondary Education is wholly illegal, unwarranted and bad inasmuch as the purported circular totally prohibits the publication of text books in Mathematics in accordance with the syllabus prescribed for classes VI and VII in any form. It has been submitted that the Secretary has not been conferred by the provision of the West Bengal Board of Secondary Education Act, 1963 as amended by the West Bengal Board of Secondary Education (Amendment) Act, 1979 and the Rules framed thereunder the power to exercise any such power of the Board. It has been next submitted by Mr. Mitra that the impugned circular is ultra vires as it purports to create unreasonable restrictions on the petitioner's fundamental right guaranteed under Art. 19 (1) (g) of

the Constitution. It has further been submitted that the Board cannot issue the impugned circular prohibiting the petitioner from printing and publishing text books in Mathematics according to the syllabi prescribed by the Board though the same may not be approved by the Board as text books for students reading in secondary schools.

9. Mr. A. P. Chatterjee, learned Standing Counsel, has, on the other hand, submitted that the Board can issue the impugned circular in exercise of the powers conferred by S. 27 of the Act and the impugned circular cannot be attacked as being illegal or unwarranted. It has been further submitted that the Board has in accordance with the provisions of S. 27 of the Act made regulations prescribing the syllabus. The impugned circular which empowers the Board to publish text books in Mathematics for Class VI and VII in secondary schools recognised by the Board and prohibiting publication of any text books in Mathematics according to the said syllabi is in accordance with the provisions of the Act and the regulations framed by the Board. It has been further submitted that this circular cannot be challenged as arbitrary, illegal and violative of the fundamental right guaranteed by the Constitution under Art. 19 (1) (g) of the Constitution of India. It has been lastly submitted by the learned Standing Counsel with great vehemence that the Board has a copyright to the syllabi made by it and the petitioner by writing text books in Mathematics in accordance with the said syllabus for classes VI and VII has infringed the copyright. For this infringement of the copyright the redress cannot be sought in this jurisdiction but to any other forum. It has also been submitted in this connection that the instant application at the instance of the petitioner is not maintainable inasmuch as the petitioner's statutory or constitutional rights have not been affected or infringed by the impugned circular. Section 27 of the West Bengal Board of Secondary Education Act, 1963 which deals with the powers and functions of the Board have been amended by S. 15 of West Bengal Board of Secondary Education (Amendment) Act, 1979 (West Bengal Act XXXII of 1979) and it substitutes cls. (a) to (m) under sub-sec. (2) of that Section. The relevant provisions which are quoted hereinbelow:—

"27 (2). Subject to any general or special orders of the State Government, the pro-

visions of this Act and any rules made thereunder, the Board shall have generally the power to direct, supervise and control Secondary Education, and in particular the power—(c): to make regulations in respect of matters referred to in clauses (c), (d), (e) and (g) of subsec. (2) of S. 19A. Section 19A (3) (g) which was inserted by S. 8 of the amended Act runs as follows:—

"it shall be the duty of the Executive Committee to provide by bye-laws after considering the recommendations, if any, of the Syllabus Committee, the Syllabus, the courses of studies to be followed and books to be studied in recognised institutions and for examinations instituted by the Board in accordance with such regulations as may be made by the Board. In this case the Board has framed certain regulations prescribing the syllabi for Mathematics in respect of Classes VI and VII of Secondary Schools recognised by the Board. The Executive Committee as well as the Board has got power to make bye-laws and regulations respectively in the manner laid down in the statute providing for the syllabus, the courses of studies to be followed by the students and books to be studied in recognised institutions. In this case the syllabi that has been prescribed by the Board by making regulations is, therefore, not illegal and bad. There is also no dispute nor it has been questioned on behalf of the petitioner that the Board cannot issue circular notifying that it will print and publish text books for students reading in secondary schools recognised by the Board and for sale of those books to the students. In other words, the Board can take up upon itself the entire responsibility of preparing, printing, publishing and selling of text books on Mathematics according to the syllabi prescribed by it to the exclusion of any other author, printer and publisher. This cannot be questioned and/or challenged by any other printer or author.

10. The next question that comes up for consideration is whether in exercise of this power the Board is competent to issue the impugned circular dated Nov. 18, 1981 preventing any individual publishers from publishing text books in Mathematics in any form whatsoever as per the syllabi prescribed by the Board. In my opinion, the Board is not empowered to publish a circular totally prohibiting other publishers from printing and publishing text books on Mathematics according to the prescribed syllabi

for students for Classes VI and VII reading in secondary schools recognised by the Board. The impugned circular which purports to prohibit printing and publishing text books in Mathematics in any form whatsoever according to the prescribed syllabi is, in my opinion, violative of the fundamental right guaranteed under Art. 19 (1) (g) of the Constitution which guarantees the right of the citizen to practice any profession or to carry on any trade or business. This impugned circular purports to create an unreasonable restriction on this fundamental right and as such it is void and so it is liable to be quashed and set aside. The Board themselves undoubtedly can monopolise the trade of printing and publishing text books to be read by the pupils in secondary schools under the Board according to the syllabi prescribed by it. But this does not either expressly or impliedly confer upon the Board power to forbid printing and publication of text books by any other publisher or author according to the prescribed syllabi for students reading in secondary schools. These books if written cannot be treated as text books nor the printers or publishers thereof can claim any right to have them treated as text books and to allow them to be read by the pupils of the secondary schools as text books. Nevertheless, if students or schools are desirous of keeping these books or buying these books and reading them it cannot be prevented. Therefore, this circular is liable to be quashed and set aside.

11. The learned Standing Counsel has submitted with great persuasiveness that the Board has a copyright to the syllabus made by it and the petitioners have no right to write text books on Mathematics for students of class VI and VII following the syllabus. It has been contended in this connection that the preparation and publication of the syllabus requires skill, capital and labour, it is the product of all these and as such no publisher including the petitioner have any right to write, print and publish text books following the said syllabus. Reference has been made in this connection to the decision of Lord Atkinson in AIR 1924 PC 75, *Mac Millan & Co. Ltd. v. K. & J. Cooper* where it has been observed that "It is the product of the labour, skill and capital of one man which must not be appropriated by another, not the elements, the raw material if one may use the expression, upon which the labour and skill and capital of

the first have been expended, to secure copyright for this product. It is necessary that the labour, skill and capital expended should be sufficient to import to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material". In AIR 1967 All 91, Agarwala Publishing House, Khurja v. Board of High School and Intermediate Education, U. P. Allahabad it has been observed that examination papers are within the category of original works within the meaning of S. 13 of the Indian Copyright Act, 1957 and copyright can be claimed therein. Section 2 (m) of the Copyright Act, 1957 defines "Infringing copy" as meaning:—

"(i) in relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of cinematograph film."

Section 13 provides that "copyright shall subsist in the following classes of works, that is to say,—

"(a) original literary, dramatic, musical and artistic works."

Chap. X deals with registration of copyright. S. 51 provides that "copyright in a work shall be deemed to be infringed

"(a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act—

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright."

In the case of Mohini Mohan Singh v. Sita Nath Basak, (1930) 34 Cal WN 540 : (AIR 1931 Cal 233) it has been held that an author may avail himself of common sources of information on a subject but he is not entitled to save himself pain and labour by adopting a predecessor's work with colourable variations even though such predecessor's work is based on materials which are common property. In AIR 1970 Madh Pra 261, Mishra Bandhu Karyalaya v. Shivaratanlal Koshal it has been held "Neither original thought nor original record is essential for a literary work to be original under S. 1. Schedule I of the 1914 Act. The real test in adjudging the originality of a work is whether it involved any skill, labour and knowledge of author. The originality in writing of a successful text book in a subject like arithmetic

lies upon the skill of the author. The amount of originality may be small, but the extent of his thought, skill and labour may be tremendous and it is that which is protected by law."

12. The guidelines for the authors and publishers of text books issued by the Board of Secondary Education, West Bengal annexed as annexure 'A' to the petition prescribing the syllabus cannot be taken as original work being the product of labour, skill and capital of some men engaged by the Board. The syllabi merely prescribing the guidelines which are to be followed by the text books writers cannot be termed as an original work having some quality or character of its own different from the raw material used. Therefore, in my opinion, the syllabi that has been prescribed by the Board being not a product of labour, skill and capital and not having an independent character and quality of its own the question of any copyright does not arise from this. The submission of the learned Standing Counsel that in accordance with the syllabi the text books prepared by the petitioners is an infringement of the copyright is without any merit and hence the same is overruled.

13. The impugned circular dated 18th Nov, 1981 as mentioned in annexure 'D' to the petition undoubtedly affects and infringes upon the petitioner's fundamental right guaranteed under Art. 19 (1) (g) of the Constitution of India. Therefore the petitioner's being aggrieved persons are competent to maintain this application in this jurisdiction. The submission of the Standing Counsel on this score is totally devoid of merit and hence the same is rejected.

14. For the reasons aforesaid the contentions raised on behalf of the petitioner having succeeded the Rule succeeds and it is made absolute. Let a writ of Mandamus be issued commanding the respondents to forbear from giving effect to the impugned circular in so far as it purports to prohibit individual publisher from publishing text books in Mathematics in any form whatsoever as per the syllabi of the Board. Let a writ of certiorari be also issued commanding the respondents to quash and set aside that portion of the circular which purports to prohibit individual publisher from publishing text books in Mathematics in any form whatsoever according to the syllabi of the Board.

15. In the facts and circumstances of the case there will, however, be no order as to costs.

Rule made absolute.

AIR 1982 CALCUTTA 251

B. N. MAITRA, J.

State of West Bengal, Appellant v. Subimal Kumar Mondal and another, Respondents.

A. F. A. D. No. 339 of of 1974 D/- 12-6-1981.*

(A) Civil P. C. (5 of 1908), Ss. 100-101 — Second appeal — Suit for declaration of title and for further declaration that entry in record of rights was incorrect dismissed — Suit decreed by lower appellate Court which ignored material evidence — Held, findings of fact thus arrived at were not binding in second appeal. AIR 1976 SC 2229 and AIR 1940 PC 192, Rel. on. (Para 6)

(B) Evidence Act (1 of 1872), Ss. 101-103 — Suit for declaration of title — Burden is on plaintiff to prove his title.

In a suit for declaration of title it is for the plaintiff to prove his case because the principle of law is that the plaintiff must succeed on the strength of his own case and not on the weakness of the defendant's version. AIR 1946 PC 59 and AIR 1954 SC 526, Rel. on. (Para 7)

(C) Civil P. C. (5 of 1908), S. 107 — Appreciation of evidence — Duty of lower appellate Court.

The plaintiff filed a suit for declaration of title to the suit property and for a further declaration that the entry in the record of rights showing the plaintiff's father as the owner was incorrect. The plaintiff alleged that when he was a minor, his father acted as his guardian and for the benefit of the minor son sold the suit property to the minor. After making the purchase the plaintiff had been possessing the property. But in the R. S. Khatian there was a wrong entry that the property belonged to his father and that land had vested in the State. The plaintiff's father did not make any purchase. A written statement was filed by defendant No. 1, the State, denying the plaintiff's allegations. It was stated that defendant No. 2, plaintiff's father, was a

big raiyat and he made a Benami purchase. He did not retain the suit-land. That property had vested in the State. The trial Court after considering all the relevant evidence, disbelieved the plaintiff's version in all respects and held that the plaintiff had no money to make the purchase. That purchase was not a genuine one. The plaintiff was not in possession of the property. The dakhilas filed by him were interpolated. The plaintiff had no title. The suit was dismissed. The plaintiff went up in appeal. The appellate Court decreed the suit by allowing the appeal. The first appellate Court practically accepted the plaintiff's version simply because defendant No. 2 did not controvert his allegations. But that Court failed to consider the broad fact that defendant No. 2 was none but the plaintiff's father.

Held, the evidence given by the plaintiff and the documents filed by him were rejected by the trial Court. Reasons were assigned why those documents could not be accepted and the evidence of the P. Ws. seemed to be unacceptable to the trial Court. Therefore, the lower appellate Court ought to have been cautious before allowing the appeal by reversing all the findings of fact of the trial Court. AIR 1972 SC 1716, Rel. on. (Para 8)

(D) T. P. Act (4 of 1882), S. 41 — Question whether transaction was benami — Evidence led by parties — Held, court had to decide issue on basis of such evidence and it had to consider source of consideration money — Court should not have decided issue by stating that defendants had failed to discharge onus — Question of onus did not arise since parties had led evidence. AIR 1964 SC 880 and AIR 1977 SC 409, Rel. on. (Para 9)

Cases Referred : Chronological Paras

AIR 1977 SC 409	9
AIR 1976 SC 2229	6
AIR 1972 SC 1716	8
AIR 1964 SC 880	9
AIR 1963 SC 302 : 1963 All LJ 67	5
AIR 1954 SC 526	7
AIR 1946 PC 59 : 50 Cal WN 477	7
AIR 1940 PC 192 : 45 Cal WN 57	6

Gouriprosad Mukherjee, for Appellant; Himadri Sankar Majumdar, for Respondents.

JUDGMENT :— The plaintiff has alleged that the disputed land belonged to the minor, Satyendra Nath Patra. The latter's father acted as his guardian and

*Against decree of S. N. Ghose 3rd Addl. Dist., J. Midnapur, D/- 15-6-1973.

for the benefit of the minor son, sold the disputed property to him on the 7th Dec., 1953, for Rs. 250/-. After making the purchase he has been possessing the property. But in the R. S. Khatian there is a wrong entry that the property belongs to his father and that land has vested in the State. The plaintiff's father did not make any purchase. The suit is for an injunction on declaration of the plaintiff's title and for a further declaration that the entry in the record-of-rights is incorrect.

2. Defendant No. 1 is the State of West Bengal. A written statement was filed denying the plaintiff's allegations. It has been stated that defendant No. 2, plaintiff's father, was a big raiyat and he made a Benami purchase. He did not retain the suit-land. That property has vested in the State.

3. The learned Munsif disbelieved the plaintiff's version in all respects and has held that the plaintiff had no money to make the purchase. That purchase was not a genuine one. The plaintiff was not in possession of the property. The dakhilas filed by him were interpolated. The plaintiff has no title. The suit was dismissed. The plaintiff went up in appeal. The appellate Court decreed the suit by allowing the appeal. Hence this appeal by the State.

4. It has been contended on behalf of the State that the decision of the learned Additional District Judge is incorrect. The facts and the law were not properly discussed. The important items considered by the learned Munsif were ignored by that court. The plaintiff has no title or possession.

5. The learned Advocate appearing on behalf of the plaintiff-respondent has stated that the fate of this appeal is concluded by the findings of fact arrived at by the learned Additional District Judge. The findings are binding on the High Court in second appeal. The case of Ramchandra v. Ramalingam in AIR 1963 SC 302 decided by Gajendragadkar, J. has been cited to support this contention.

6. The first question arises whether there was non-consideration of material evidence by the learned Additional District Judge. In the case of Damadilal v. Parashram reported in AIR 1976 SC 2229, A. C. Gupta, J. has stated that where there was non-consideration of material evidence by the first appellate Court, the High Court can enter into questions of fact in second appeal. The most impor-

tant fact is that the entry in the R. S. Khatian is against the plaintiff. The statutory presumption attached to the record-of-rights was not considered by the first appellate Court. In the well-known case of Shankar Rao v. Sambhu reported in (1941) 45 Cal WN 57 : (AIR 1940 PC 192). Sir George Rankin has stated that where in arriving at the finding of fact, the final Court of fact omitted to consider the presumption arising out of the provisions of S. 135J of the Bombay Land Revenue Code (corresponding presumption u/s. 103B of the Bengal Tenancy Act), such finding is not binding on the High Court in second appeal. The question of possession was elaborately dealt with by the learned Munsif. But that finding has been reserved in one line by stating that the evidence of the P. Ws. was accepted. No reason was assigned why that Court rejected the reasons given by the learned Munsif in this respect. The question of benami was also cryptically discussed and stated that since the defendant failed to establish the plea of benami, the same could not be accepted. The learned Munsif stated that the plaintiff filed only two dakhilas, which were interpolated. This item was not at all discussed by the first appellate Court. The other important points were dealt with by the learned Munsif, but not considered by the learned Additional District Judge. Hence for non-consideration of material evidence, the findings of fact cannot be accepted by this Court in Second appeal.

7. Then about the merits. The plaintiff has asked for declaration of title. Hence it is for him to prove his case because the principle of law is that the plaintiff must succeed on the strength of his own case and not on the weakness of the defendant's version. This principle was laid down by Sir George Beaumont in the well-known case reported in (1946) 50 Cal WN 477 at p. 478 : (AIR 1946 PC 59). This principle was also enunciated in the case in AIR 1954 SC 526 at p. 538 by Jagannadhadas, J.

8. The learned first appellate Court practically accepted the plaintiff's version simply because defendant No. 2 did not controvert his allegations. But that Court failed to consider the broad fact that defendant No. 2 is none but the plaintiff's father. So the Court ought to have been cautious before allowing the appeal by reversing all the findings of fact. The observations of the Supreme Court are clear,

in this respect. In the Court of T. D. Gopalan v. Commr., H.R. & C.E., Madras, reported in AIR 1972 SC 1716 at p. 1719, it has been stated that the uniform practice in the matter of appreciation of evidence has been that if the trial court has given cogent, detailed reasons for not accepting the testimony of a witness, the appellate court in all fairness should deal with those reasons before proceeding to form a contrary opinion about accepting the evidence, which has been rejected by the trial court. Here the evidence given by the plaintiff and the documents filed by him were rejected by the learned Munsif. Reasons were assigned why those documents could not be accepted and the evidence of the P. Ws. seemed to be unacceptable to him.

9. Then about the question of benami. The learned Additional District Judge should not have decided the point of benami simply by stating that the defendants failed to discharge the onus in this respect. In the latest Supreme Court case *Bibi Fatima v. Union of India*, Singha, J.,* after following the case of *Kalwa Devadattam* in AIR 1964 SC 880 at p. 885 and AIR 1977 SC 409 at p. 413 has stated that the question of onus in a benami case is important only in the early stages of the case. It may assume importance where no evidence is led. But where evidence has been led, an abstract consideration of onus is out of place and the case has to be decided on the evidence adduced by the parties. In such cases, the court has to consider about the source of the consideration money. This point was emphasized by the Judicial Committee all along and subsequently the Supreme Court has also taken that view.

10. The learned Munsif has pointed out that the plaintiff's evidence in this respect bristles with contradictions. When P. W. 1, Subimal, plaintiff, was cross-examined, he had to admit that he had nothing to show that he had sufficient money to pay the consideration money at the relevant time for the purpose of purchasing the disputed property. This witness has stated that he had a discussion with the vendor for purchasing the property. He admits that he did not go

through the papers to satisfy himself about the vendor's title. He first says that he himself purchased the stamp paper. In the next breath he denies the same. These facts were elaborately discussed by the learned Munsif. P. W. 1 Subimal says that the consideration money was paid before the Registrar, whereas P. W. 2, Pramatha Nath, makes a different statement and states that the consideration was not paid before the Sub-Registrar, but in the presence of the scribe. The plaintiff has stated that he cannot say who presented the deed for registration and what was the value thereof. He says that he called P. W. 2, Pramatha, and other witnesses for witnessing the execution of the document. But P. W. 2 Pramatha Nath, has stated that the plaintiff did not call him and he went to that place of his own accord because he had business in the registration office.

11. The plot 1225 covers 90 cents, whereas the kobala in question, 1, will show that the area of that plot No. 1225 is 1.22. This shows that the plaintiff was tutored to make statements in the Court and somebody else was pulling the string from behind.

12. The learned Munsif pointed out that the two dakhilas, Exts. 6 and 6(a), were interpolated and the same could not be connected with the entry of the plot in the disputed kobala, Ext. 1. This item was also not discussed by the first appellate Court.

13. Then about the point of possession. It has already been pointed out that the first appellate Court did not refer to the presumption arising out of the finally published R. S. Khatian, which is against the plaintiff. P. W. 1, Subimal, is the plaintiff and is thus an interested witness. P. W. 2, Pramatha Nath, lives in a different village altogether. P. W. 3, Niranjan Mandal, deposed in the plaintiff's favour. He says that he is a neighbour of the plaintiff. He admits that he does not know when the plaintiff first possessed the disputed plot nor does he know the plot number or the area of the disputed plot. The learned Munsif pointed out that this witness could not give details about the land which he claims to have cultivated himself. This witness says that he has land to the adjoining east of the disputed land. The learned Munsif has pointed out that the kobala, Ext. 1, shows that to the adjoining east of the plot lies the land of Aniruddha, plain-

*Citation not given in certified copy. It seems to refer to AIR 1978 SC 1362 and the judgment is delivered by Hon'ble Untwalia, J. —Ed.

tiff's father. One fails to understand why in the face of these findings, the learned Additional District Judge allowed the appeal.

14. Thus from the aforesaid discussion the evidence of the P. Ws. cannot be believed. It must be held that the plaintiff's kobala, Ext. 1, is not a genuine transaction and he did not purchase the property in question for consideration. It is further held that he has no interest in the disputed land and that land is not in his possession. The decision of the learned first appellate Court is absolutely perverse.

15. The appeal is allowed. The judgment and decree appealed against be hereby set aside and those of the learned Munsif restored without any order as to costs.

Appeal allowed.

AIR 1982 CALCUTTA 254

MANAS NATH ROY, J.

Bhakta Prosad Paul, Petitioner v. State of West Bengal and others, Respondents.

Civil Rule No. 12374 (W) of 1980, D/-18-6-1981.

(A) W. B. Land Reforms Act (10 of 1956), Section 54 — Tribunal could correct accidental error in its order. — Party not being prejudiced could not challenge the correction as being opposed to rules of natural justice. (Constitution of India Art. 226).

The Tribunal exercising jurisdiction under the above W. B. Land Reforms Act is competent to correct an accidental error or mistake in the order made by it. Where the appellate authority corrected an obvious error with reference to the bhagchas case number and the correction could not be said to have caused any prejudice or difficulty to the other party in appreciating the effect of the appellate order, it was not allowed to be challenged on the ground that he had not been heard before the correction was made. (Para 8)

(B) Constitution of India, Article 226 — High Court's power under Art. 226 to interfere with a perverse order — Where perversity was in issue the appellate body was bound to give a speaking order even though it was confirming

that of the Tribunal. (W. B. Land Reforms Act (10 of 1956), S. 54).

The contention that, unlike in the case of a statutory appeal the Court was bound to make a speaking order, the same could not be insisted upon when the High Court was moved under Article 226 of Constitution because the High Court acting under that Article could not interfere with the findings of fact reappreciating the evidence in the case, was rejected. Where there was an allegation of perversity or where there was at least a claim to that effect or which would be required to be decided by the High Court, the Tribunal was bound to make a speaking order not only for finding out whether the exceptions taken were duly decided but also for testing the validity of the findings reached on the evidence on record. The circumstance that the appellate authority was only confirming the finding of the lower Tribunal was no excuse, AIR 1966 SC 1827 and AIR 1963 SC 1612, Distinguished. AIR 1970 SC 1302 and AIR 1971 SC 862, Rel. on. (Paras 9 & 12)

Cases Referred : Chronological Paras

AIR 1977 SC 567: 1977 Lab IC 55	7
AIR 1975 SC 2057: 1975 Lab IC 1497	11
AIR 1972 Goa 41	7
AIR 1971 SC 862	10
AIR 1970 SC 1202	10
AIR 1969 SC 414 : 1969 Cri LJ 663	7
AIR 1966 SC 671	7
AIR 1966 SC 1827	11
AIR 1963 SC 1612	11

Mrs. Archana Sen Gupta and Amit Prokash Lahiri, for Petitioner; B. C. Dutt and Satyanarayan Jas, for Respondents Nos. 4 and 5.

ORDER:— The Rule, in which the exceptions regarding the maintainability have been taken and the particulars whereof are mentioned hereinafter, was obtained on 18th Nov., 1980, against order dated 13th March, 1978, made by the Bhagchas Officer, Monteswar, Burdwan, in Bhagchas Case No. 40 of 1976, as affirmed in M. P. Case No. 154 of 1978 on 10th July 1980. The impugned orders are in Annexures "E" and "H" to the petition of motion.

2. It was contended by the petitioner, on a reference to the impugned appellate order, that the same was bad, irregular, void, illegal and unauthorised, as firstly, the same was not a duly reasoned order or a speaking order,

secondly the reference to Bhagchas Case No. 46 of 1976 in the order itself, which should have been Bhagchas Case No. 40 of 1976, proved and established non application of mind and thirdly, even though such point was not taken in explicit language, both the determinations as impeached, were perverse, as the facts and evidence as lead or tendered, were not duly considered. It has been stated that the lands in question belonged to one Khudiram Mondal and on his death, his son Sri Sailendra Nath Mondal, Sm. Bhagabati Mondal, the second wife of the deceased and Sm. Minati Rani Mondal, the daughter, inherited those properties. It has also been stated that Sm. Bhagabati Mondal and Sm. Minati Rani Mondal, settled the lands in question as Bargadar with the petitioner, after such inheritance.

3. It was the case of the petitioner that thereafter, Respondents Nos. 4 and 5, for whom Mr. B. C. Dutt was appearing, filed an application for eviction of the petitioner on the grounds as mentioned in Section 17 (I) (d) of the West Bengal Land Reforms Act. 1955 (hereinafter referred to as the said Act). This application, as mentioned above, was numbered as Bhagchas Case No. 40 of 1976. Such application, even after contest by the petitioner, was allowed, wherefrom the concerned appeal was taken, which again was dismissed in the manner as indicated above.

4. The main grievance of the petitioner have been indicated hereinbefore. The Respondents Nos. 4 and 5, by their affidavit-in-opposition dated 17th December 1980, apart from denying the material allegations and facts, claimed that the determinations as made by the Bhagchas Officer, were due, proper and appropriate, on the basis of the pleadings and records or evidence as available before him and since the terms of the appellate order would establish that the determinations as made in the manner as indicated hereinbefore, were appropriate, so there was also no justification in the contentions of the petitioner that the appellate order was bald, bare or without any appropriate particulars or reasons. It was also stated that the reference to Case No. 46 of 1976, instead of Case No. 40 of 1976, was made inadvertently and in any event, such reference, has not created any prejudice.

so far the petitioner was concerned and such mistake, which was an accidental one, was appropriately corrected, by an order dt. 3rd Oct. 1980. It was claimed that in the facts of the case, if the Rule is not disposed of early, the interim order as made, should be vacated. In fact, when on 21st April, 1981, the case appeared in the list, Mr. Jas prayed, that let the affidavit-in-opposition as filed, be treated as an application for vacating the interim order. Such prayer was allowed and it was directed that exceptions by the petitioner, if any, to the said application for vacating the interim order, be taken within two weeks and reply thereto by a week thereafter. The exceptions and the reply have been filed and they are dated 4th May, 1981 and 7th May, 1981 respectively. Mrs. Sen Gupta claimed that instead of determining the issues regarding the maintainability of the application, on the grounds as mentioned by the answering Respondents at this interlocutory stage, where and when no final order is required or intended to be made, this Court can, without deciding the point, should direct the matter to go back before the learned Tribunal, for appropriate determination in accordance with law and that too, after giving due reasons, for such determinations.

5. The above submissions of Mrs. Sen Gupta and those of her contentions, that the learned Tribunal, who was required to pass a reasoned order or to make a speaking order, was contested by Mr. Dutta, who claimed, that in the facts and circumstances of the case and more particularly when, on a reference to the order as made by the learned Tribunal, it would appear that such order was made or passed, on consideration of the initial order and more particularly when the reasons given in the initial order, are the basis of the final and ultimate order by the learned Tribunal so no interference is required or should be made or necessary, as, if the two orders are read together, they would give a complete answer to the submissions of Mrs. Sen Gupta and more particularly, that a reasoned or a speaking order has been passed.

6. Mr. Dutt also claimed that such reasoned or speaking order, would be necessary or required when there would

be a statutory appeal, but not in cases, where a writ proceeding has been initiated. He contended that writ proceeding, not being statutory appeals and in such proceeding, this Court having no jurisdiction or authority to interfere with the findings of facts or to assess or reappraise evidence as led, unless perversity is proved or established, the submissions as put forward by Mrs. Sen Gupta, could not be considered or would be available in such a proceeding. It was in fact, claimed by Mr. Dutt that perversity in this case, has neither been pleaded nor established and as such the same should not be a ground for consideration by this Court.

7. In support of his submissions as aforesaid Mr. Dutt firstly, referred to the determinations in the case of *Uttam Bala v. M. N. Mathur*, AIR 1972 Goa 41. This was a case under the Defence of India Rules 1952 and more particularly under Part XII-A, comprised of the Gold Control Rules. In that case, it has been observed that where order of the Government in revision, indicates that the detailed reasons given in the order of the Collector and Administrator, were considered and adopted by the Government, there was no need for the Secretary to the Government, to pass the order to repeat those reasons in his own order. The order of the Government, therefore, cannot be quashed on the ground that it was a non speaking order. Then, reference was made to the determinations in the case of *Tarachand Khatri v. Municipal Corporation of Delhi*, AIR 1977 SC 567, for the observations that although it may be necessary for the disciplinary authority to record its provisions and conclusions in the notice calling upon the delinquent officer to show cause why the proposed punishment should not be imposed upon him, if it differs from the findings arrived at by the Enquiry Officer with regard to the charge, it is not obligatory to do so in case the delinquent officer concurs with the findings of the enquiry officer. Mr. Dutt thereafter referred to the case of *Madhya Pradesh Industries Ltd. v. Union of India*, AIR 1966 SC 671. In this case, it has been observed that the order of the Central Government, in the facts of that case, was not bad, since they agreed with the reasons given in the orders of

the State Government and under the relevant Rules, they were not bound to give fuller reasons in the concerned order. It was then pointed out by Mr. Dutt, on a reference to the determinations in the case of *Som Datt Dutta v. Union of India*, AIR 1969 SC 414, which was a case under the provisions of the Army Act, 1950, that there is no express obligation imposed by S. 164 or by S. 167 of the Army Act, on the confirming authority or upon the Central Government, to give reasons in support of its decision to confirm the proceeding of the Court Martial. It has also been observed in that case, that apart from any requirement imposed by the statute or statutory Rules, either expressly or by necessary implication, it cannot be said that there is any general principle or any rule of natural justice that a statutory Tribunal should always and in every case give reasons in support of its decision. It was thus observed further that such orders cannot, therefore, be held to be illegal for not giving any reasons for confirming the orders of the Court Martial.

8. The above argument on natural justice and the case, was made and cited, as Mrs. Sen Gupta contended that when admittedly the learned Tribunal changed the number of the case from B. C. Case No. 46 of 1976 to B. C. Case No. 40 of 1976 after a lapse of time and without any opportunity to the petitioner of being heard, there was violation of such principles. On this point, on consideration of the arguments and the pleadings, I do not think that the petitioner has a substantial case, as admittedly he had no prejudice or difficulty in appreciating the effect of the appellate order on that basis or to challenge the appellate order, for that reason. The quoting of a wrong case number, may happen or occur for reasons more than one, but, that would not ipso facto establish non-application of mind as claimed by Mrs. Sen Gupta. The learned Tribunal, in my view, had jurisdiction and authority to correct such accidental error or mistake and since it has duly made such corrections, it can but be held that the learned Tribunal duly acted within its power, competence and jurisdiction. So, the submissions of Mrs. Sen Gupta on this aspect, should also fail.

9. Mrs. Sen Gupta claimed that the cases as cited by Mr. Dutta and the particulars whereof are mentioned hereinbefore, are distinguishable on facts. It was specifically claimed by her, on a reference to the grounds of appeal in M. P. Case No. 154 of 1978 and the appellate order as impeached, that the learned Tribunal has not duly determined the issues involved, on proper or due reasons being given. It was claimed by her that the initial authority also was in errors in deciding the lis or the points as raised and pleaded duly. As such, she claimed that the point regarding perversity, even if not taken specifically, this Court would not be powerless to consider whether the points as duly raised have been appropriately decided on good and cogent reasons and if the answer is not satisfactory, then that would give rise to or would be a case of perversity, which this Court, in a proceeding under Art. 226 would be justified and authorised to investigate. There is no doubt that in a writ proceeding High Court would be justified to interfere and investigate in cases of perversity, when the findings arrived at, are obstinately or wilfully or unreasonably or blindly or unaccountably wrong. In fact, it was the submissions of Mrs. Sen Gupta that since the exceptions as duly taken or raised at appropriate stages, have not been properly dealt with or decided, on reasons or such reasons are not available from the records viz., the orders as impeached, there was admittedly a case of perversity, which this Court can investigate, more so when in a writ proceeding. High Court, as a superior authority, has such right over inferior Tribunals. Mrs. Sen Gupta further claimed that the High Court, as such superior authority, has every jurisdiction to see, scan and scrutinise the reasonings given by the inferior Tribunals, in a case like this and as such, the learned Tribunal was required to record its reasons duly or should have passed a speaking order, so that reading the appellate order, it could form the opinion or get an idea about the basis or background of the order, as made. It was further claimed by Mrs. Sen Gupta that since the orders as made, have determined the rights of the petitioner.

so the authorities making them, were quasi-judicial authorities and as such also, they were required to pass speaking orders. She claimed that the order by the initial authority was speaking order no doubt, but since the learned Tribunal, has not decided all the exceptions as taken by a speaking order, such determination was perverse.

10. The submissions as referred to above, do get support from the determinations in the case of M/s. Mahabir Prosad Santosh Kumar v. State of U. P., AIR 1970 SC 1302, where it has been observed that opportunity to a party interested in the dispute to present his case on question of law as well as fact, ascertainment of facts from materials before the Tribunal after disclosing the materials to the party against whom it is intended to use them and adjudication by a reasoned judgment upon a finding of the facts in controversy and application of the law to the facts found, are attributes of even a quasi-judicial determination. Recording of reasons in support of a decision by a quasi-judicial authority is obligatory as it ensures that the decision is reached according to law and is not a result of caprice whim or fancy reached on ground of policy or expediency. The necessity to record reasons is greater if the order is subject to appeal. The submissions of Mrs. Sen Gupta, do also get further support from the determinations in the case of M/s. Travancore Rayons Ltd. v. Union of India, AIR 1971 SC 862. In that case, it has been observed that when judicial power is exercised by an authority normally performing executive or administrative functions, the Supreme Court insists upon disclosure or reasons in support of the order on two grounds, one, that the party aggrieved in a proceeding before the High Court or the Supreme Court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous, the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power.

11. It must also be noted that apart from the decisions as mentioned hereinbefore, specific reference was made by Mr. Dutta to the determinations in the case of State of Madras v. A. R. Srin-

vasan, AIR 1966 SC 1827, which was also a case on disciplinary proceedings and where, the Supreme Court has observed that in dealing with the question as to whether it is obligatory on the State Government to give reasons in support of the order imposing a penalty on the delinquent officer, it is to be remembered that the disciplinary proceedings against such a delinquent officer begin with an enquiry conducted by an officer appointed in that behalf. That enquiry is followed by a report and the Public Service Commission is consulted where necessary. Having regard to the material which is thus made available to the Government and which is made available to the delinquent officer also, it is unreasonable to suggest that the State Government must record its reasons as to why it accepts the findings of the Tribunal. It is conceivable that when the State Government does not accept the findings of the Tribunal which may be in favour of the delinquent officer and proposes to impose a penalty on the delinquent officer, it should give reasons as to why it differs from the conclusions of the Tribunal, though even in such a case it is not necessary that the reasons should be detailed or elaborate. This case was also sought to be distinguished by Mrs. Sen Gupta on the grounds as mentioned above. Mr. Dutt also made further reference to the determinations in the case of the State of Assam v. Bimal Kumar, AIR 1963 SC 1612, wherein, the effect of absence of statements, if the findings of the enquiry officer were accepted and what was contemplated by reasonable opportunity under Art. 311 (2), were considered and it has been observed that it is no doubt desirable that the dismissing authority should indicate in the second notice its concurrence with the conclusions of the enquiry officer before it issues the notice under Art. 311 (2) of the Constitution. But the failure to so state expressly in the notice does not necessarily justify the conclusion that the notice given in that behalf does not afford a reasonable opportunity to the delinquent officer under Art. 311 (2) and amounts to a contravention of Article 311 (2). If the dismissing authority differs from the findings either wholly or partially, recorded in the enquiry report it is essential that the provisional conclu-

sions reached by the dismissing authority must be stated in the notice in order to give the delinquent officer a reasonable opportunity to show cause under Art. 311 (2). But where the dismissing authority purported to proceed to issue the notice after accepting the enquiry report in its entirety (as in the instant case) and a copy of the enquiry report was also enclosed along with the notice, it must have been obvious to the delinquent officer that the findings recorded against him by the enquiring officer had been accepted, and so it would not be reasonable to accept the view that the civil servant concerned had no reasonable opportunity as required by Art. 311 (2). From the fact that the enquiry report had suggested the punishment of withholding of three increments while in the show cause notice the action proposed was removal from service, it cannot be inferred that the dismissing authority did not accept the findings recorded by the enquiring officer in favour of the delinquent officer, apart from holding that it is now well settled that a public officer against whom disciplinary proceedings are intended to be taken is entitled to have two opportunities before disciplinary action is finally taken against him. An enquiry must be conducted according to the rules prescribed in that behalf and consistently with the requirements of natural justice. At this enquiry, the public officer concerned would be entitled to test the evidence adduced against him by cross-examination, where necessary, and to lead his own evidence. In other words, at this first stage of the proceedings he is entitled to have an opportunity to defend himself. When the enquiry is over and the enquiring officer submits his report, the dismissing authority has to consider the report and decide whether it agrees with the conclusions of the report or not. If the findings in the report are against the public officer and the dismissing authority agrees with the said finding, a stage is reached for giving another opportunity to the public officer to show why disciplinary action should not be taken against him. In issuing the second notice, the dismissing authority naturally has to come to a tentative or provisional conclusion about the punishment which would meet the requirement of justice in his case, and it is only after

reaching conclusions in both these matters provisionally that the dismissing authority issues the second notice. The second opportunity enables the public officer to cover the whole ground and to plead that no case had been made out against him for taking any disciplinary action and then to urge that if he fails in substantiating his innocence, the action proposed to be taken against him is either unduly severe or not called for. It should also be noted that in the case of *M/s. Mahabir Jute Mills Ltd., v. Shibban Lal*, AIR 1975 SC 2057, it has been observed that while the rules of natural justice would apply to administrative proceedings, it is not necessary that the administrative orders should be speaking orders unless the statute specifically enjoins such a requirement. But it is desirable that such orders should contain reasons when they decide matters affecting rights of parties.

12. Thus, on the basis of the decisions as cited at the Bar and as above and when one thing is certain, that the High Court has power of interference in cases of perversity, so it will also have the jurisdiction to see, if the exceptions as taken, have been appropriately dealt with and decided. For that, and to ensure proper justice, thus, the High Court, in appropriate cases, will have jurisdiction to demand a speaking order from the lower Tribunal, not only for the purpose of finding out, whether the exceptions as taken, have been duly decided, but also for the purpose of testing the validity of the findings arrived at, on the available materials and evidence. Under the determinations of the Supreme Court, ordinarily and where perversity is not in issue, a learned Tribunal, on appeal, may not be required to record reasons extensively, where such appellate order is made on the basis of or on consideration of and in the light of the findings of or by the initial authority, as, in terms of the submissions of Mr. Dutt, the theory of merger would apply. But, the position would be different in a case like this or where there has been an allegation of perversity or there has at least been a claim to that effect, or which would be required to be decided by the High Court. In such view of the matter, the determinations, as referred to by Mr.

Dutt are distinguishable. So, on the basis of the claims as made by him, on the aspect under consideration, when a Rule has been issued, on prima facie satisfaction, the same, in my view can neither be discharged nor the interim order as made in aid of the same, can or should be dissolved at the interlocutory stage, the more so when, the orders as made, have also affected the right of the petitioner or affect the right of the parties.

13. As such, the prayers of Mr. Dutt at this stage, are refused and I further have it on record, that by this determination, I have not made and in fact I have not intended to make any final determination of the issues as involved in the case and they are left to be decided or considered at the relevant stage, on appropriate or proper materials and submissions.

Ordered accordingly.

AIR 1982 CALCUTTA 259

RAMENDRA MOHAN DATTA AND

C. K. BANERJI, JJ.

Prahldrai Agarwalla and others,
Appellants v. Sm. Renuka Pal and
others, Respondents.

Appeal No. 444 of 1979, D/- 15-2-1982.

Letters Patent (Cal), Cl. 15 — Civil P.C. (1908), O. 7, R. 11; O. 43 R 1—Order under O. 7 R. 11 refusing to reject plaint is not a judgment — Appeal against it is not maintainable.

An order under O. 7 R. 11 refusing to reject the plaint and dismissing the application for rejection of the plaint is not appealable under Cl. 15 of the Letters Patent as the order is not a judgment within the meaning of that clause. Similarly any order under O. 7, R. 11 under any of the clauses thereof is clearly non-appealable in view of O. 43 R. 1, Case law discussed.

(Paras 21, 22, 23)

An order to be a "judgment" within the meaning of cl. 15 of the Letters Patent must be a decision affecting the merits of the disputes between the parties by determining some right or liability although it might be either final or preliminary or interlocutory. The court

CZ/CZ/B48/82/VVG/SNV-H

in dismissing an application for rejection of the plaint does not determine any right or liability of the parties to the suit which could be said to have affected the merits of the disputes between the parties. (Para 22)

Cases Referred: Chronological Paras

AIR 1976 Cal 1	15, 23
AIR 1974 SC 1719	20
AIR 1974 SC 2089	15, 23
(1971) 75 Cal WN 447	20
(1970) 74 Cal WN 972	20
AIR 1964 SC 993	15, 23
AIR 1953 SC 198	20
AIR 1950 Bom 345	20
(1948) 52 Cal WN 389	17, 19
AIR 1942 Cal 530	13
AIR 1925 Bom 440	9
(1904) ILR 31 Cal 340: 8 Cal WN 246	13
(1904) ILR 31 Cal 1001	13
(1890) ILR 17 Cal 541	13
(1885) ILR 11 Cal 261	13

P. K. Ghosh, for Appellants; Gautam Chakravarty, for Respondents.

C. K. BANERJI, J.:— This is an appeal from the judgment and order dated 19th Nov., 1979 of R. N. Pyne, J. dismissing the application made by the appellants, inter alia, for the plaint in the suit herein being rejected and taken off the file; alternatively for stay of the suit till the disposal of Title Suit No. 2297 of 1978 (Prahladrai Agarwalla & Ors. v. Shri Rabindranath Pal & Ors.) pending in the City Civil Court at Calcutta; an injunction restraining the respondents herein from proceeding with the suit herein until the disposal of the said application. Facts material for the purpose of this appeal shortly are that, the respondents are owners of premises No. 23, Acharya Jagadish Chandra Bose Road, Calcutta, within the Ordinary Civil Jurisdiction of this Court. Their predecessor-in-interest Radhakanta Pal obtained a decree for ejectment in the city Civil Court against Dwariknath Das & Anr., the erstwhile lessees of the said premises. While the said decree was being executed the said Radhakanta Pal died. The respondents as the heirs and legal representatives of the said deceased executed the said decree and obtained possession of the said premises on the 27th Nov., 1978. The case of the respondents is that since then at all material times they lawfully held, seized and possessed the said premises. The

suit herein was instituted by the respondents against the appellants in this Court by invoking the concurrent jurisdiction of this Court with the Presidency Small Cause Court, Calcutta. The relevant paragraphs of the plaint filed in the suit herein which would be material for the purposes of this appeal, are set out below:

"6. By an agreement of tenancy dated Dec. 1, 1978 entered into by the plaintiff No. 2 (being the respondent No. 2 Rabindranath Pal) on behalf of all the plaintiffs (being the other respondents) the defendant No. 3 (being the appellant No. 3 Kailash Agarwalla) was granted the tenancy and as such tenant possession of one shop room on the ground floor of the said premises No. 128, Acharya Jagadish Chandra Bose Road, Calcutta.

7. On or about Dec. 9, 1978, the defendants (being the appellants) wrongfully and/or illegally dispossessed the plaintiffs without their consent and without recourse to law of the entire first floor of the said premises No. 128, Acharya Jagadish Chandra Bose Road, Calcutta, save and except two rooms in possession of one Bimal Homeo Hall Private Ltd., by forcing open the Padlock to the said floor which was put by the plaintiff after obtaining possession of the premises as aforesaid. The defendants have also removed the furniture kept by the plaintiff in the first floor of the said premises wrongfully, illegally and without the consent of the plaintiff.

8.

9.

10. The plaintiffs state that in the premises aforesaid they are entitled to recover possession of the said property notwithstanding any title, right or interest which may be set up by the defendants or by any of them.

11.

12. Further and in the alternative by reason of the premises the plaintiffs have suffered damages caused by the defendants and by each of them in respect of the suit property which the plaintiff assess at Rs. 4,000.00 on and from Dec. 9, 1978 being the date of their dispossession.

13. The plaintiffs are entitled to and claim recovery of possession of suit pro-

party and damages as aforesaid from the defendants from the date of dispossession i.e., Dec. 9, 1978.

14. The plaintiffs' cause of action in this suit arose on Dec. 9, 1978 at premises No. 128, Acharya Jagadish Chandra Bose Road within the jurisdiction of this Hon'ble Court and has been and still is continuing from day-to-day.

15. Inasmuch as the value of the suit property exceed Rs. 50,000.00 and damages claimed by the plaintiffs do not exceed Rs. 5,000.00 this Hon'ble Court has the jurisdiction concurrent with Small Cause Court at Calcutta and the City Civil Court at Calcutta has not the jurisdiction to entertain, try and determine this suit.

16. For the purpose of court-fees this suit has been valued at Rs. 500.00/- for delivery of possession and at Rupees 4,000.00/- for damages and such ad valorem Court-fees has been paid in this suit and the plaintiffs undertake to pay such additional Court-fees as and when the same may be directed by this Hon'ble Court.

The plaintiffs claim:

(a) Decree for possession of the suit property being the first floor of the said premises No. 128, Acharya Jagadish Chandra Bose Road, Calcutta save and except two rooms in possession of the said Bimal Homeo Hall (P) Ltd.

(b) Decree for Rs. 4,000.00 as damages.

(c) Receiver.

(d) Injunction.

(e) Costs.

(f) Further or other reliefs."

2. It appears that the appellants Nos. 1 and 2 herein have also instituted a suit against the respondents herein in the City Civil Court being Title Suit No. 2297 of 1978 (Shri Prahladrai Agarwalla & Anr. v. Shri Rabindranath Paul & Ors), inter alia, for a declaration that the appellant No. 1 is the rightful tenant of the first floor flat of premises No. 128, Acharya Jagadish Chandra Bose Road at a monthly rent of Rs. 215/- and the appellant No. 2 is the rightful tenant in respect of the shop room on the ground floor of the said premises No. 128 Acharya Jagadish Chandra Bose Road at a monthly rent of Rs. 40/-.

3. Mr. P. K. Ghose, learned Advocate for the appellants, submitted that

the said application in the Court below was made by the appellants for the plaint in the suit herein being rejected and taken off the file and alternatively, for stay of the said suit until the disposal of the suit filed by the appellants in the City Civil Court against the respondents. The suit has been instituted by the respondents by invoking the concurrent jurisdiction of this Court with the Presidency Small Causes Court, Calcutta as would appear from paragraph 15 of the plaint. To keep the suit within the pecuniary limit of the jurisdiction of the Presidency Small Causes Court, Calcutta the suit has been valued for the purpose of court-fees at Rupees 500.00 for delivery of possession and at Rs. 4,000.00 for damages. Such damages are claimed by the respondents in respect of damages done by the appellants to the suit property as will appear from paragraph 12 of the plaint. In paragraph 15 of the plaint the respondents have valued the suit property at exceeding Rs. 50,000.00. A suit for recovery of possession of a property exceeding Rs. 50,000.00 in value could not be entertained by the Presidency Small Causes Court, Calcutta, the pecuniary limits of its jurisdiction being Rs. 5,000.00. The valuation of the suit for delivery of possession at Rs. 500.00 for the purpose of Court-fees is an undervaluation and would not in any event determine the question of jurisdiction. Mr. Ghose referred to S. 18 of the Presidency Small Cause Courts Act as amended by the West Bengal Act XXXII of 1969. The portion relevant for our purposes of the said section reads as under:

"Subject to the exceptions in Sec. 19, the Small Cause Court shall have jurisdiction to try all suits of a civil nature when the amount or value of the subject matter does not exceed five thousand rupees."

He also referred to Section 19 of the said Act and to clauses (d) and (g) of the said section which read as under:

"The Small Cause Court should have no jurisdiction in

(d) Suits for the recovery of immovable property

(g) Suits for the determination of any other right to or interest in immovable property."

4. Mr. Ghose urged that the suit herein is a suit for recovery of immoveable property. The claim for damages is merely an ancillary relief. The immoveable property, recovery whereof is claimed in the suit is valued in paragraph 15 of the plaint at exceeding Rs. 50,000.00. The Small Cause Court, therefore, had no jurisdiction to entertain or try such suit. In any event the claim for damages is an alternative claim as pleaded in paragraph 12 of the plaint. Thus, even if the respondents give up their claim for possession, the suit cannot proceed merely on an alternative claim. The claim for damages as framed in the suit arises out of alleged dispossession of the respondents of the property in suit by the appellants and in paragraph 12 of the plaint it is pleaded that the respondents suffered damages caused by the appellants in respect of the suit property which the respondents assess at Rs. 4,000.00 on and from 9th December, 1978 being the date of their alleged dispossession. To decide the question of damages as made in the suit it would be necessary for the Court to determine the right or interest of the parties in the the property in suit which the Small Cause Court has no jurisdiction to decide under Section 19 (g) of the said Act.

5. Thus if the Small Cause Court had no jurisdiction to entertain or try the suit, the suit could not be filed in this Court with the Small Causes Court.

6. Mr. Ghose next urged that the application in the Court below was maintainable under Order 7 Rule 11 (d) of the Civil P. C. Alternatively for determination of a preliminary issue as to the jurisdiction of this Court to entertain or try this Suit.

7. Under O. 7 R. 11 (d) the plaint shall be rejected where the suit appears from the statements in the plaint to be barred by any law. The suit is barred by Section 18 read with Section 19 Clauses (d) and (g) of the Presidency Small Cause Courts Act. The suit is firstly for recovery of immoveable property. The jurisdiction of the Presidency Small Cause Courts to entertain or try the suit in respect of such claim is barred by section 19 (d) of the Presidency Small Cause Courts Act and its jurisdiction to try the claim for damages is barred by section 19 (g) of the said Act.

8. It was next urged that both the claims in the suit, namely, recovery of possession and damage arise out of the same cause of action, namely, trespass by the appellants and dispossession of the respondents. Both the claims are therefore joined in the suit under O. 2 R. 4 (c) of the Civil P. C. otherwise the claim for possession could not be joined with the claim for recovery of possession of immoveable property. The respondents could not have sued only for the damages nor could they relinquish the claim for possession inasmuch as in such case the relief for recovery of possession would be barred under O. 2 R. 2 sub-rules (2) and (3). There is no question of return of the plaint under Order 7, R 10, that rule does not apply to this Court, a chartered High Court, as will appear from O. 49, R. 3 sub-r. (1) of the Civil P.C. The valuation of the suit for the purposes of Court fees as made in para. 16 of the plaint, is incorrect and the suit has been undervalued. The suit could not be valued either for the purpose of court fees or for any other purpose in respect of delivery of possession at Rs. 500.00 in respect of a property exceeding Rs. 50,000-00 in value.

9. Mr. Ghose urged that the suit herein being a suit for recovery of possession of immoveable property from a trespasser without any claim for declaration of title to the property, the Court fees payable under the West Bengal Court Fees Act, 1970 had to be computed under Section 7 (vi) of the said Act according to the amount at which the relief sought is valued in the plaint and so far as the claim for damages the Court-fees payable had to be computed under Section 7 (i) of the said Act according to the amount claimed. Section 7 (i) and Section 7 (vi) of the West Bengal Act corresponds to Section 7 (i) and S. 7 (v-A) respectively of the Court-fees Act, 1870, which sections are not exempted from the operation of Sec. 8, of the Suits Valuation Act, 1887 and the value of the suit for computation of Court-fees and for the purposes of jurisdiction shall be the same. The respondents having valued the property in suit at a sum exceeding Rs. 50,000.00 could not value the suit either for the purposes of Court fees or jurisdiction at any other sum so as to bring the suit within the jurisdiction of a particular

Court. In any event, the suit as framed not being a suit of a small cause Court nature the respondents could not convert it to a suit of small cause Court nature by arbitrary valuation. It was held by a Division Bench of the Bombay High Court in *Ganappa Putta Hedge v. Hammad Saiba* reported is AIR 1925 Bom 440. That the suit as framed not being of a small cause Court nature did not attain that character because the plaintiff gave up his claim to the declaration. This was a suit where the plaintiff sued the defendant for recovery of Rs. 150.00/- and for a declaration that the mortgage bond executed by him was satisfied. The plaintiff did not pay the court-fees in respect of the said declaration and gave up that claim. The matter ultimately went before the High Court in Second Appeal and it was contended that such appeal did not lie as the suit was of a Small Cause Court nature by reason of the plaintiff having given up his claim for declaration. The High Court negatived such contention.

10. It was urged before us that even if the respondents gave up their claim for recovery of possession the suit would not be converted into a suit of a Small Cause Court nature so that this Court would be entitled to entertain or try this suit in exercise of its concurrent jurisdiction with the Presidency Small Cause Court. The jurisdiction had to be determined on the basis of the suit as filed and not on the basis of what the plaintiff might do or might not do subsequently. It was next urged that the suit having been filed in this Court as a suit entertainable by the Small Cause Court could not be converted into a suit solely entertainable by this Court alone by subsequent amendment of the plaint. It was next urged that even if, Order 7 Rule 11 (d) did not apply, the said application may be treated as an application for trial of an issue under Chapter XIV Rule 6 of the Original Side Rules of this Court and this Court could decide in such application the issue as to the jurisdiction of this Court in the exercise of its concurrent jurisdiction with the Small Cause Court in entertaining the suit herein.

11. It was lastly contended that the order under appeal was without jurisdiction inasmuch as the learned Judge of the Court below proceeded on the

basis that the Small Cause Court was entitled to entertain and try the suit if the respondents gave up their claim for recovery of possession which was solely on the basis of an assumption although the respondents had not, in fact, given up any part of their claim in the suit. Subsequent facts would reveal that not only the respondents did not give up any part of their claim in the suit but on the contrary they applied for amendment of the plaint so as to convert the suit to a suit triable by this Court in its Ordinary Original Civil Jurisdiction and not on the basis of concurrent jurisdiction of this Court with the Small Cause Court.

12. Mr. Gautam Chakravarty appearing for the respondents urged that this Court having allowed the amendment of the plaint and payment of additional Court fees, the defect, if any, in the suit was regularised under Section 11 of the West Bengal Court Fees Act, 1970. The Court has power to revise the valuation and determine the correct valuation of the suit and may make an enquiry for that purpose and under O. 7, R. 11 (b) and (c) of the Civil P. C. the Court may direct the plaintiff to correct the valuation and put in the deficit Court-fees. It was urged that the Court-fees Act was an Act for the computation of Court fees, it had nothing to do with, nor did it confer jurisdiction on Court. The jurisdictional value of a suit had to be determined only under the Suits Valuation Act. The relief as to recovery of possession of the property in suit from the appellants, the trespassers, as no declaration of title had been claimed, was governed by Sec. 7 (vi) (a) of the West Bengal Court Fees Act, 1970 and computation of the Court fees would be according to the amount at which such relief had been valued in the plaint and under Section 8 of the Suits Valuation Act the value determined for Court fees and the value for the purposes of jurisdiction should be the same. If the case of the appellants was that the respondents have undervalued the suit, they would bring the matter to the notice of the Court and the provision of valuation and determination of correct valuation as contained in Sections 11 to 14 of the West Bengal Court Fees Act, 1970 could be applied by the Court.

13. It was next urged that, the entire claim and issue in the suit was not beyond the jurisdiction of the Small Cause Court. Even if the Small Cause Court could not grant the relief in prayer (a) of the plaint, being the claim for recovery of possession, it could grant the relief in prayer (b) of the plaint, the claim for Rs. 4,000.00 as damages. Thus, it was not a case where the Small Cause Court had no jurisdiction at all to entertain or try the suit but it could entertain and try the suit as to recovery of damages and decide that question. The expression "right to or interest in immovable property" as used in Section 19 (g) of the Presidency Small Cause Courts Act, suits for determination whereof was not cognizable by the Small Cause Court under the said section did not mean proceeds of immovable property. The Small Cause Court had jurisdiction to try even questions of title which arose incidentally in a suit even if such question was the principal question but not the sole and only question. In support of such contention Mr. Chakraborty referred to the following decisions of this Court:

(1) In the matter of Peary Mohun Ghosaul v. Haran Chunder Gangooly reported in (1885) ILR 11 Cal 261.

(2) Makhan Lal Datta v. Goribullah Sardar reported in (1890) ILR 17 Cal 541.

(3) Ashutosh Dey v. Foolchand Keshabdeo, reported in AIR 1942 Cal 530.

(4) Amritlal Kalay v. Nibaran Chandra Nayek reported in (1904) ILR 31 Cal 240.

(5) Rajendra Mullick v. Nanda Lal Gupta reported in (1904) ILR 31 Cal 1001.

14. It was urged that Order 7 R. 11 (d) was not applicable in this case. Rejection of a plaint under that rule was envisaged in a case where from the statement made in the plaint the suit appeared to be barred by any law. There was a fundamental difference between want of jurisdiction in a Court to entertain the suit and the suit being barred by law. Want of jurisdiction in a Court was a matter of procedure under the Civil P. C. That would not bring the

suit or any part of the claim in the suit within the mischief of O. 7 R. 11 (d). Want of jurisdiction could not be equated with the expression "barred by any law". The suit being barred by any law and suit not entertainable by a particular Court because of want of jurisdiction in that Court in that behalf, were two different concepts. Question as to the jurisdiction of the Court could not be agitated under O. 7 R. 11 (d). Such question could be agitated under O. 7 Rule 10, the specific provision made for such purpose. Under O. VII R. 10 plaint could not be rejected for want of jurisdiction in a Court in which it was filed but it would be returned for being presented to the Court in which the suit should have been instituted. If this Court had no jurisdiction to entertain the suit, it would be returned for filing in the City Civil Court, Calcutta under Section 14 of the Calcutta City Civil Court Act. Mr. Chakraborty in this connection referred to Section 5 and the non obstante clause in Section 21 and to Clause 17 of Schedule I of the Calcutta City Civil Court Act.

15. It was next urged that the question of jurisdiction decided herein by the Court below on the said application of the appellants was not barred by the principles of res judicata or estoppel and could be urged by the appellants over again at the hearing of the suit. Mr. Chakravarty relied on the following decisions:—

1. P. Dasa Muni Reddi v. P. Appa Rao reported in AIR 1974 SC 2089.

2. Arjun Singh v. Mohindra Kumar reported in AIR 1964 SC 993.

3. Sushil Kumar Ghosh v. Revenue Officer, Balurghat reported in AIR 1976 Cal 1.

16. For the meaning of the expressions "bar" and "jurisdiction" Mr. Chakraborty referred to Osborne's Judicial Dictionary (5th Edition). At page 44 it is stated: "to bar a right is to destroy or to end it" and at page 178 jurisdiction is defined as "power of Court or Judge to entertain an action". Reference was also made for the same purpose to Stroud's Judicial Dictionary (4th Edition) at page 254 for the meaning of the expression "bar" and to page 1452 for the meaning of the expression "jurisdiction."

17. It was next urged that if the Small Cause Court had jurisdiction to

entertain the suit with regard to prayer (b) of the plaint being the claim for damage of Rs. 4,000.00, the suit could be tried and decided by the Small Cause Court in respect of that prayer, while the prayer for recovery of possession could be given up by the respondents or rejected by the Court. It was not a case of total lack of jurisdiction of Small Cause Court to entertain or try the suit. That being the position, part of the plaint with regard to only recovery of possession could not be rejected by this Court on the said application of the appellants. In support of such contention reliance was placed on a decision of this Court in *Manick Lal v. Shiva Jute Bailing* reported in (1948) 52 Cal WN 389. Here, the plaintiff filed the suit for the following reliefs:

(a) Declaration that the aforesaid contract is void;

(b) Delivery up of the said contract by the defendants to the plaintiff;

(c) Cancellation of the said alleged contract;

(d) Injunction on the defendants from proceeding with the arbitration or taking any other steps.

18. The defendants made an application under Order 7 R. 11 (a) of the Civil P. C. for rejection of the plaint on the ground that it did not disclose any cause of action. Das, J. found that the plaint disclosed a cause of action and the plaintiff could obtain relief in the suit with regard to delivery up and cancellation of the contract although the other prayers in the plaint were not maintainable and in that context, his Lordship made the following observation:

"Under O. 7 Rule 11 the Court has no authority to reject parts of the plaint. Therefore even if the prayer for declaration and injunction may not be maintainable, the plaint cannot be rejected or taken off the file, for it discloses a cause of action for cancellation under Section 39 of the Specific Relief Act."

19. The case before us is, not a matter which is governed by Order 7. Rule 11 (a) but governed by Order 7, Rule 11 (d). It is not the case of the appellants that the plaint filed herein does not disclose a cause of action; but their case is that jurisdiction of the Small Cause Court is barred by law, namely, Section 19 (d) and (g) of the

Presidency Small Cause Courts Act. The primary and main relief claimed in the suit is recovery of possession on the ground that appellants are trespassers. The claim for damages is merely an ancillary relief based on damages caused by the respondents in respect of the property in suit from the date of dispossession of the respondents by the appellants. Whether the respondents would ultimately give up their claim for recovery of possession or not so as to bring the suit within the cognizance of the Small Cause Court, would not be, in our view, a relevant consideration in a case where the suit has been filed in the High Court on the basis of its concurrent jurisdiction with the Small Cause Court. A subsequent event which might or might not happen would not determine the jurisdiction of the High Court to entertain or try the suit on the ground that the suit is cognizable by the Small Cause Court. In our opinion the question has to be considered and decided on the basis of the suit as framed and filed in this Court. It is possible that if this suit was filed in the Small Cause Court, the respondents might have given up a part of their claim to bring it within the jurisdiction of the Small Cause Court, but we are not concerned with such question. We are concerned with a case where the suit has been filed in the High Court on the basis of its concurrent jurisdiction with the Small Cause Court as a suit cognizable by the Small Cause Court. Then again, when the application by the appellants was made, heard and decided the respondents had not given up their claim for recovery of possession. The suit was at that time a suit for recovery of immovable property with a claim for damages. Thus there was no question of part of the plaint being rejected. In that view of the matter the case of *Manik Lal Memani v. Shiva Jute Bailing Co.* (1948) 52 Cal WN 389 (supra) has no application to this case.

20. Whether the respondents would give up part of their claim which is admittedly not within the cognizance of the Small Cause Court would be a matter of conjecture and speculation and cannot determine the question of jurisdiction. Subsequent events however, show that the respondents not only

did not give up the claim for recovery of possession, but amended the plaint in such a way that the suit herein became a suit solely cognizable by this Court. Whether that is permissible or not is the subject matter of the very next appeal appearing before us being Appeal No. 24 of 1980 (Prahladrai Agarwalla & Ors. v. Smt. Renuka Pal & Ors). In our opinion, the said subsequent event also would not decide the questions raised by the appellants before the Court below in the application herein. The same has to be decided on the basis of plaint as it stood at the time when the said application was made, heard and decided. It was next urged by Mr. Chakraborty that an order made under Order 7 Rule 11 was not appealable and he referred to O. 43 Rule 1 of the Civil P. C. It was also urged that an order under O. 7 R. 11 refusing to reject a plaint and dismissing the application for rejection of the plaint was not a judgment within the meaning of Cl. 15 of the Letters Patent. Such order did not determine any part of the suit. In support of his contention Mr. Chakraborty cited the following decisions.

1. Shanti Kumar R. Kanji v. Home Insurance Co. of New York reported in AIR 1974 SC 1719.

2. Rani Asrumati Debi v. Rupendra Nath Raikat reported in AIR 1953 SC 198.

3. Gaganmal Ramchand v. Hongkong & Shanghai Banking Corporation reported in AIR 1950 Bom 345.

4. Lal Behari Prosad Chowdhury v. Parasmull Jain reported in (1970) 74 Cal WN 972.

5. National Screw & Wire Products Ltd. v. Syndicate Bank Ltd., reported in (1971) 75 Cal WN 447.

21. It is not necessary to discuss above decisions in detail. Any order under O. 7. Rule 11 under any of the clauses thereof is clearly not appealable as will appear from O. 43 R. 1.

22. An order to be a "judgment" within the meaning of Cl. 15 of the Letters Patent must be a decision affecting the merits of the disputes between the parties by determining some right or liability although it might be either final or preliminary or interlocutory. The Court below in dismissing the ap-

plication of the appellants and rejecting their prayer for rejection of the plaint did not determine any right or liability of the parties to the suit which could be said to have affected the merits of the disputes between the parties. The said disputes have to be decided in the suit and it would be open to the appellants to raise all contentions in their written statement which they might desire to urge in the suit at the hearing. In that view of the matter the order under appeal is not, in our opinion, appealable under clause 15 of the Letters Patent. An application for trial of issues could be made only after written statement has been filed by the defendant and thereupon issues have been settled. That is not the case here. But even if the said application of the appellants be taken as an application for trial of issues under Chapter XIV R. 6 of the Rules of the Original Side of this Court then also the answer to the question as to the appealability of the order would remain the same. The order would be appealable only if it was a 'Judgment' within the meaning of clause 15 of the Letters Patent, which, as has been noted earlier, it is not.

23. We are, therefore, of opinion that the order under appeal is not appealable and this appeal is, therefore, not maintainable. We should note another point urged by Mr. Chakraborty and we accept his argument that the point of jurisdiction as decided by the Court below on the said application of the appellants was not barred by res judicata and the appellants would be entitled to urge the same over again at the trial of the suit. Reference may be made in this connection to the two decisions of the Supreme Court and also to a decision of this Court.

1. Arjun Singh v. Mohindra Kumar reported in AIR 1964 SC 993.

2. P. Dasa Muri Reddy v. P. Appa Rao reported in AIR 1974 SC 2089.

3. Sushil Kumar Ghosh v. Revenue Officer Balurghat reported in AIR 1976 Cal 1.

24. For all the above reasons the appellants cannot succeed in this appeal and the appeal is therefore dismissed with costs.

25. We however make it clear, that we have not decided in this appeal any of the other points raised by the parties

before us save and except the question of appealability of the order under appeal. The parties would, therefore, be entitled to urge all such points at the hearing of the suit.

RAMENDRA MOHAN DATTA, J.:-

I agree,

Appeal dismissed

AIR 1982 CALCUTTA 267

FULL BENCH

PRADYOT KUMAR BANERJEE,

B. N. MAITRA AND

AMITABHA DUTTA, JJ.

Sudhir Chandra Ghosh and others,
Petitioners v. Sachindra Nath Ghosh,
Respondent.

C. O. No. 168 of 1982, D/- 30-3-1982.

W. B. Premises Tenancy Act (12 of 1956), S. 17 (1) & (2) — Striking out defence — Protection against — Tenant must deposit even time-barred rent. (1961) 65 Cal WN 1093 and AIR 1981 Cal 352 (Pt C), Overruled.

Under Sec. 17 (1) and (2) of the W. B. Premises Tenancy Act the tenant is under obligation to deposit the rent which may have been time barred if he is to avail of the protection against striking out the defence against delivery of possession u/s. 17 (3) of the Act. (1961) 65 Cal WN 1093 and AIR 1981 Cal 352 (Pt. C.), Overruled; AIR 1980 Cal 114 Approved. AIR 1978 SC 287 Explained. (Paras 24, 33, 37, 47 to 49)

Per P. K. Banerjee, J.

In the context of the history of the Rent Control legislation in West Bengal and in the context of earlier legislation it is quite clear that the word 'legally' cannot be read in S. 17 (1) and (2). As the words "legally payable" have been deliberately omitted from sub-s. (1) of S. 17 by the Legislature in S. 17 or for that matter S. 17 (1) and (2), the words "legally payable" cannot be read into S. 17 (1) and/or (2). The Rent Act of West Bengal gives the tenant a protection only if he is a defaulter and if he pays the amount within the period allowed under Ss. 17 (1) and 17 (2) of the Act. The Act and amendment therein make it clear that a tenant who is a defaulter cannot be protected unless he pays the amount of default and the

principle is "pay and stay". If tenant does not pay or default in making the payment the protection available to the tenant under the Act for the benefit of the tenant cannot be availed of. In the context of S. 17 the amount of arrears which is barred will have to be deposited and the court will have to consider all the amounts whether it is barred or not and come to a finding of the actual amount deposited if the tenants want to avail the protection of Section 17 of the Act.

(Paras 10, 10A, 12, 33, 37)

Per Maitra, J. (concurring):

The use of the expression "for the period for which the tenant may have made default" in sub-s. (1) of S. 17 is a pointer that there is no restriction about the period of default. It covers the entire period of default and is wide enough to indicate that the tenant is enjoined to deposit the entire arrears. After the determination of the dispute under the sub-sec. (2), the amount payable by the tenant is substantially the same, as stated in sub-sec. (1) of S. 17 of the Act. (Paras 28, 29)

Per Dutta, J. (concurring):

Raghunath Singh v. Patel & Co. (1961) 65 Cal WN 1093 has not been impliedly overruled by the decision of the Supreme Court in Khadi Gram Udyog Trust v. Shri Ram Chandrajji Virajman Mandir, AIR 1978 SC 287. But Raghunath Singh's case was not correctly decided and that a tenant raising a dispute under S. 17 (2) read with S. 17 (1) of the 1956 Act is required to deposit the arrears for the period for which he may have made default including the time barred arrears as payment of such arrears can be and has been made a condition of protection granted to the tenants under S. 17 of the Act. (Para 44)

Cases Referred: Chronological Paras

AIR 1981 Cal 352:85 Cal WN 840
1, 3, 12, 13, 36, 39, 47

AIR 1980 Cal 114: (1980) 1 Cal LJ 80
1, 3, 12, 22, 36, 47

AIR 1979 Cal 332: (1980) 1 Cal HN 498
40

AIR 1978 SC 287: 1978 All LJ 7
1, 3, 11, 16, 18A, 20, 21, 36, 37, 41, 44.
48, 49

AIR 1978 Cal 457: (1979) 1 Cal LJ 160
(FB) 22

AIR 1978 Madh Pra 54 (FB) 42

AIR 1978 Madh Pra 165 (FB) 18A, 42

AIR 1977 All 399:1977 All. LJ 334 20, 21
 AIR 1977 Cal 110:(1975) 1 Cal LJ 1 (FB) 22
 AIR 1976 SC 1637 17, 30, 39
 AIR 1975 Pat 283 (FB) 11, 19
 AIR 1973 Cal 529:77 Cal WN 424 22
 AIR 1971 SC 1691:1971 Tax LR 952 22
 (1961) 65 Cal WN 1093:1962 Cal LJ 112 1, 9, 12, 16, 22, 27, 33, 36, 37, 38, 43, 44, 47, 48, 49
 AIR 1960 Cal 378:63 Cal WN 976 41
 AIR 1959 Punj 328 11
 AIR 1958 SC 328:1958 SCR 1122 11, 31
 1957 AC 436:(1957) 1 All ER 49:(1957) 2 WLR 1, Attorney-General v. Prince Ernest Augustus of Hanover 39
 AIR 1940 Mad 385 (FB) 23, 29
 AIR 1933 PC 63:60 Ind App 13 18, 30, 39
 (1889) 42 Ch D 424:62 LT 278:38 WR 49, Curwen v. Milburn 11
 S. N. Bakshi and Subrata Nayak, for Petitioners; Tarun Chatterjee, for Respondent.

BANERJEE, J.:— This revisional application was heard as contested application in presence of both the parties. The point involved in this revisional application is whether in adjudicating an application under S. 17 (2) of the West Bengal Premises Tenancy Act the Court is to take cognizance of arrears which are time barred or not. On the point there was an earlier Division Bench decision reported in (1961) 65 Cal WN 1093 (Raghu Nath Singh v. Patel & Co.). In a case reported in AIR 1978 SC 287 (Khadi Gram Udyog Trust v. Shri Ramchandra) it was held by the Supreme Court that while considering a provision of S. 20 (4) of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, the Supreme Court held that the words 'entire amount due' as contained in S. 20 (4) of the Act included rent which has become time barred. Following the said decision the Division Bench of this Court in the case reported in (1980) 1 Cal LJ 80: (AIR 1980 Cal 114) (Central Coalfields Ltd. v. Rabindra Nath Dutta) held, *inter alia*, that the case reported in (1961) 65 Cal WN 1093 (Raghu Nath Singh v. Patel & Co.) was not properly decided and in any case has been overruled by the Supreme Court judgment as hereinbefore stated. After the judgment was delivered by the Division

Bench, however, the Hon'ble single Judge in a case reported in (1981) 85 Cal WN 840: (AIR 1981 Cal 352) (L. N. Shah v. D. P. Karmakar) at page 846 (of Cal WN): (at p. 356 of AIR) held that the Supreme Court is clearly distinguishable and the Supreme Court has not by implication overruled the decision of our High Court reported in (1961) 65 Cal WN 1093. When the same matter came up before the Division Bench, the Division Bench referred the matter to the learned Chief Justice for constitution of a Special Bench for hearing of the present revisional application. The Hon'ble Chief Justice having constituted the Bench, the matter was placed before us for hearing.

2. Mr. S. N. Bakshi on behalf of the petitioner contended firstly that in S. 17 of the W. B. Premises Tenancy Act there are no restrictions for the period of default in the four corners of the said section, secondly, he argued that S. 17 was enacted to give the benefit to the tenant on condition that if the tenant wants to avoid striking out his defence against delivery of possession he must have to deposit the amount specified under section or if there is a dispute of the amount under S. 17 (2) of the Act may raise it by an application under S. 17 (2) of the Act. It is argued by Mr. Bakshi that limitation bars the remedy but does not extinguish the debt which still remains in force and if payable the creditor or in this case landlord may recover the debt in some other way. The bar of limitation only extinguishes the remedy by way of suit but the debt still remains due.

3. Mr. Tarun Chatterjee on behalf of the opposite party, however, contended that S. 17 is not only for the benefit of the tenant but also for the landlord. Mr. Chatterjee contended that the decision reported in AIR 1978 SC 287 (Khadi Gram Udyog Trust v. Shri Ramchandra) has no manner of application in the present case as the provision of the W. B. Premises Tenancy Act is quite different from S. 20 (4) of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, which was interpreted by the Supreme Court in AIR 1978 SC 287. It is argued by Mr. Chatterjee that the Division Bench judgment reported in (1980) 1 Cal LJ 80: (AIR 1980 Cal 114) (Central Coalfields Ltd. v.

Rabindra Nath Dutta) is not correct, inasmuch as, their Lordships of the Division Bench could not import the word "entire" into the body of S. 17 as the said section does not contain the word. Mr. Chatterjee further contended the Hon'ble single Judge in the case reported in (1981) 85 Cal WN 840: (AIR 1981 Cal 352) (L. N. Saha v. D. P. Karmakar) was of the opinion and rightly so that the judgment of (1980) 1 Cal LJ 80: (AIR 1980 Cal 114) does not deal with S. 17 (2) at all. It only deals with S. 17 (1). It is, therefore, argued that the provision of S. 20 (4) of the U. P. Act and the scheme of the section are quite different and therefore the Supreme Court decision has no manner of application.

4. Before we discuss those decisions cited at the Bar it is relevant for us to consider the history of the tenancy legislations in our State beginning from 1950. The W. B. Premises Rent Control (Temporary Provisions) Act, 1950 which came into force on 30th March, 1950. The said legislation was enacted in order to make better provision for the control of rents of premises in Calcutta or certain other areas. Section 12 of the Act provides for the grounds on which and which alone the tenant can be evicted from the tenanted premises. The marginal note of section is for protection of a tenant against eviction which provides a non obstante clause, namely, "notwithstanding anything to the contrary to any other Act or law, no order or decree for the recovery of possession of any premises shall be made by any court in favour of the landlord against a tenant, including a tenant whose lease has expired: Provided that nothing in the sub-section shall apply to any suit for decree for such recovery of possession",.....12 (1) (i) provided "subject to the provisions of Section 14 where the amount of two months' rent legally payable by the tenant and due from him is in arrears by not having been paid within the time fixed by contract, or in the absence of such contract by the fifteenth day of the month next following that for which the rent is payable or by not having been validly deposited in accordance with Section 10." Section 14 of 1950 Act runs as follows:—

"14 (1). If in a suit for recovery of possession of any premises from the

tenant the landlord would not get a decree for possession but for clause (i) of the proviso to sub-section (i) of Section 12, the court shall determine the amount of rent legally payable by the tenant and which is in arrears taking into consideration any order made under sub-section (4) and effect thereof up to the date of the order mentioned hereafter, as also the amount of interest on such arrears of rent calculated at the rate of nine and a three eights per centum per annum from the day when the rents became arrears up to such date, together with the amount of such cost of the suit as is fairly allowable to the plaintiff-landlord, and shall make an order on the tenant for paying the aggregate of the amounts (specifying in the order such aggregate) on or before a date fixed in the order.

(2) Such date fixed for payment shall be the fifteenth day from the date of the order, excluding the day of the order.

(3) If within the time fixed in the order under sub-section (i), the tenant deposits in the court the sum specified in the said order, the suit, so far as it is a suit for recovery of possession of the premises, shall be dismissed by the court. In default of such payment the court shall proceed with the hearing of the suit:

Provided that the tenant shall not be entitled to the benefit of protection against eviction under this section if he makes default in payment of the rent referred to in clause (i) of the proviso to sub-section (i) of Section 12 on three occasions within a period of eighteen months.

(4) If the tenant contests the suit as regards claim for ejectment, the plaintiff landlord may make an application at any stage of the suit for order on the tenant-defendant to deposit month by month rent at a rate at which it was last paid and also the arrears of rent, if any, and the court after giving an opportunity to the parties to be heard may make an order for deposit of rent at such rate month by month and the arrears of rent, if any, and on the failure of the tenant to deposit the arrears of rent within fifteen days of the date of order or the rent at such rate for any month by the fifteenth day of the next following month, the court shall order the defence

against ejectment to be struck out and the tenant to be placed in the same position as if he had not defended the claim to ejectment. The landlord may also apply for permission to withdraw the deposited rent without prejudice to his right to claim decree for ejectment and the court may permit him to do so.

(5) The power given under sub-section (4) may be exercised by courts of appeal with necessary adaptation".

5. The W. B. Premises Rent Control (Temporary Provisions) Act, 1950 was repealed and West Bengal Premises Tenancy Act of 1956 was enacted and came into force on 31st of March, 1956. Section 13 (1) runs as follows:

"13 (1). Protection of tenant against eviction:

Notwithstanding anything to the contrary in any other law, no order or decree for the recovery of possession of any premises shall be made by any court in favour of the landlord against a tenant except on one or more of the following grounds, namely,.....(i) where the tenant has made a default in payment of rent for two months within a period of twelve months or for two successive periods in cases where rent is not payable monthly".

Sections 17 (1) and 17 (2) of the West Bengal Premises Tenancy Act, 1956 also run as follows:—

"17. When a tenant can get the benefit of protection against eviction.—

(1) On a suit or proceeding being instituted by the landlord on any of the grounds referred to in Section 13, the tenant shall, subject to the provisions of sub-section (2), within one month of the service of the writ of summons on him or where he appears in the suit or proceeding without the writ of summons being served on him, within one month of his appearance deposit in Court or with the Controller or pay to the landlord an amount calculated at the rate of rent at which it was last paid, for the period for which the tenant may have made default including the period subsequent thereto up to the end of the month previous to that in which the deposit or payment is made together with interest on such amount calculated at the rate of eight and one-third per cent. per annum from the date when any such amount was payable up to the date of deposit, and shall there-

after continue to deposit or pay, month by month, by the 15th of each succeeding month a sum equivalent to the rent at that rate.

(2) If in any suit or proceeding referred to in sub-section (1) there is any dispute as to the amount of rent payable by the tenant, the tenant shall, within the time specified in sub-section (1), deposit in court the amount admitted by him to be due from him together with an application to the court for determination of the rent payable. No such deposit shall be accepted unless it is accompanied by an application for determination of the rent payable. On receipt of such application, the court shall—

(a) having regard to the rate at which rent was last paid, and the period for which default may have been made, by the tenant, make, as soon as possible within a period not exceeding one year, a preliminary order, pending final decision of the dispute, specifying the amount, if any, due from the tenant and thereupon the tenant shall, within one month of the date of such preliminary order, deposit in court or pay to the landlord the amount so specified in the preliminary order and

(b) having regard to the provisions of this Act, make, as soon after the preliminary order as possible, a final determining the rate of rent and the amount to be deposited in court or paid to the landlord and either fixing the time within which the amount shall be deposited or paid or, as the case may be, directing that the amount already deposited or paid be adjusted in such manner and within such time as may be specified in the order".

6. In S. 17 (1) of the Act it has been provided that on a suit or proceeding being instituted by the landlord on any of the grounds referred to in S. 13 the tenant shall, subject to the provisions of sub-sec. (2) within one month of the service of the writ of summons on him or where he appears in the suit or proceeding without the writ of summons being served on him, within one month of his appearance deposit in court or with the Controller or pay to the landlord an amount calculated at the rate of rent at which it was last paid for the period for which the tenant may have made default including the period subsequent thereto up to the

end of the month previous to that in which the deposit or payment is made together with interest on such amount calculated at the rate of eight and one-third per cent, per annum from the date when any such amount was payable up to the date of deposit, and shall thereafter continue to deposit or pay month by month by the 15th of each succeeding month a sum equivalent to the rent at that rate. If in any suit or proceeding referred to in sub-sec. (1) there is any dispute as to the amount of rent payable by the tenant, the tenant shall, within the time specified in sub-sec. (1), deposit in court the amount admitted by him to be due from him together with an application to the court for determination of the rent payable. No such deposit shall be accepted unless it is accompanied by an application for determination of the rent payable.

7. We are not at the present moment required to consider the other provisions of the said section for answering the reference. Sub-section (2A) provides that an application can be made by the tenant for the extension of the period and the court may by order extend the time specified in sub-sec. (1) or sub-sec. (2) for the deposit or payment of any amount referred to therein by instalment. S. 17 (2B) provides for extension of time for the deposit or payment of any amount under cl. (a) of sub-sec. (2A) shall be entertained unless it is made before the expiry of the time specified in sub-sec. (1) or sub-sec. (2). It must be stated that there were number of amendments to this section from 1950 and the last amendment was in 1969 in the present section.

8. The question, therefore, is and which has been argued by both the parties whether in making any deposit as hereinbefore stated under sub-ss. (1) and (2) of S. 17 the rent which has been already barred is to be deposited or only the rent which is not barred is to be deposited under section 17 (1) and or section 17 (2) of the Act.

9. In (1981) 65 Cal WN 1093 (Rahu Nath Singh v. Patel & Co.) the Division Bench of this Court held, *inter alia*, that under S. 17 of the W. B. Premises Tenancy Act, 1956 does not require the tenant to deposit or pay any amount in respect of time barred arrears of rent. Their Lordships con-

sidered that it is not a duty of the tenant to pay or he is not required to deposit or pay any amount in respect of rent which have been assigned by the plaintiff-landlord to a stranger. Similarly he is not required to deposit or pay any amount in respect of time barred arrears of rent which are not recoverable from him on account of bar of limitation.

10. It appears to us that since a rent is assigned to a stranger the rent is not recoverable as such but if a stranger wants to file a suit against a tenant he will have to pay it as a person to whom the tenant is a debtor in respect of a debt which cannot be suit for rent but a money suit. Therefore the bar will certainly apply in so far as the said case is concerned. In our opinion, the learned Judges read the words "legally payable" as enforceable under S. 17 (2) when the word is only payable. Their Lordships also held that the word 'payable' is of somewhat vague import but in the context of the section it means 'legally enforceable.' In our opinion, in the context of the history of the legislation and in the context of earlier legislation it is quite clear that the word 'legally' cannot be read into the section as we have already stated hereinbefore. In 1950 Act S. 12 (1) (i) 'legally' payable was in the section itself. It is quite clear and it is to be found in the statute itself that the tenant is to deposit an amount of rent legally payable and S. 14 read with the context it is clear that the section provides that the rent 'legally payable' under S. 14 is a section by which the landlord is given power to apply for an order on the tenant-defendant to deposit month by month the rent at the rate it was last paid and also arrears of rent and if such payment are made then the landlord may also apply to withdraw the deposited amount, if not made, the defence against the ejectment has to be struck out. In the present provision of the W. B. Premises Tenancy Act S. 13 does not say anywhere that the amount due may be legally payable. S. 17 on the other hand provides that within one month from the date of the service of writ of summons on the tenant or within one month from the date when he appears without the writ of summons the tenant must deposit or pay to the landlord or to the controller an amount calculated the amount last paid. The

sub-sec. in S. 17 (2) also refers to S. 17 (1) where there is any dispute as to the amount of rent payable by the tenant. S. 17 (3) provides that if the tenant fails to pay any amount referred to within the time specified the court shall order the defence and the proceeding of the hearing of the suit. In our view as the words "legally payable" have been deliberately omitted from the sub-section by the legislature in S. 17 or for that matter S. 17 (1) and (2) we cannot read the words "legally payable" into S. 17 (1) and/or (2).

10A. In order to consider the effect of the Supreme Court decision on the present rent in the W. B. Legislation, it is convenient for me to quote the relevant S. 20 of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. The said section runs as follows:—

"20. Bar of suit for eviction of tenant except on specified grounds. — (1) Save as provided in sub-sec. (2), no suit shall be instituted for the eviction of a tenant from a building, notwithstanding the determination of his tenancy by efflux of time or on the expiration of a notice to quit or in any other manner.

Provided that nothing in this sub-section shall bar a suit for the eviction of a tenant on the determination of his tenancy by efflux of time where the tenancy for a fixed term was entered into by or in pursuance of a compromise or adjustment arrived at with reference to a suit, appeal, revision or execution proceeding, which is either recorded in court or otherwise reduced to writing and signed by the tenant.

(2) A suit for the eviction of a tenant from a building after the determination of his tenancy may be instituted on one or more of the following grounds, namely:—

(a) that the tenant is in arrears of rent for not less than four months, and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand:—

Provided that in relation to a tenant who is a member of the armed forces of the Union and in whose favour the prescribed authority under the Indian Soldiers (Litigation) Act (No. IV of 1925) has issued a certificate that he is serving under special conditions within the meaning of Sec. 3 of that Act or where

he has died by enemy action while so serving, then in relation to his heirs, the words 'four months' in this clause shall be deemed to have been substituted by the words 'one year.'

(b) that the tenant has wilfully caused or permitted to be caused substantial damage to the building;

(c) that the tenant has without the permission in writing of the landlord made or permitted to be made any such construction or structural alteration in the building as is likely to diminish its value or utility or to disfigure it,

(d) that the tenant has without the consent in writing of the landlord used it for a purpose other than the purpose for which he was admitted to the tenancy of the building or otherwise done any act which is inconsistent with such use or has been convicted under any law for the time being in force of an offence of using the building or allowing it to be used for illegal or immoral purposes;

(e) that the tenant has sublet in contravention of the provisions of Sec. 25, or as the case may be, of the old Act, the whole or any part of the building;

(f) that the tenant has renounced his character as such or denied the title of the landlord, and the latter has not waived his right of re-entry or condoned the conduct of the tenant;

(g) that the tenant was allowed to occupy the building as part of his contract of employment under the landlord, and his employment has ceased.

(3) (Omitted).

(4) In any suit for eviction on the ground mentioned in cl. (a) of sub-s. (2), if at the first hearing of the suit the tenant unconditionally pays or tenders to the landlord or deposits in Court the entire amount of rent and damages for use and occupation of the building due from him (such damages for use and occupation being calculated at the same rate as rent) together with interest thereon at the rate of nine per cent per annum and the landlords' costs of the suit in respect thereof, after deducting therefrom any amount already deposited by the tenant under sub-sec. (1) of S. 30, the Court may, in lieu of passing decree for eviction on that ground, pass an order relieving the tenant against his liability for eviction on that ground;

Provided that nothing in this sub-section, shall apply in relation to a tenant who or any member of whose family has built or has otherwise acquired in a vacant state, or has got vacated after acquisition, any residential building in the same city, municipality, notified area or town area.

Explanation — For the purpose of this sub-section—

(a) the expression 'first hearing' means the first date for any step or proceeding mentioned in the summons served on the defendant.

(b) the expression 'cost of the suit' includes one-half of the amount of counsel's fee taxable for a contested suit.

(5) Nothing in this section shall affect the power of the Court to pass a decree on the basis of an agreement, compromise or satisfaction recorded under Rule 3 of O. XXIII of the first Schedule to the Civil P. C. 1908 (Act No. V of 1908).

(6) Any amount deposited by the tenant under sub-sec. (4) or under R. 5 of O. XV of the First Schedule to the Civil P. C. 1908, shall be paid to the landlord forthwith on his application without prejudice to the parties pleadings and subject to the ultimate decision in the suits."

In our opinion, the provision of S. 20 (4) of the Act gives the benefit to the tenant if he deposits the entire amount of rent etc. etc. on the very first date of the hearing of the suit unconditionally. This provision is also applicable in subsequent rent suit filed by the landlord on the ground of default only. It must be remembered that the tenant must deposit on the very first date of the hearing of the suit unconditionally the entire amount of rent. In our Legislation under Section 17 (1) of the Act a tenant must deposit the arrears of rent within one month from the date of service of the writ of summons and if no summons is served within a month from the date of appearance, in that matter such amount is to be deposited under Sec. 17 (1) of the Act. Under Sec. 17 (2) of the Act, the defendant-tenant can apply for determination of the rate of rent and the amount in arrear and till the dispute is decided the admitted amount of rent is to be deposited by the tenant. In that view

of the matter, in our opinion, the Rent Act of West Bengal gives the tenant a protection only if he is a defaulter and if he pays the amount within the period allowed under Secs. 17 (1) and 17 (2) of the Act. In that respect, in our opinion, there is no material difference in the carriage of suit between the landlord and tenant. Sec. 17 (1) of the West Bengal Premises Tenancy Act applies in respect of all ejectment suits on any ground mentioned in Secs. 17 and 13 and Sec. 20 (4) of the U. P. Act only applies in respect of the ground for default of payment of rent.

11. In the Supreme Court decision reported in AIR 1978 SC 287, (Khadi Gram Udyog Trust v. Shri Ramchandra) it has been held as follows (Para 4):—

"It will be seen that under Sec. 20 (2) of the Act the landlord gets a cause of action for evicting the tenant when the tenant is in arrears of rent for not less than four months, and has failed to pay the same to the landlord within one month from the date of service upon him a notice of demand. If the tenant pays the entire arrears of rent due at the first hearing of the suit the court may relieve the tenant against eviction even though he had not complied with Sec. 20 (2). The tenant can take advantage of the benefit conferred by Sec. 20 (4) only when he pays the entire amount of rent due as required under Sec. 20 (4). The question that arises for consideration in this appeal is whether the entire amount of rent due would include even rent which cannot be recovered as having been time-barred. There is ample authority for the proposition that though a debt is time-barred it will be a debt due though not recoverable, the relief being barred by limitation. In Halsbury's Laws of England (3rd Edn.) Vol. 24 at p. 205, Article 369 it is stated 'except in cases previously mentioned, the Limitation Act, 1939 only takes away the remedies by action or by set off; it leaves the right otherwise untouched and if a creditor whose debt is statute-barred has any means of enforcing his claim other than by action or set-off, the Act does not prevent him from recovering by those means. The Court of Appeal in *Curwen v. Milburn* (1889) 42 Ch. D 424 Cotton, L. J. said: 'Statute-barred debts are dues though payment of them cannot

be enforced by action.' The same view was expressed by the Supreme Court in *Bombay Dying and Manufacturing Co. Ltd. v. State of Bombay*, 1958 SCR 1122: (AIR 1958 SC 328) where it held that the statute of limitation only bars the remedy but does not extinguish the debt, except in cases provided for by Sec. 28 of the Limitation Act, which does not apply to a debt. Under S. 25 (3) of the Contract Act a barred debt is good consideration for a fresh promise to pay the amount. Sec. 60 of the Contract Act provides that when a debtor makes a payment without any direction as to how it is to be appropriated, the creditor has the right to appropriate it towards a barred debt. In a Full Bench decision of the Patna High Court in *Ram Nandan Sharma v. Smt. Maya Devi*, AIR 1975 Pat 283 Untwalia, C. J. as he then was, has stated 'there is a catena of decisions in support of what has been said by Tek Chand, J. in *First National Bank Ltd. v. Sant Lal*, (AIR 1959 Punj 328 at p. 330 para 12) that the Limitation Act with regard to personal actions, bars the remedy without extinguishing the right.' The law is well settled that though the remedy is barred the debt is not extinguished. On consideration of the scheme of the Act, it is clear that the statute has conferred a benefit on the tenant to avoid a decree for eviction by complying with the requirement of Sec. 20 (4). If he fails to avail himself of the opportunity and has not paid the rent for not less than four months and within one month from the date of service upon him of a notice of demand, the landlord under Sec. 20 (2) would be entitled to an order of eviction. Still the tenant can avail himself of the protection by complying with the requirements of Sec. 20 (4). As he has not deposited the entire amount due the protection is no more available. We agree with the view taken by the trial court and the High Court of Allahabad that the words "entire amount of rent due" would include rent which has become time-barred."

12. The principles laid down in the Supreme Court decision applies on all fours in the provision of Sec. 17 (1) and (2) of the Act. The Supreme Court made it clear that on the scheme of the Act it is clear that the statute confers a benefit to a tenant to avoid the decree of eviction. Similarly in S. 17 of the West Bengal Premises Tenancy Act

it confers a benefit for protection against eviction. This marginal note gives a clue which is to be found in the body of Sec. 17. Subsequent amendments were made in order to protect the tenant even when he has failed to comply with the provisions and his defence was struck off. Even Sec. 17 (1) which was amended as far back in 1959 gives power to the court to stay the decree passed on account of failure of availing of those benefits. Inasmuch as when the legislature found that the tenants are having hardship because of monetary difficulty they have tried to amend the Act to protect the tenant. It appears to us that the Act and amendment therein make it clear that tenant who is a defaulter cannot be protected unless he pays the amount of default and the principle is "pay and stay." If tenant does not pay or default in making the payment the protection available to the tenant under the Act for the benefit of the tenant cannot be availed of. In our opinion, the Supreme Court judgment clearly lays down the principle on which the tenant can have the benefit but not without payment. In our opinion, therefore the Hon'ble Judges of the Division Bench in the case reported in (1961) 65 Cal WN 1093 (*Raghunath v. Patel & Co.*) were wrong in importing the words 'legally payable' into Section 17 of the Act. In the case reported in (1961) 65 Cal WN 1093 (*Raghunath v. Patal & Co.*) it will be clear from the said decision that their Lordships considered section 14 (4) of the West Bengal Premises Tenancy (Temporary Provision) Act. It was held by their Lordships that the decision under S. 14 read with sub-sec. (4) of the West Bengal Premises Rent Control (Temporary Provision) Act, 1950 and the decision made thereto are of historical interest. Only the structure of S. 17 of the W. B. Premises Tenancy Act was in many respects materially different from S. 14 of W. B. Rent Control (Temporary Provision) Act, 1950. We respectfully agree to this view expressed by the Hon'ble Division Bench and we are, therefore, really at a loss to find their Lordships importing the words 'legally payable' in Sec. 17 of the Act when it has not been provided in Sec. 17 (1) the words 'legally payable' as we find in 1950 Act. The Hon'ble single Judge in the case reported in (1981) 85 Cal WN 840: (AIR 1981 Cal 352) (*L. N. Saha v. D. P. Kar-*

makar) distinguished the case reported in (1980) 1 Cal LJ 80: (AIR 1980 Cal 114) on the ground that their Lordships only considered Sec. 17 (1) of the Act and not 17 (2). In our opinion, the word 'amount' in Sec. 17 (1) and in Sec. 17 (2) must have the same meaning and cannot have a different meaning. In the context of Sec. 17 the amount of arrears which is barred will have to be deposited and the court will have to consider all the amounts whether it is barred or not and come to a finding of the actual amount deposited if the tenants want to avail the protection of Sec. 17 of the Act.

13. In the case reported in (1981) 85 Cal WN 840: (AIR 1981 Cal 352) (L. N. Saha v. D. P. Karmakar) at p. 846 (of Cal WN) (at p. 356 of AIR) the Hon'ble single Judge held that Sec. 17 (1), (2) and (2A) provide the foundation for the landlord's right to recover arrears and current rent during the pendency of the ejectment suit in the trial court and for the discharge of the tenant's liability to pay arrear and current rent. This position in our opinion, cannot be accepted to be correct. Sec. 17 (1), (2) and (2A) does not give any foundation to the landlord but only gives relief to the tenant. Sec. 17 (1) and (2) confer benefit to the tenant who may make an application for availing the benefit contained in the section but will only be entitled to it if the tenant deposits all the arrears of rent including (time-barred arrears) and the current rent during the pendency of the ejectment suit in the trial court as otherwise his defence against delivery of possession is liable to be struck out under Sec. 17 (3) of the Act. It is clear even from the judgment of the Hon'ble single Judge that Sec. 20 (4) of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 and Sec. 17 (1), (2) and (2A) of our Act are the same though the dissimilarity have not been enumerated. If there is similarity, we are bound therefore to follow the principle laid down by the Supreme Court. The Supreme Court sought to lay down the principle that Sec. 20 (4) of the said Act conferred a benefit on the tenant to avoid eviction decree by complying with the requirements of Sec. 20 (4) of the Act. If he fails to avail himself of the opportunity and has not paid the rent for not less than four months and within one month from the date of ser-

vice upon him of a notice of demand, the landlord under Sec. 20 (2) would be entitled to an order of eviction. Still the tenant can avail himself of the protection by complying with the requirements of Sec. 20 (4) on deposit of the entire amount due as contained in Section 20 (4) of the Act. In our opinion, in this judgment the principle laid down applies on all fours in respect of Section 17 (4) read with Sec. 17 (1) and other sub-sections of Sec. 17 of the Act.

14. It is argued by Mr. Chatterjee that Sec. 20 (c) of the Act only applies to the defaulting tenant and not any other grounds upon which the eviction may be prayed for by the tenant. In so far as we are concerned with our Act, Sec. 17 (1) of the Act is applicable in the ejectment suit on any ground whatsoever, as the wording of S. 17 (1) of the Act makes it clear that "on a suit or proceeding being instituted by the landlord on any of the grounds referred to in Sec. 13....." In our opinion, Sec. 17 (4) of the Act is only applicable in a matter for a decree of delivery of possession passed on the ground of default only. Sec. 17 (4) runs as follows:—

"17 (4). If a tenant makes deposit or payment as required by sub-sec. (1), sub-sec. (2) or sub-section (2A) no decree for delivery of possession of the premises to the landlord on the ground of default in payment of rent by the tenant shall be made by the Court but the Court may allow such costs as it may deem fit to the landlord:

Provided that a tenant shall not be entitled to any relief under this sub-section if, having obtained such relief once in respect of the premises, he has again made default in the payment of rent for four months within a period of twelve months."

15. It appears that if the tenant makes deposit or payment as required by sub-sec. (1) or (2) or (2A), no decree or order for delivery of possession on the ground of default in payment of rent shall be made by the Court; but it does not cover any other cases. Therefore a tenant is only entitled to the benefit of protection if he has made a default in payment of rent under Section 13 (1) (i) of the Act and if he has complied with Sec. 17 (1), (2) and (2A) of the Act. In that view of the matter, in our opinion, we respectfully differ

with the view expressed by the Hon'ble single Judge.

16. The case reported in (1961) 65 Cal WN 1093 was not properly decided and if there is any doubt whatsoever that has been set at rest by the Supreme Court in the case reported in AIR 1978 SC 287, (Khadi Gram Udyog Trust v. Shri Ram Chandraji Virajman Mandir).

17. Mr. Chatterjee relied on the case reported in AIR 1976 SC 1637 (New Delhi Municipal Committee v. Kalu Ram). In that judgment the Supreme Court held that the power to recover arrears of rent under the Public Premises (Eviction of Unauthorised Occupants) Act, 1958 by the Estate Officer is only limited to which is "legally recoverable." In this case the Estate Officer under Sec. 7 of the Act wanted to recover arrears of rents for more than 7 years from the tenant. Their Lordships, held that the procedure taken by the Estate Officer for recovery of rent is barred by limitation.

18. In the present case this is not a suit by the landlord for recovery of rent for more than 3 years but a suit for eviction on the ground of default and necessary requirement wherein an application was made by the tenant under Sec. 17 (2) of the Act and as such we are here concerned with the interpretation of Sec. 17 of the Act and what amount is payable by the tenant in order to protect himself from the penal provision of striking out the defence against the delivery of possession. "We are of the opinion that the word 'payable' herein does not mean 'legally payable.'" Therefore the payment of amount in so far as the rent is concerned must be, according to us, the arrears including the time-barred rent. In the case reported in (1933) 60 Ind. App 13: (AIR 1933 PC 63) filed by the Company in Liquidation, their Lordships held what the Judicial Committee held that the bar of limitation is 3 years but this decision, in our opinion, does not apply in the facts of the present case.

18A. The case reported in AIR 1978 Madhya Pradesh 165 (FB) on which Mr. Chatterjee relied, in our opinion, is clearly distinguishable. In the M. P. Act, Sec. 12 (1) refers to the whole arrears that "that the tenant has neither paid nor tendered the whole of the arrears of the rent legally recoverable from

him." In view of the particular expression, their Lordships of the Full Bench of the Madhya Pradesh High Court held that the decision reported in AIR 1978 SC 287, (Khadi Gram Udyog Trust v. Shri Ram Chandraji Virajman Mandir) in terms does not apply to the Madhya Pradesh Rent Act.

19. Mr. Chatterjee relied upon the case reported in AIR 1975 Pat 283 (FB) (Ram Nandan Sharma v. Maya Devi) and contended that under the Bihar Buildings (Lease, Rent and Eviction) Control Act the arrears of rent is only confined to period after institution of and during the pendency of the suit. In the said case it was held that under S. 11 of the Act the landlord can make an application for arrears of rent falling due during the period of the suit. In that view of the matter it is quite clear that the wordings of S. 17 of our Act and the S. 11 of the Bihar Act are quite different. In S. 17 (1) and (2) of our Act the tenant must deposit the arrears of rent prior to the suit in the Court within one month of the service of the writ of summons on him or within one month of his appearance in Court or with the Rent Controller or pay to the landlord. Therefore the case reported in AIR 1975 Pat 283 (FB) is of no help to us.

20. The case reported in AIR 1977 All 399 was a case which was decided by the Supreme Court in the case reported in AIR 1978 SC 287, (Khadi Gram Udyog Trust v. Shri Ram Chandraji Virajman Mandir). In the said judgment, in paragraph 17, it has been stated as follows:—

"17. It will thus be seen that the word 'due' was held to have a special connotation in the context of the situation that the provision provided a special procedure for recovery of money without creating any new right and that the provision was discretionary. The court may well refuse to act under it. The word 'due' occurring in S. 20 (4) of the Rent Control Act of 1972 has entirely a different context. It occurs in a section which provides, not an alternative procedure for recovery of arrears of rent, but which confers upon the tenant a right to relief against eviction. This right is founded upon the condition that the rent due must be paid. It confers no discretion on the tenant. The provision is explicit and mandatory.

Unless the condition is fulfilled, the right to relief against eviction does not accrue'.

21. In our opinion the Supreme Court has upheld the view taken in the Allahabad High Court's judgment, we are of the opinion that there is no material difference between S. 17 (4) of the W. B. Act and S. 20 (4) of the U. P. Act. The principle laid down in the Supreme Court case reported in AIR 1978 SC 287, (K. G. U. Trust v. Shri Ram Chandraji Mandir) upheld the Allahabad High Court judgment the case reported in AIR 1977 All 399 (Khadi Gram Udyog Trust v. Ram Chandraji Mandir)

22. Mr. Chatterjee argued that after the decision is made in the case reported in (1961) 65 Cal WN 1093, (Raghunath v. Patel & Co.) there are number of amendments of S. 17 of the Act. But still the legislature did not amend the word 'payable' to mean 'legally payable'. It was argued by Mr. Chatterjee that the legislature knew what decision has been taken in the case reported in ((1961) 65 Cal WN 1093), (Raghunath v. Patel & Co.) and it may be said that the interpretation given by the judgment was a proper and the legislature did not think to amend the same. In our opinion as we have already stated in the context and historical background of the legislation it is quite clear that when the legislature in their wisdom omitted the words 'legally recoverable' it is no answer to say that the subsequent amendment, the legislature did not think it fit to make amendment of the statute if the legislature intended otherwise. We have not, therefore, dealt with the cases referred to by Mr. Chatterjee on that point, namely, (1973) 77 Cal WN 424: (AIR 1973 Cal 529), AIR 1971 SC 1691, (1979) 1 Cal LJ 160: (AIR 1978 Cal 457) (FB) (Renuka Pachal v. Chapa Guha Neogi) and (1975) 1 Cal LJ 1: (AIR 1977 Cal 110) (FB) (Gurudas Biswas v. Sibasankar Seal). In the case reported in (1980) 1 Cal LJ 80: (AIR 1980 Cal 114) (Central Coalfields Ltd. v. Rabindra Nath Dutta) the Hon'ble Judges held that the entire amount due including the time barred rent must be deposited. It will be found by the amendment the word 'total' was used in Ss. 17B and 17C of Act. The word 'entire' used by the Division Bench only means the total arrears

due including the time-barred rent and it will have to be deposited under S. 17 (1) read with S. 17 (2) of the Act.

23. Mr. Chatterjee referred to AIR 1940 Mad 385 (FB) (Nana Rao v. Arunachalam). In our opinion the Full Bench decision of the Madras High Court does not support the contention of Mr. Chatterjee. The Full Bench in the said judgment held that 'if the words of a later statute differ materially from those of an earlier one, effect should be given to the change, especially where to do so would be to advance the policy underlying it. If the language fails to achieve the object in view, it can only be regretted but not helped. But the court need not be astute to adopt a construction which would tend to bring about a frustration of the objective. If the words of a latter statute differ from those of an earlier one, the Court in construing the later, is not bound by decisions under the earlier, even though it relates to the same subject matter'. We have already held in the present case with reference to the earlier Act that the word 'legally recoverable' has been omitted by the legislature in the present statute and therefore in our opinion the learned Judges of the Division Bench were right in holding that the rent which was time barred will have to be deposited under S. 17 (1) of the Act.

24. In the circumstances, I hold that under Ss. 17 (1) and 17 (2) of the W. B. Premises Tenancy Act the tenant is under obligation to deposit the rent which may have been time barred if he is to avail of the protection against striking out the defence against delivery of possession u/s. 17 (3) of the Act.

25. In the present case the Division Bench did not issue a rule in the matter but both the parties were present before the Division Bench as also before us on notice being issued by the Division Bench and the arguments were advanced in the matter. In view of our finding that the tenant is liable to deposit the rent which has become time barred, the learned Subordinate Judge will have to reconsider his order and re-hear the matter afresh and decide the same in accordance with law.

B. N. MAITRA, J. (Concurring) :—

26. I agree. But it is necessary to make some observations.

27. The important question is, if the provisions of S. 20 (4) of the U. P. Act and of Section 17 of the W. B. Premises Tenancy Act, 1956, are substantially the same. It is true that the words "entire arrears" appearing in S. 20 (4) of the U. P. Act do not find place in S. 17 of the West Bengal Act. Nevertheless the various circumstances be dealt with to arrive at a decision whether or not the bench case of Raghunath Singh v. Patel and Company in (1961) 65 Cal WN 1093 still holds the field.

28. Firstly, according to the provisions of S. 17 of the West Bengal Act, the landlord can only receive the rent as there is no scope for him to pay court fees and ask for recovery of the arrears. The amount to be deposited by the tenant has been specified in sub-sec. (1) of S. 17. Only in case of a dispute, sub-sec. (2) comes into operation. After the determination of the dispute under the sub-sec. (2), the amount payable by the tenant is substantially the same, as stated in sub-sec. (1) of Section 17 of the Act. It can be next seen that the choice is entirely with the tenant whether he will comply with the provisions of S. 17. That sub-section imposes a statutory obligation on him to pay or deposit the arrears for avoiding the defence against delivery of possession being struck out, for in such an eventuality the landlord has the only right of invoking the provisions of sub-sec. (3) of S. 17 for striking out such defence. So, S. 17 provides for a conditional protection to the contesting tenant.

29. The Limitation Act merely bars the remedy but not the right of the landlord nor does it bar the debt. One cannot lose sight of the fact that previously, in the Temporary Rent Act of 1950, the expression used was "legally payable". But the word "legally" was dropped from the S. 17 of the later West Bengal Act of 1956. In the Full Bench case of Nana v. Arun in AIR 1940 Mad 385 at page 392, it has been stated that where the words of a later statute differ materially from those of an earlier one, effect should be given to the change, especially where to do so would be (to) advance the policy underlying it. The court should not adopt a construction which would tend to bring about a frustration of the objective. Moreover, the use of the expression "for

the period for which the tenant may have made default" in sub-sec. (1) of S. 17 is a pointer that there is no restriction about the period of default. It covers the entire period of default and is wide enough to indicate that the tenant is enjoined to deposit the entire arrears.

30. In the Privy Council case of Hansraj Gupta v. Official Liquidator in (1933) 60 Ind App 13 at p. 23: (AIR 1933 PC 63 at p. 66) the Liquidator was concerned only with the money due from a contributory. In the case of New Delhi Municipal Committee v. Kaluram in AIR 1976 SC 1637, the Estate Officer had power to recover the dues from the defaulter, whereas in the West Bengal Act, 1956, no such procedure has been provided for the landlord's benefit.

31. In the case of Bombay Dyeing Manufacturing Co. Ltd. v. State of Bombay, AIR 1958 SC 328 at p. 335, it has been stated that the statute of limitation only bars the remedy, but does not extinguish the debt except in cases provided for in Section 28 of the Act.

32. Reference has been made to the provisions of S. 17 (4) of the W. B. Act by both the sides. The provisions of this sub-sec. (4) speak of a relief to the defaulting tenant and the same is analogous to those of S. 114 of the Transfer of Property Act.

33. The provisions of S. 17 of the West Bengal Act of 1956 and of S. 20 (4) of the U. P. Act of 1972 are, therefore, substantially the same. There is no reason to import the word "legally" in S. 17 of the West Bengal Act, though that word was specifically omitted by the Legislature when the Act came into operation. It is thus held that the bench case of Raghunath Singh v. Patel and Company ((1961) 65 Cal WN 1093) (supra) has been impliedly overruled and in a case covered by the provisions of sub-Ss. (1), (2) and (2A) of S. 17 of the West Bengal Act, the tenant is required to deposit the entire amount including the time-barred debt.

AMITABHA DUTTA, J. (Concurring):—

34. I agree with the order proposed by my Lord. But I want to explain in my own way, my point of view.

35. The question at issue arises in a revisional application by the plaintiff, which is directed against Order No. 16 dated 24-9-1980 of the learned Sub-

ordinate Judge. Siliguri in O. C. Suit No. 17 of 1979 for ejectment of the defendant as a premises tenant on the grounds mentioned in cls. (f), (ff) and (i) of sub-sec. (1) of S. 13 of the W. B. Premises Tenancy Act, 1956, the defendant having been a defaulter in payment of rent at Rs. 250/- per month payable according to English calendar month for the suit premises from January, 1970. The defendant filed an application under S. 17 (2) of the said Act claiming set off of Rs. 29,239/-. The plaintiff opposed that application. The learned Subordinate Judge negatived the defendant's plea of set off and determined the amount payable by the defendant as Rs. 9,000/- being equivalent to arrears for three years. The plaintiff moved this Court in revision against the said order on the ground that the trial court has acted illegally and with material irregularity as in determining the amount payable it ought to have included the time barred arrears of rent also within such amount.

35. The learned Judges of the Division Bench while hearing the revisional application as Civil Order No. 168 of 1982 felt that in view of the conflict between the Bench decision in the case of Central Coalfields Ltd. v. Rabindra Nath Dutta, (1980) 1 Cal LJ 80: (AIR 1980 Cal 114) and the decision of the learned single Judge in the case of L. N. Saha v. D. P. Karmakar, (1981) 85 Cal WN 840: (AIR 1981 Cal 352) on the point whether the earlier Bench decision of this Court in the case of Raghunath Singh v. Patel & Co., (1961) 65 Cal WN 1093 stands impliedly overruled by the decision of the Supreme Court in the case of Khadi Gram Udyog Trust v. Shri Ram Chandraji Virajman Mandir, AIR 1978 SC 287, the matter should be referred to a larger Bench to resolve the conflict. This is how the matter came up before this Bench.

37. In my view, it is correct to hold that under the provisions of S. 17 (1) read with (2) of the W. B. Premises Tenancy Act, 1956 (hereinafter called the 1956 Act), the tenant defendant is required to deposit the arrears of rent for the period for which he may have made default including the time barred arrears. But I do not think that the Supreme Court's decision in Khadi Gram Udyog Trust's case AIR 1978 SC 287 has impliedly overruled the Bench decision of this Court in Raghunath Singh's

case, (1961) 65 Cal WN 1093 in which it has been held that S. 17 (2) read with sub-s. (1) of the 1956 Act does not require the tenant to deposit or pay any amount in respect of time barred arrears of rent. The reasons are these. The Supreme Court had no opportunity in that case to apply its mind to and analyse the provisions of S. 17 of the W. B. Premises Tenancy Act, 1956. The Supreme Court after considering the provisions of S. 20 (1), (2) and (4) of the U. P. Urban Buildings (Regulation of Letting Rent and Eviction) Act, 1972 has decided that the words "entire amount of rent due" in Section 20 (4) would include rent which has become time-barred. Their Lordships of the Supreme Court observed as follows (at page 289):

"On a consideration of the scheme of the Act it is clear that the statute has conferred a benefit on the tenant to avoid decree for eviction by complying with the requirement of S. 20 (4)". Secondly the provisions of S. 17 (1) and (2) of the 1956 Act are not in pari materia with S. 20 (4) of the U. P. Act. The relevant expression as to arrears payable are different. There is no provision in the U. P. Act corresponding to Section 17 (1) of the 1956 Act which applies to every suit for ejectment on any of the grounds mentioned in Section 13 (1) and which requires the tenant to deposit both arrear rent and current rent to get the benefit of protection against eviction on the ground of default under Section 17 (4). Again a tenant can get the relief under Section 20 (4) of the U. P. Act more than once. But under Section 17 (4) of the 1956 Act read with its proviso a tenant shall not get any relief if having got such relief once he defaulted in payment of rent for four months within a period of twelve months.

38. The learned advocate for the petitioner has submitted and in my view, rightly that the decision in Raghunath Singh's case does not lay down the law correctly for the following reasons. Sec. 17 (1) read with (2) of the 1956 Act does not provide for the procedure for recovery of arrears of rent at the instance of the landlord. S. 17 imposes a statutory obligation on the tenant to deposit or pay rent in accordance with the provisions thereof if he wants to avoid a decree for eviction on the ground of default in payment of

rent when it is the first occasion of such default or if he wants to avoid his defence against delivery of possession being struck out whatever be the ground in S. 13 (1) of the Act on which the suit is based. In other words Section 17 grants conditional protection to the tenant. If he chooses to avail of the protection he had to comply with the conditions. The landlord cannot apply for recovery of arrears of rent. There is no restriction on the period for which the tenant may have made default in Section 17 (1) or (2) (a) of the Act and bar of limitation is foreign to Section 17.

39. The learned single Judge in L. N. Saha's case (1981) 85 Cal WN 840: (AIR 1981 Cal 352) has referred to the following two decisions which may be discussed. In *New Delhi Municipal Committee v. Kaloo Ram*, AIR 1976 SC 1637, the recovery of arrears of rent was at the instance of the Estate Officer under Section 7 of the Delhi Public Premises (Eviction of Unauthorised Occupants) Act, 1958 and so it has been held that if the person in arrears raises a dispute as to the "arrears of rent payable" the Estate Officer in determining the amount of arrears payable cannot insist on payment of arrears barred by limitation. The Supreme Court has interpreted the word "payable" in Section 7 by holding that "in the context in which it occurs, (it) means legally recoverable". Thus in the aforesaid case the recovery was at the instance of the Estate Officer representing the landlord. In *Hans Raj Gupta v. Official Liquidator etc.*, (1933) 60 Ind App 130: (AIR 1933 PC 63) the Privy Council interpreting the expression "money due" to the company in Section 186 of the Indian Companies Act, 1913 held it as confined to money due and recoverable in a suit by the company and so the bar of limitation would apply. In the summary proceeding under the said section in the winding up court against debtor contributories every objection is just as open to the person sought to be charged as it would have been if the suit had been brought by the liquidator in the company's name for the money. These decisions in the context of the provisions of the particular Acts are distinguishable and do not furnish authority for the proposition that "the amount of rent payable" in Section 17 (2) of the

1956 Act should be confined to an amount legally recoverable by the landlord in a suit for recovery of arrears of rent. The meaning of that expression is to be gathered from its context. It has been observed by Viscount Simonds in *Attorney General v. Prince Ernest Augustus of Hanover* 1957 A. C. 436 at page 461 "For words and particularly general words cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context and I use context in its widest sense....." The legislative history of Section 17 and the context in which the expression "the amount of rent payable" appears in Section 17 (2) of the 1956 Act will be presently explained.

40. There is no provision in Section 17 of the 1956 Act enabling the landlord to make an application for recovery of the arrears of rent and in this respect of scheme of the 1956 Act is basically different from the scheme of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 which it replaced, as under Section 14 (4) of the earlier Act the landlord could apply for an order on the tenant to deposit the arrear and current rent. In the earlier Act of 1950 Section 14 (1) provided that "the court shall determine the amount legally payable by the tenant and which is in arrears taking into consideration any order made subsection (4)". But under Section 17 (2) of the 1956 Act the tenant may by an application raise dispute as to "the amount of rent payable" and in that case the court shall "having regard to the rate at which the rent was last paid and the period for which default may have been made "make a preliminary order" "specifying the amount of rent due from the tenant" (the word used is due and not recoverable) and as soon as thereafter as possible having regard to the provisions of the Act make a final order determining the rate of rent and the amount to be deposited or paid by the tenant. It is well settled that if the words of a later statute differ materially from those of an earlier one effect should be given to the change to advance the policy underlying it. There is no express or implied restriction of "the period for which the tenant may have made default" in Section 17 (1) or

of "the period for which default may have been made" in Section 17 (2) (a) of the 1956 Act. The court cannot disregard the plain and natural meaning of those words in determining the amount of rent payable. "It is sometime more important to emphasize the obvious than to elucidate the obscure". The Court cannot limit the said period to three years preceding the date of the suit. Such confinement of the period will also be not justified as the determination of the amount payable is made at the instance of the tenant seeking protection in terms of Section 17 and not on the application of the landlord. The procedure is not a source or foundation of the landlord's right to recover the arrears. It gives the tenant option to avail of the conditional protection. If he chooses not to avail of it and his defence against delivery of possession is struck out as a consequence, he can still contest the suit by cross-examining the plaintiff's witnesses on all points and making submissions on the merits of the plaintiff's case before the court. It has been so held in the Bench decision of this Court in the case of Dayamoyee Sudhakhan v. Dal Singer Singh, (1980) 1 Cal HN 498: (AIR 1979 Cal 332). Having regard to this scheme of Section 17 I find that it will be wrong to construe the expression "the amount payable" in the context in which it is used to mean the amount legally recoverable in an action by the landlord and to interpret the word 'period' in Section 17 (1) and (2) (a) so as to limit and confine it to three years.

41. The principle underlying Section 114 of the Transfer of Property Act granting relief against forfeiture for non-payment of rent may not be germane to the interpretation of S. 17 of the 1956 Act, the basic structures of the two provisions not being identical. It cannot be said that because the tenant does not get relief against eviction when the suit is on a ground other than the first default, he cannot be called upon to pay the time barred arrears. The legislature can reasonably enact that the tenant must fulfil his obligation to pay the arrears due to the landlord before he can be permitted to pursue his defence against delivery of possession in the suit. The "amount of rent payable" means what the tenant should pay as rent. Rent does not lose its character

by being in arrear for over three years. So the principle laid down in the Bench decision in the case of Dayadebi v. Chapala Debi, (1959) 63 Cal WN 976: (AIR 1960 Cal 378) does not come into the picture. In Khadi Gram Udyog Trust's case, (AIR 1978 SC 287) the Supreme Court has approved of the principles that statute barred debts are dues though payment thereof cannot be enforced by action and that if the creditor has any means of enforcing his claim other than by action or set off, law does not debar him from recovering it by those means.

42. The decision in the case of Man-kunwar Bai v. Sunderlal, AIR 1978 Madh Pra 54 (FB) and AIR 1978 Madh Pra 165 (FB) relied on by the learned advocate for the respondent are distinguishable as the pivot on which the decisions turn is the word "default" in the expression "the period for which the tenant may have made default" in Section 13 (1) of the M. P. Accommodation Control Act, 1961 which refers to the default described in Sec. 12 (1) (a) of the Act meaning non-payment of "the whole of the arrears of rent legally recoverable from him" within two months of service of the notice of demand.

43. It has been submitted by the learned advocate for the respondent that Raghunath Singh's case (1961-65 Cal WN 1093) was decided in June, 1961 but the legislature has not changed the provisions of Sec. 17 (1) and (2) of the 1956 Act although Sec. 17 was amended several times thereafter and that a decision of long standing on the basis of which many persons have arranged their affairs should not be disturbed. But in my view, legislative inaction is no ground for perpetuating an erroneous construction of the statute and when disturbance of a long standing decision will not have the effect of reopening transactions relating to title to immovable property or imposition of any unjust liability on persons, the superior court will not hesitate to overrule it as in the instant case to remove doubt expressed about it in a subsequent decision and resolve conflict of subsequent decisions on the same point for bringing about certainty in the law.

44. In conclusion, I find that Raghunath Singh v. Patel & Co. (1961) 65 Cal

WN 1093 has not been impliedly overruled by the decision of the Supreme Court in Khadi Gram Udyog Trust v. Shri Ram Chandraji Virajman Mandir, AIR 1978 SC 287. But I hold that Raghunath Singh's case was not correctly decided and that a tenant raising a dispute under Sec. 17 (2) read with Sec. 17 (1) of the 1956 Act is required to deposit the arrears for the period for which he may have made default including the time barred arrears as payment of such arrears can be and has been made a condition of protection granted to the tenants under Sec. 17 of the Act.

45. I, accordingly, agree that this reference should be answered in the manner suggested by my Lord and I concur in the order proposed by him.

46. We, therefore, hold as follows:—

47. We hold that the decision reported in (1961) 65 Cal WN 1093 (Raghunath Singh v. Patel & Co.) was wrongly decided. We respectfully agree with the view taken by the Division Bench in the case reported in (1980) 1 Cal LJ 80: (AIR 1980 Cal 114) (Central Coalfields Ltd. v. Rabindra Nath Dutta) and differ with due respect to the views of the Hon'ble single Judge taken in the case reported in (1981) 85 Cal WN 840: (AIR 1981 Cal 352) (L. N. Saha v. D. P. Karmakar).

48. (Mr. Justice P. K. Banerjee and Mr. Justice B. N. Maitra) We hold that by implication that the judgment reported in (1961) 65 Cal WN 1093 (Raghunath Singh v. Patel & Co.) is overruled by the Supreme Court judgment reported in AIR 1978 SC 287 (Khadi Gram Udyog Trust v. Shri Ram Chandraji Mandir).

49. (Mr. Justice Amitabha Dutta) The case reported in (1961) 65 Cal WN 1093 (Raghunath Singh v. Patel & Co.) has not been impliedly overruled by the decision of the Supreme Court in Khadi Gram Udyog Trust v. Shri Ramchandraj Mandir reported in AIR 1978 SC 287.

50. Let the order be communicated to the Court below for disposal of the application pending before him in accordance with law as hereinbefore laid down.

Order accordingly.

AIR 1982 CALCUTTA 282

P. K. BANERJEE AND

B. N. MAITRA, JJ.

Alliance Mills (Lessees) Pvt. Ltd.,
Appellant v. M/s. Madan Gopal & Sons,
Respondent.

A. F. O. D. Nos. 333, 202, 250, 313
and 170 of 1975, D/- 16-2-1982.

(A) Forward Contracts (Regulation) Act (74 of 1952), Sec. 15 (3A) — Contract relating to Jute and Hessian not made in prescribed form and in accordance with prescribed Bye-laws read with S. 15 (3A) of Forward Contracts (Regulation) Act, would be void. (East India Jute and Hessian Exchange Ltd. Calcutta (Working Manual Vol. III), Chap. V. Bye-laws 15, 17, Appendix II).

Any member of the East India Jute and Hessian Exchange Ltd. cannot contract out of Appendix II in respect of transferable specific delivery contracts in jute goods. The prescribed form as provided in Appendix II is imperative and a contract in order to be valid must contain all the terms and conditions set out in the prescribed form. Either the contract must incorporate all those terms and conditions or no contract can be made at all. No term or condition in the prescribed form can be dispensed with on the plea that it is inapplicable. Thus where the contract was not in form as in Appendix II and was entered in violation of Chap. V Bye-laws 15 and 17 read with Sec. 15 (3A) of the Forward Contracts (Regulation) Act the contract would be void. Case law discussed. (Paras 8, 9)

When there was no option given in the column left for option prescribed in the contract form to be exercised by the buyer within the time specified in the contract, the contract becomes illegal in view of Bye-laws 15 and 17 of the Manual read with Sec. 15 (3) of the Forward Contracts (Regulation) Act, 1952. However in view of the fact of statutory prohibition and in view of the fact that the contract must be entered into in Appendix II and not otherwise, the purchase or no purchase is of no concern for the consideration whether the contract was validly made or not in accordance with the statutory regulations framed under the Forward Contracts (Regulation) Act, 1952. (Para 9)

(B) Arbitration Act (10 of 1940), Sections 33, 2 (9) — Application to set aside award — Plea that contract containing arbitration clause is void — Can be raised even after party has acquired to arbitration after proceedings and award was passed. (Para 9)

Cases Referred: Chronological Paras

AIR 1974 SC 1579	6, 8
AIR 1971 SC 166	8
AIR 1963 SC 90	9
AIR 1962 SC 1810	7, 9
AIR 1959 Mad 351	6
AIR 1953 Cal 621: 57 Cal WN 482	6
AIR 1951 SC 9: 1951 All LJ 124	6
AIR 1949 PC 334: 1949 All LJ 490	9

Pramatha Nath Chatterjee, K. N. Misra and N. C. Bhattacharjee, for Appellant; K. K. Maitra and Tapan Mitra, for Respondent.

BANERJEE, J.:— These appeals arise out of an application under Secs. 30 and 33 of the Arbitration Act 1940 for setting aside the award made by the Tribunal of Arbitration, The Bengal Chamber of Commerce & Industry, Calcutta. The fact relating to the arbitration proceeding is that there was a contract between the appellant and the respondent coming under the East India Jute & Hessian Exchange Ltd., Calcutta for Trading in Transferable Specific Delivery Contracts in Raw Jute and Jute Goods and Rules (Sic). The transferable specific delivery contracts in raw jute and jute goods are embodied in the Rules framed under the East India Jute & Hessian Exchange Ltd. The contract also is to be found in Appendix X of the East India Jute & Hessian Exchange Ltd., Calcutta (Working Manual Vol. III). There was no dispute that some sort of agreement was entered into by Alliance Mills (Lessees) Pvt. Ltd. and M/s. Madan Gopal & Sons in a form which is akin to Appendix II as hereinbefore stated. But it appears from the original that the rubber stamp which was embossed on the same form could not be deciphered.

2. These matters were being heard by us sometime in Mar. 1978 and we passed an order on the same by consent of parties. It is imperative what is imprinted by the rubber stamp must be deciphered. We, however, made the order on 20th Mar., 1978 by sending back the matter to the learned Judge, City Civil Court for decision on the following issues framed by us "(1) Whe-

ther the Transferable Specific Delivery Contract for Jute Goods being Contract No. JG/C-10053 dated 9th Dec., 1971 is statutory form upon which the contract was entered into? and (2) What was the prescribed form prevalent on the date of the Contract?" We also directed that the parties should be given liberty to adduce evidence.

3. The learned Judge however sent his decisions on the said two issues to this Court holding inter alia that the contract was not entered into in the statutory form and secondly, that statutory form in Appendix II at the page next to 93 of the Working Manual Vol. III is a form with up-to-date amendments as prevalent on the date of contract as on 9th Dec. 1971.

4. After the records were sent to us with a decision of the learned Judge, the matter could not be heard because a number of adjournments were taken by the parties on different grounds including the one that one of the appeals in which the main judgment was printed, was not ready. Be that as it may, though belated, all the matters could be heard analogously today.

5. Mr. P. N. Chatterjee on behalf of the appellant contended firstly that the doctrine of substantial compliance has no application in the present case. The contract not being in the prescribed form, there is no contract and as such, arbitration clause is not applicable. Secondly, it is argued by Mr. Chatterjee that so far as the option clause is concerned the Rule in Chapt. V, sub-r. (3) time will have to be specified and no time having been specified in the contract itself, the parties are not entitled in law to rely on custom.

6. Mr. K. K. Maitra on behalf of the respondent, however, contended that it is not Chap. V but Chapter VII of the Working Manual, Vol. III applies. It is also contended by Mr. Maitra that the Supreme Court judgment as reported in AIR 1974 SC 1579 has no application in the facts of the present case, as there was no scoring or cancellation in the statutory form prescribed under the Manual. It is argued further by Mr. Maitra that no prejudice is caused to the seller, when subsequent to the contract about the option in regard to the time, element for the exercise of option is present as contained in R. 3 of Chap. V of the Working Manual, Vol. III. Mr. Maitra further contended that the

matter had gone to the arbitration and the appellant cannot now raise the question having submitted to the jurisdiction of the arbitrator and it cannot also say that the arbitration was without jurisdiction. Mr. Moitra relied upon the decisions reported in AIR 1949 PC 334, AIR 1951 SC 9, (1953) 57 Cal WN 482: (AIR 1953 Cal 621), AIR 1959 Mad 351 and on Russell's Arbitration 19th Ed. p. 453.

7. In reply to the above decisions as cited by Mr. Moitra, Mr. Chatterjee contended that as the contract itself is void, this question is not at all relevant. Mr. Chatterjee relied upon a decision reported in AIR 1962 SC 1810.

8. The question for our consideration is therefore whether the contract is in Appendix II of the Working Manual Vol. III at page 93. Admittedly it is not so. It appears that in the original there is some rubber stamp which cannot be deciphered. On evidence also nothing came out that the amended form has been used at the time of contract on 9th Dec. 1971. In our opinion, the case reported in AIR 1974 SC 1579 applied here on all fours as the Supreme Court has held in the said case that it is not correct to say that the prescribed form may be followed only in so far as circumstances may admit. The prescribed form is imperative and a contract in order to be valid must contain all the terms and conditions set out in the prescribed form. Either the contract must incorporate all those terms and conditions or no contract can be made at all. No term or condition in the prescribed form can be dispensed with on the plea that it is inapplicable. The Supreme Court has clearly stated in para 10 relying upon the case reported in AIR 1971 SC 166 that "In our opinion, the High Court was right in holding that the contracts in question were not in the prescribed form and thus they did not comply with the requirement of Bye-law 1 (b) of Chap. V. There can be no manner of doubt that that bye-law is mandatory when read with By-laws 15 and 17. It must be remembered that under Bye-law 15 no member shall enter into any transferable specific delivery contract otherwise than on terms and conditions prescribed under the bye-laws and under Bye-law 17 if there is a contravention inter alia of Bye-law 15 the contract shall be rendered illegal by

virtue of the provisions contained in Sec. 15 (3A) of the Act, that is, Forward Contracts (Regulation) Act, 1952. It is clear from this judgment that any member of the East India Jute & Hessian Exchange Ltd. cannot contract out of Appendix II in respect of transferable specific delivery contracts in jute goods. Chap. V of the said Manual deal with the trading provisions in general. Chap. V sub-para (g) provides that all Transferable Specific Delivery Contracts shall be subject to the provisions of the Bye-laws. Bye-law 3 of Chap. V runs as follows:—

"T. S. D. Contracts in jute goods shall ordinarily provide for delivery of a specified quality of these goods but provisions can be made in the contract for specified options which may be with or without penalty and/or premium or which may contain terms for delivery at specified rates arranged mutually between the sellers and the buyers. Such options shall be exercised by the buyer within the time specified in the contract."

9. It appears from the contract form that there was no option given in the column left for option to be exercised by the buyer within the time specified in the contract. If no such option is given, the contract becomes illegal in view Bye-laws 15 and 17 of the Manual read with Sec. 15 (3) of the Forward Contracts (Regulation) Act, 1952.

That there was no incorporation in the form is clear from the application the buyer made in his arbitration petition which contained an objection thereto, to the appellant's objection. It is clear from their objection that they pleaded that even if the option clause was not there, still this can be incorporated in the contract itself by consent of the parties and according to the customs prevailing. In our opinion, in view of the fact of the statutory prohibition and in view of the fact that the contract must be entered into in Appendix II and not otherwise, this purchase or no purchase is of no concern for the consideration whether the contract was validly made or not in accordance with the statutory regulation framed under the Forward Contracts (Regulation) Act, 1952. Mr. Moitra further contended that, when the matter was referred to the arbitration, the petitioner or appellant or any

of the party was barred in raising the question of arbitration being invalid because the contract was invalid. In our opinion this cannot be correct. The Privy Council in AIR 1949 PC 334 has already decided that the award cannot be set aside even if there is error of law unless it comes within the mischief of provision of Sec. 20 (or 30) of the Arbitration Act of 1940. This question was also considered in a similar matter by the Supreme Court in a case reported in AIR 1962 SC 1810 and AIR 1963 SC 90 where the question was raised similarly under the Forward Contracts (Regulation) Act that this cannot be raised by the parties to the Contract. The Supreme Court categorically stated that if the contract itself is void the question of submitted jurisdiction of arbitrator is of no avail. It has been held by the Supreme Court that it cannot be disputed that the expression "arising out of" or "concerning" or "in connection with" or "in consequence of" or "relating to this contract" occurring in an arbitration clause in an agreement to purchase goods are of sufficient amplitude to take in a dispute as to the validity of the agreement. But the arbitration clause cannot be enforced when the agreement of which it forms an integral part is held to be illegal. On principle it must be held that when an agreement is invalid every part of it including the clause as to arbitration contained therein must also be invalid. The point which Mr. Moitra argued was specifically taken by the parties. It has been held by the Supreme Court that the party applying under S. 33 is not estopped by its conduct in appearing before the arbitrators and in taking part in the proceedings before them from questioning the validity of the award. What confers jurisdiction on the arbitrators to hear and decide a dispute is an arbitration agreement as defined in Section 2 (a), and where there is no such agreement, there is an initial want of jurisdiction which cannot be cured by acquiescence. We are therefore of opinion that this argument of Mr. Moitra that the appellant having acquiescence and taking part in the arbitration proceeding cannot now challenge the arbitration proceeding, cannot be sustained and must fail. In view of the finding on the first question we must hold that the contract not being in form as in Appendix II and in violation of Chap. V

Bye-laws 15 and 17 read with S. 15 (3A) of the Forward Contracts (Regulation) Act cannot be upheld and must be said to be void.

10. The appeals are therefore allowed. The judgment and order passed by the court below are set aside and the Award of the Tribunal is set aside. But there will be no order as to costs.

B. N. MAITRA, J.:— I agree.

Appeals allowed.

AIR 1982 CALCUTTA 285

ANIL KUMAR SEN AND
B. C. CHAKRABARTI, JJ.

Paresh Nath Mondal, Petitioner v. Bijan Behari Mondal and others, Respondents.

C. R. Nos. 258 and 259 of -1980, D/- 26-2-1982.

(A) West Bengal Land Reforms Act (10 of 1956), S. 9 (6) — Appeal under — District Judge in entertaining appeal does not act as a persona designata. (Bengal, Agra and Assam Civil Courts Act (12 of 1887), S. 22, Civil P. C. (1908), S. 24).

It cannot be said that the District Judge in entertaining appeal under S. 9 (6) acts as persona designata and as such none but he alone could hear and dispose of the appeal. Sec. 9 (6) when it speaks of District Judge it really means the Court of the District Judge or the Principal Civil Court of the District. Further, Bengal, Agra and Assam Civil Courts Act and Civil P. C. are applicable to proceedings contemplated by that provision before the District Court. AIR 1977 SC 282, (1977) 81 Cal WN 580. (1977) 81 Cal WN 866, Rel. on. (Para 4)

(B) West Bengal Land Reforms Act (10 of 1956), S. 9 (6) — Appeal under S. 9 (6) before District Judge — Appeal cannot be transferred to Subordinate Court. (Bengal, Agra and Assam Civil Courts Act (12 of 1887), S. 22, Civil P. C. (1908), S. 24).

The appeal under S. 9 (6) preferred to the District Judge could not have been transferred to the Court of the Subordinate Judge when that Court had not the jurisdiction to either entertain or hear and dispose of the appeal as the statute itself has prescribed the forum to be the Court of the District Judge

CZ/CZ/B46/82/PGS/MYJ

and has neither left the forum to be determined by the Bengal, Agra and Assam Civil Courts Act nor has it given any indication that the District Judge in dealing with such an appeal can transfer the appeal to any other Court Subordinate to the District Judge. Therefore the District Judge could not transfer appeal under S. 9 (6) to the Court of Subordinate Judge. AIR 1962 Cal 635, Rel. on. (Para 5)

Cases Referred: Chronological Paras

AIR 1977 SC 282	4
(1977) 81 Cal WN 580: (1977) 2 Cal LJ 439	4
(1977) 81 Cal WN 866	4
AIR 1962 Cal 635: 66 Cal WN 970	5
Jahar Lal De, for Petitioner; G. C. Pal, for Respondents.	

ANIL K. SEN, J.:— These are the two revisional applications at the instance of one Paresh Nath Mondal who filed an application under S. 8 of the West Bengal Land Reforms Act against the opposite party being Misc. Case No. 40 of 1974 for pre-empting a sale by a co-sharer in favour of the opposite party. The opposite party in his turn instituted a counter proceeding under the same provision being Misc. Case No. 11 of 1975. The learned Munsif allowed the petition filed by the petitioner Paresh Nath Mondal but dismissed the counter petition filed by the opposite party by two separate orders both dated June 26, 1976. The opposite party preferred two appeals being Misc. Appeal No. 78 of 1976 (arising out of Misc. Case No. 40 of 1974) and Misc. Appeal No. 79 of 1976 (arising out of Misc. Case No. 11 of 1975). Both the appeals having been transferred by the learned District Judge to the court of the learned Subordinate Judge, the learned Subordinate Judge by two independent orders both dated Sept. 4, 1976 allowed both the appeals and reversed the decision of the learned Munsif. Feeling aggrieved the petitioner Paresh Nath Mondal has moved this court with two revisional applications on which the above two Rules had been issued. Mr. De, learned Advocate appearing on behalf of the pre-emptee petitioner, has raised a short point that the appeals which lay to the learned District Judge could not have been lawfully transferred to the court of the learned Subordinate Judge since the learned Subordinate Judge had no jurisdiction to entertain or hear and

dispose of the appeals. According to Mr. De, under S. 9 (6) of the West Bengal Land Reforms Act an appeal lies to the District Judge not as a Court but as a persona designata and hence he could not have transferred the appeal to the court of the learned Subordinate Judge for hearing. Mr. De has next contended that even if it be not held that the District Judge is a persona designata, yet the jurisdiction conferred being a special one, it was for him to exercise it and he cannot transfer the appeal to the court of the learned Subordinate Judge. Mr. Pal, appearing on behalf of the pre-emptor opposite party, has contested both the points thus raised by Mr. De. According to Mr. Pal, S. 9 (6) has extended the jurisdiction of the principal civil court of the District to hear the appeals from orders of pre-emption made under S. 9 (1) read with S. 8 of the West Bengal Land Reforms Act and such appeals, as appeals from orders and decrees of a munsif, could be transferred for disposal to the court of the learned Subordinate Judge; it could be so transferred, according to Mr. Pal, under either of the provisions of S. 22 of the Bengal, Agra and Assam Civil Courts Act, 1887 or 24 of the Civil P. C.

2. The points raised require careful consideration. It would be necessary first of all to refer to the statutory provisions providing for the right of appeal, its forum and the procedure for disposal of such an appeal. An application under S. 8 of the Land Reforms Act claiming pre-emption is to be disposed of by the learned Munsif in terms of S. 9 (1) of the Act. Sub-sec. (6) of S. 9 provides "any person aggrieved by an order of the Munsif under this section may appeal to the District Judge having jurisdiction over the area in which the land is situated, within thirty days, from the date of such order and the District Judge shall send a copy of his order to the Munsif. The fees to be paid by the parties and the procedure to be followed by the District Judge shall be such as may be prescribed."

3. Rule 8 of the Rules framed under the Act prescribes the procedure for appeals and fees to be paid under sub-sec. (6) of S. 9 and the said provision is set out hereunder:

"8. (1) Every appeal under sub-sec. (6) of Section 9 shall be filed in the form of

a memorandum and shall be signed and verified by the appellant in the manner provided in sub-rules (2) and (3) of R. 15 of O. VI of Schedule 1 to the Civil P. C. 1908. It shall be accompanied by an authenticated copy of the order appealed against and shall contain the following particulars namely:—

(a) the name and address of the appellant;

(b) the name and address of the respondent;

(c) the location and particulars of the holding in respect of which orders were passed by the Revenue Officer, and

(d) the grounds of appeal.

(2) The Court-fees payable on the memorandum of appeal shall be such as are provided in sub-cl. (ii) of cl. (a) of Art. 11 of Sch. II to the Court-fees Act, 1870 and shall be collected in the same manner as laid down in that Act.

(3) On the filing of an appeal, the Appellate Officer shall call for the records of the case from the officer or authority against whose order the appeal has been filed and after giving the appellant and the respondent an opportunity of being heard shall dispose of the appeal.

(4) A process fee of rupees three per party on whom a notice is to be served shall be paid along with the memorandum of appeal."

4. On the statutory provisions as aforesaid we are to consider the two objections raised by Mr. De. Though a decision of a learned single Judge of this court supports the first objection raised by Mr. De it appears to us that the view expressed by the learned single Judge is not approved by two subsequent Bench decisions of this court. Following the decision of the Supreme Court in the case of Kerala State Electricity Board, Trivandrum v. T. P. Kunhaliumma, AIR 1977 SC 282, this court in the cases of Prosonna Kumar Giri v. Gangadhar Raut, (1977) 81 Cal. WN 580 and Kalidasi Nath v. Obedullah Sheikh, (1977) 81 Cal. WN 866 held that S. 9 (6) of the West Bengal Land Reforms Act when it speaks of District Judge it really means the court of the District Judge or the principal Civil Court of the District. It had been further held that both the Bengal, Agra and Assam Civil Courts Act and the Civil P. C. are applicable to proceedings contemplated by that provision before

the District Judge. Having regard to the statutory provisions we are not inclined to differ from the view so expressed which is otherwise binding on us. This negatives the first objection raised by Mr. De to the effect that the learned District Judge in entertaining an appeal under Sec. 9 (6) of the Act acts as a persona designata and as such none but he alone could hear and dispose of the appeal.

5. Although the first objection raised by Mr. De stands overruled for reasons given hereinbefore, the question still remains as to whether the learned District Judge could have transferred the appeal to the court of the learned Subordinate Judge for hearing and disposal. Mr. Pal, as we have indicated hereinbefore, relies upon the provisions of S. 24 of the Civil P. C. and S. 22 of the Bengal, Agra and Assam Civil Courts Act and contends that the appeal being one to the court of the District Judge is to be regulated by the normal practice and procedure of such a court as prescribed by law. But, in our view, neither of the provisions relied on by Mr. Pal can be invoked to support an order of transfer of such an appeal to the court of the learned Subordinate Judge. In order to attract the provisions of S. 24 (1) (a) of the Code in aid of an order of transfer to the court of the learned Subordinate Judge, it has to be first established that the court of the learned Subordinate Judge is otherwise competent to hear and dispose of the appeal. Unless the court of the learned Subordinate Judge is otherwise a court competent to hear and dispose of such an appeal the learned District Judge cannot transfer the appeal to the said court for hearing and disposal in exercise of his powers under the said provision. Sec. 9 (6) of the West Bengal Land Reforms Act not only confers the right of appeal but also fixes the forum, namely the court of the District Judge which in view of the provisions of Section 8 (2) of the Bengal, Agra and Assam Civil Courts Act may include on assignment the court of the Additional District Judge appointed for the District. But the position of the Subordinate Judge is materially different. Sec. 24 (1) of the Civil P. C. can be attracted only if S. 22 of the Bengal, Agra and Assam Civil Courts Act can be invoked to confer upon the learned Subordinate Judge the jurisdiction to hear and dis-

pose of such an appeal preferred under S. 9 (6) of the West Bengal Land Reforms Act. S. 22 of the Bengal, Agra and Assam Civil Courts Act, however, cannot be invoked. S. 22 must be read along with and in the light of S. 21 of that Act. When S. 22 speaks of "appeals pending before him from the decrees or orders of Munsifs, it obviously refers to appeals the forum of which is prescribed by S. 21 (2) of the Bengal, Agra and Assam Civil Courts Act. It has now been clearly held by a Special Bench of this court in the case of Union of India v. Manmull Jain, (1962) 66 Cal WN 970 : (AIR 1962 Cal 635) that S. 21 of the Bengal, Agra and Assam Civil Courts Act when it speaks of orders, it means orders passed in suits or proceedings arising out of suits. Such being the position, the order appealed against in the present case though passed by a Munsif is not an order coming within the scope of S. 21 (2) or S. 22 of that Act because it is not an order passed in a suit or a proceeding arising out of a suit. Moreover, we have pointed out hereinbefore that the statute itself has prescribed the forum to be the court of the District Judge and has neither left the forum to be determined by the Bengal, Agra and Assam Civil Courts Act nor has it given any indication that the District Judge in dealing with such an appeal can transfer the appeal to any other court subordinate to the District Judge. In such a situation it would not be permissible for us to hold that the learned District Judge could transfer the appeal as done in the present case to the court of the learned Subordinate Judge or that the learned Subordinate Judge was competent to hear and dispose of such an appeal. In this view we must uphold the objection of Mr. De that the appeal preferred to the learned District Judge could not have been competently transferred to the court of the learned Subordinate Judge when that court had not the jurisdiction to either entertain or hear and dispose of the appeal.

6. In the result, the revisional applications succeed and the Rules are made absolute. The impugned orders passed by the learned Subordinate Judge in two Misc. Appeals referred to hereinbefore being set aside the appeals are remanded for rehearing by the competent court in accordance with law.

7. The parties will bear their respective costs.

8. Let the records be sent down forthwith.

B. C. CHAKRABARTI, J.:— I agree.
Applications allowed.

AIR 1982 CALCUTTA 288

P. K. BANERJEE AND

B. N. MAITRA, JJ.

Sk. Abdul Latif, Appellant v. Commissioner of Wakfs and another, Respondents.

A. F. O. O. No. 455 of 1980, D/- 20-1-1982.

Bengal Wakf Act (13 of 1934), Section 27 (1) (a) and (b)—Power given to Commissioner of Wakfs under — It must be exercised in quasi-judicial manner. (Wakf Act (1954), S. 15).

Section 27 (1) (a) of the Act requires investigation as well as determination of the nature and extent of the wakf and wakf property. S. 27 (1) (b) is corollary to S. 27 (1) (a) or in other words, in order to determine the nature and extent of the wakf, the wakfnama must be considered and it must be shown how does it benefit and to whom benefit is intended and what is the object of wakfnama and how the income is to be spent on the said objects. All these require determination by Commissioner of Wakfs. This is a quasi judicial power.

(Para 4)

Cases Referred : Chronological Paras

AIR 1978 Cal 92 3

AIR 1944 Cal 206 : 48 Cal WN 157 4

Altamas Kabir and Miss. Sukla Kabir, for Appellant; T. P. Das, B. C. Roy and Miss. S. Parmar, for Respondents.

BANERJEE, J.:— This appeal at the instance of the petitioner arises out of an application under Art. 226 of the Constitution of India challenging the order passed by the Commissioner of Wakfs under S. 27 of the Bengal Wakf Act. The petitioner who is the appellant herein, is alleged to be mutwalli and the respondent No. 2 is alleged to be beneficiary under the Wakf created by one Sk. Panchkari who executed wakf and registered the Wakfnama on 10th of Falgun, 1332 B. S. At the time of execution of the said wakfnama, it is alleged, the Wakif had only two daughters namely. Raushan Ara Bibi and

BZ/BZ/A749/82/VSS/MVJ-H

Masuda Dibi, both of whom were married. After the execution of the Wakf-nama the wakif married again and the petitioner was born of the wakif's second wife. The wakif died sometime in 1940 and after his death, it is alleged, one of his sons-in-law, husband of respondent No. 2 was appointed as mutwalli of the wakf estate. At that time the petitioner was a minor. The said mutwalli died on 7th of Sraban, 1362 B. S. and the office of mutwalli fell vacant whereupon both Masuda Bibi and the petitioner applied before the Commissioner of Wakfs for recording their names as mutwallis of the wakf estate. The Wakfs Commissioner on intimation to the applicants for being appointed as mutwallis, fixed 16th Nov. 1955 as a date of hearing and by an order dated 9th January, 1956 the petitioner was appointed mutwalli after rejection of the application of Masuda Bibi. Thereafter Masuda Bibi filed a suit on 9th of Jan. 1956 in the court of the 3rd Munsif at Burdwan and prayed for declaration that she was the mutwalli of the wakf estate of Sk. Panchkari and the aforesaid order of the Commissioner was not binding on her and was liable to be set aside. The said suit was dismissed on 10th of August, 1957. An appeal was taken against that order. That appeal was also dismissed. A second appeal was taken to this Court which was also dismissed. It appears that on or about 1st week of Dec. 1976 the petitioner received a notice dated 1st Dec. 1976 from the office of the Commissioner of Wakfs regarding enquiry to be made by the Commissioner into the affairs of the wakf estate. Then the petitioner appeared on 23rd Dec. 1976 and it is stated he was surprised to find Masuda Bibi applying again to the Commissioner of Wakfs for recording her name as mutwalli in respect of the wakf estate. The Commissioner of Wakfs by an order dated 6th Nov. 1977 removed the petitioner from the post of mutwalli and appointed Masuda Bibi to act as mutwalli of the wakf estate for a period of six months. Then the matter was taken to this Court under Art. 226 of the Constitution of India and in C. R. 178 (W) of 1977 this Court quashed the order of the Commissioner of Wakfs on 6th of Jan. 1977 and directed the Commissioner to

pass fresh order in accordance with law. Subsequently the petitioner was appointed mutwalli of the wakf estate of Sk. Panchkari. Thereafter another Rule was obtained against an order passed by the Commissioner of Wakfs for reviewing the earlier order and the Rule was made absolute by this court. Thereafter again a fresh notice from the Commissioner of Wakfs was received enclosing a copy of petition filed by Masuda Bibi wherein the petitioner was directed to make a payment of Rs. 1,26,000/- to Masuda Bibi. The Commissioner directed such payment to be made by the order dated 19th May, 1979. Against the said order the petitioner moved this court and obtained a Rule. The said Rule was discharged by the Hon'ble single Judge. In his order it was directed as follows: "The Commissioner would be at liberty to determine who are the beneficiaries under the aforesaid wakf deed and the shares of the allowances payable to them". In discharging the Rule the Hon'ble single Judge held inter alia that the proceeding before the Commissioner of Wakfs was one under S. 27 (1) (a), (b), (c), (d) and (e) and whether it was a quasi-judicial power or not. It has been held by the Hon'ble single Judge that the wakf estate has been enrolled with the description that it is a wakf-alal-aulad which under S. 6 (11) of the Bengal Wakf Act means a wakf under which not less than 75 per cent of the net available income is for the time being payable to the wakf for himself or any member of his family or descendants. Argument was advanced before the Hon'ble single Judge about maintenance of (एकानरु बढती संसार) and the question remains who are the beneficiaries of the wakf estate. The Hon'ble single Judge held that the settlement was made in favour of the beneficiaries namely for himself or any members of his family or descendants. The learned Commissioner held that Masuda Bibi being a daughter is a beneficiary under the wakf deed. Be that as it may, he has directed that the Commissioner will consider the question again and decide what will be the share of the allowance the beneficiaries are entitled to get under the gift.

2. Being aggrieved by the order of the Hon'ble single Judge discharging the

Rule, this appeal has been preferred. Before us the only question which was mooted is whether S. 27 (1) (a) and (b) of the Bengal Wakf Act has given power which is to be exercised quasi judicially or not.

3. Mr. Kabir on behalf of the appellant contended before us that at least the power given in S. 27 (1) (b) (c) (d) and (e) is not quasi-judicial in function but administrative function of the Commissioner of Wakfs only. Assuming for a moment that Kabir is correct in his submission that power given in Section 27 (b) (c) (d) and (e) is administrative function, in view of judgment reported in AIR 1978 Cal 92 at page 98 it is clear that even the administrative function which affects other persons will be vulnerable to attack any application under Art. 226 of the Constitution. On the basis of this judgment Mr. Kabir contended that we must also hold that power under S. 27 (1) (b) of the Act is administrative function and cannot be exercised by the Commissioner in a quasi-judicial way as it has done.

4. Mr. Das on behalf of the respondents, however, contended that all the powers under S. 27 (1) (a) (b) (c) (d) and (e) are functions to be exercised in a quasi judicial manner and not administratively. Mr. Das relied upon a number of cases in support of his contention. In our opinion, S. 27 (1) (a) of the Bengal Wakf Act on the face of it cannot but be quasi judicial. In a case reported in (1944) 48 Cal WN 157: (AIR 1944 Cal 206) Mr. Justice Pal sitting with Mr. Justice Bijon Kumar Mukherjee held inter alia that the power, so far as the decision is concerned, under S. 27 (1) (a) is a quasi judicial power. His Lordship held that so far as this decision is concerned the Commissioner discharged the quasi judicial function. On reading S. 27 (1) (a) of the Act it is quite clear that the Commissioner may investigate and determine the nature and extent of wakfs and wakf property, and call from time to time for accounts, returns and information from mutwallis and it cannot but be quasi-judicial, because it requires investigation as well determination of the nature and extent of the wakf and wakf property. The nature and extent of the wakf property prima facie means, in our opinion, how income from the property has to be applied for the objects and purposes of

the wakf and for such benefit of such class of persons for which such wakf is created or intended. This is exactly what has been stated in S. 27 (1) (b) of the Act. In our opinion, S. 27 (1) (b) of the Bengal Wakf Act is corollary to S. 27 (1) (a) of the Act or, in other words, in order to determine the nature and extent of the wakf, the wakfnama must be considered and it must be shown how does it benefit and to whom the benefit is intended and what is the object of the wakfnama and how the income is to be spent on the said objects. All these, in our opinion, require determination by the Commissioner of Wakfs. Therefore, naturally this is a quasi judicial power. We are not concerned with sub-sections (d) and (e) of S. 27 (1) of the Act in this case. It is suffice for us to say that the power under S. 27 (1) (a) and (b) given to the Commissioner of Wakfs is the power which is to be exercised in a quasi judicial manner and not otherwise. In the present case this was done. Therefore, we agree with the Hon'ble single Judge while discharging the Rule that the Commissioner may now decide how much benefit each of the beneficiaries will get and how much from the income of the wakf property. We make it clear that the learned Judge has not decided regarding payment to be made to the respondent No. 2. On the other hand, the learned Judge, in our opinion, has directed the learned Commissioner to decide the matter afresh after hearing all the parties about the benefits which are to be determined by the Commissioner under the aforesaid Deed of Wakf.

5. The appeal is therefore dismissed

6. There will be no order as to costs.

7. No formal decree need be drawn in this appeal.

B. N. MAITRA, J.:— I agree.

Appeal dismissed.

AIR 1982 CALCUTTA 290

ANIL K. SEN AND

B. C. CHAKRABARTI, JJ.

Ganges River Transport, Petitioner v. Reliance Jute and Industries Ltd. and others, Respondents.

C. O. No. 2915 of 1981, D/- 28-1-1982.

Civil P. C. (5 of 1908) Ss. 151, 149 and O. 7, R. 11 — Order rejecting plaint

CZ/DZ/B53/82/VSS/SNV

for failure to put in deficit court-fee within extended time — Plaintiff's application under S. 151 for recalling that order and restoration of plaint — Matters to be considered.

Plaintiff filed money suit with deficit court-fee. When plaintiff failed to put in deficit court-fee within the extended time given by Court under S. 149 of the Code, he was called upon to show cause why the plaint should not be rejected in terms of O. 7, R. 11. The cause shown being considered unsatisfactory, court passed order dated 28-1-1980 rejecting plaint. On 25-2-1980, plaintiff filed an application under S. 151 for recalling the said order and praying time to put in deficit court-fee. That application was allowed by an ex parte order dated 22-3-1980. Plaintiff paid deficit court-fee. After service of summons defendant filed an application under S. 151, dated 23-3-1981 for reconsideration of order dated 22-3-1980 but it was dismissed by impugned order.

Held: The fact that the plaintiff's default has resulted in accrual of a right in favour of the defendant under limitation is certainly a matter of consideration when the court is dealing with an application under S. 151 for restoration of a plaint, which had earlier been rejected, because that right would be lost to the defendant as and when the plaintiff's prayer is allowed. It may be that when the court finds that the order of rejection of the plaint was due to any error or default of the court or where the plaintiff himself is not in any way instrumental to the default, the court may allow an application under S. 151 and recall an order of rejection of the plaint notwithstanding the fact that the same would deprive the defendant of a right which had accrued in the meantime by limitation. But where the default concerns the plaintiff or arises out of his own conduct, whatever the reason, that would not entitle him to have the order of rejection recalled and thus deprive the defendant of a valuable right which has accrued in his favour in the meantime. When the court exercises its powers under S. 151, it so exercises for doing justice to the parties including the defendant. The ex parte order dated 22-3-1980, was vacated and plaintiff's application under S. 151 dated 25-2-1980 was remanded for reconsideration on its merits upon notice

to defendant in accordance with law. AIR 1961 SC 882 explained.

(Paras 7, 8, 10)

Cases Referred: Chronological Paras
AIR 1981 Cal 267: 85 Cal WN 671
6, 8
AIR 1961 SC 882 7, 8, 9

Sudhis Das Gupta and Kedar Nath Sen, for Petitioner; S. K. Lahiri, Amal Sahu and S. S. Roy, for Respondents.

ANIL K. SEN, J.:— Defendant No. 1 in Money Suit No. 47 of 1979 of the 8th Court of the learned Subordinate Judge at Alipore is the petitioner before us. The order challenged is the one dated June 18, 1981 passed by the learned Subordinate Judge dismissing an application filed by the defendant No. 1 on Mar. 23, 1981 for reconsideration of an order dated Mar. 22, 1980. It will be necessary to refer to the facts shortly in the background in order to appreciate the real dispute between the parties.

2. The plaintiff opposite party, namely, the Reliance Jute and Industries Limited, a company incorporated under the Companies Act instituted the aforesaid Money Suit No. 47 of 1979 for a decree for a sum of Rs. 1,03,257.11 P. by way of compensation and in the alternative for damages. This suit was filed on Oct. 23, 1979 with deficit court fee paid on the plaint. The court directed the plaintiff to put in the balance court-fee on or before Nov. 17, 1979 on which date the balance court-fee not having been paid further time was granted till Dec. 4, 1979. Since the balance court-fee was not paid even on that date, on Dec. 4, 1979, the Court issued a show cause notice upon the plaintiff calling upon the plaintiff to show cause why the plaint should not be rejected. The notice was made returnable on Dec. 22, 1979 on which date an application was filed by the plaintiff for further time to put in the deficit court-fee. The Court allowed the prayer and directed the plaintiff to put in the deficit court-fee on or before Jan. 15, 1980. On the date fixed deficit court-fee was not put in but again a prayer was made for time to put in the deficit court-fee which prayer being refused the court issued a fresh show cause notice calling upon the plaintiff to show cause why the plaint should not be rejected. The notice was made returnable on Jan. 28, 1980 on

which date the cause shown by the plaintiff was considered unsatisfactory and the plaint was rejected.

3. On Feb. 25, 1980 the plaintiff filed an application under S. 151 of the Civil P. C. for recalling the order dated Jan. 28, 1980 whereby the plaint was rejected. Therein the plaintiff further prayed for time to put in the balance court-fee payable on the plaint. This application was allowed *ex parte* by the learned Judge who observed that he is satisfied that the plaintiff could not pay the deficit court-fee within time. There is no indication in the order as to the reason why it could not be so put in and what exactly was the satisfaction of the court as regards such reasons. Be that as it may, the order dated Jan. 28, 1980 being recalled the Court granted the plaintiff time till April 17, 1980 to put in the deficit court-fee. The deficit court-fee this time being put in summons was issued upon the defendants.

4. Once the service of the summons upon the defendants was effected the defendants appeared and after appearance defendant No. 1 filed an application out of which the present revisional application arises. This was an application made under Sec. 151 of the Code by defendant No. 1 filed on Mar. 23, 1981. He made a grievance that the Court should not have recalled the order dated Jan. 28, 1980 *ex parte* without notice to the defendants and without giving them any opportunity to contest the prayer made therein. In particular it was claimed by defendant No. 1 that the plaintiff's plaint having been rejected on Jan. 28, 1980, his claim became barred by limitation so that a valuable right accrued in favour of the defendant and such a right could not have been taken away by an *ex parte* order without giving the defendants' an opportunity to contest the application on which such an *ex parte* order was passed.

5. This application being heard the learned Judge disposed of the application by observing "In the instant case the petition under Sec. 151 C. P. C. was already allowed. So this Court cannot revoke his own order but it be made clear that the question whether the suit shall be deemed to have been filed afresh or not after the petition under Sec. 151 was filed is kept open and to be determined at the time of trial of

the suit. At this stage I however find no ground for rejection of the plaint again under O. 7 R. 11 C. P. C." Feeling aggrieved defendant No. 1 has preferred the present revisional application. The revisional application is being heard upon notice to and on contest by the plaintiff opposite party.

6. Mr. Sen, appearing in support of this revisional application, has contended that the learned Judge had in substance rejected the prayer of the defendant upon a clear misconception of the legal position. According to Mr. Sen, when the plaint was rejected the plaintiff's claim, according to the defendant, came to be barred by limitation and in such a situation the learned Judge could not have restored the plaint by an *ex parte* order. It was necessary for him to recall the *ex parte* order and allow the defendants to contest the earlier application filed by the plaintiff under Sec. 151 of the Code. According to Mr. Sen, if the defendants' claim be correct, namely that the claim of the plaintiff became barred by limitation on the date the plaint was rejected the learned Judge could not have restored the plaint to take away the right which accrued in the meantime in favour of the defendants. Reliance is placed on an earlier judgment of ours in the case of Joydeb Mukherjee v. William Jacks and Co. (India) Ltd. (1981) 85 Cal WN 671: (AIR 1981 Cal 267) in support of such a contention.

7. Mr. Lahiri, appearing on behalf the plaintiff opposite party, has been fair enough not to dispute the position that the *ex parte* order allowing the application under Sec. 151 of the Code should have been recalled and the defendants should have been given an opportunity to contest that application on its merits. He has, however, strongly contested the claim of Mr. Sen that if the claim of the plaintiff gets barred on the date of rejection of the plaint, an application under Sec. 151 of the Code for restoration of the plaint cannot be entertained so as to deprive the defendants of the right which had accrued in their favour. According to Mr. Lahiri, as and when the default is sufficiently explained the fact that the claim of the plaintiff stood barred by limitation on the date of rejection of the plaint should be no consideration for refusing the prayer for restoration

made under Sec. 151 of the Code, Reliance is placed by Mr. Lahiri on the provision of Sec. 149 of the C. P. C. and the decision of the Supreme Court in the case of Mahanth Ram Das v. Ganga Das, AIR 1961 SC 882. We have carefully considered the rival contentions put forward before us. We are unable to sustain the order impugned before us or the view expressed by the learned Judge therein. He seems to think that since the plaintiff's application under Sec. 151 of the Code had already been allowed that order can neither be recalled nor can that application be reheard on its merits on contest by the defendants. We are also unable to agree with the learned Judge that the question of limitation as sought to be raised by the defendants can be relegated for consideration at the trial of the suit. In our view, the learned Judge had failed to appreciate that once the order rejecting the plaint is recalled and the suit is restored to file, it is so restored with reference to the original date of the filing of the plaint. The defendants' objection is not restricted to the position that the claim of the plaintiff is barred on the date of the suit, but that in any event it is so barred on the date when the plaint was rejected. This the defendants are claiming upon the plaint itself. The defendants rely on limitation only in support of their plea that it would not be just and proper for the court to restore a plaint which has once been rejected if such restoration amounts to revival of a barred claim a claim which got barred on the rejection of the plaint. Hence, we are of the view that the learned Judge could not have relegated the point for consideration at the trial of the suit. In such a circumstance it was necessary for the learned Judge to recall the ex parte order dated Mar. 22, 1980 which the learned Judge has ample power to do and allow the defendants to contest the plaintiff's application dated Feb. 25, 1980 made under Sec. 151 of the Code. When the learned Judge refused such a prayer made on behalf of the defendants he did so on a clear misconception of the legal position resulting in the order being made in irregular exercise of his jurisdiction. Hence the impugned order, in our view, should be set aside, the application of the defendants being allowed the ex parte order dated Mar. 22, 1980 should be set aside and the plain-

tiff's application dated Feb. 25, 1980 should be directed to be reheard on contest by the defendants.

8. But before we go on to record the final order of ours in this revisional application, we feel it necessary to consider the other point raised by Mr. Lahiri. According to Mr. Lahiri, we were not correct when in the case of Joydeb Mukherjee v. William Jacks & Co. (India) Ltd., (1981) 85 Cal WN 671: (AIR 1981 Cal 267), we held that where the claim of the applicant would be barred by limitation on the date the plaint is rejected, it would not be just and proper for the court to exercise its inherent power and recall the order of rejection of the plaint for default. Mr. Lahiri contends that where the plaintiff sufficiently explains his default the fact that restoration of the plaint would deprive the defendant of a right, which has accrued by way of limitation in the meantime, can be no consideration for refusing an application under Sec. 151. In support of this proposition Mr. Lahiri has placed great reliance on a decision of the Supreme Court in the case of Mahanth Ram Das v. Ganga Das, AIR 1961 SC 882. We have given our anxious consideration to the point thus raised by Mr. Lahiri. We are, however, unable to accept a proposition in such a wide term as put forward by Mr. Lahiri. At one time the view that prevailed with this Court was to the effect that once a plaint has been rejected under Or. 7 R. 11 no application under Section 151 of the Code is entertainable for recalling such an order and restoration of the plaint. Somewhat different views were expressed by other High Courts and some of the decisions relied on by Mr. Lahiri are authorities in that regard. We had reviewed the decisions on the point in our earlier decision in the case of Joydeb Mukherjee and in view of the later Full Bench decision of this Court and the decision of the Supreme Court, we have held that the mere fact that the order rejecting a plaint is appealable would not necessarily bar entertainment of an application under Sec. 151 of the Code. The divergence of views in that regard now stands resolved and really does not arise now before us because it is not the contention of Mr. Sen that the application filed by the plaintiffs was not entertainable at all. The specific point which arises

for our consideration is as to whether when such an application is entertained, should the court recall the order of rejection of the plaint and restore the plaint irrespective of the consideration that such an order may result in deprivation of a right which has since accrued in favour of the defendant by limitation? In our view, the fact that the plaintiffs' default has resulted in accrual of a right in favour of the defendant under limitation is certainly a matter of consideration when the court is dealing with an application under S. 151 of the Code for restoration of a plaint, which had earlier been rejected, because that right would be lost to the defendant as and when the plaintiff's prayer is allowed. It may be that when the court finds that the order of rejection of the plaint was due to any error or default of the court or where the plaintiff himself is not in any way instrumental to the default, the court may allow an application under S. 151 of the Code and recall an order of rejection of the plaint notwithstanding the fact that the same would deprive the defendant of a right which had accrued in the meantime by limitation. But where the default concerns the plaintiff or arises out of his own conduct, whatever the reason, that would not entitle him to have the order of rejection recalled and thus deprive the defendant of a valuable right which has accrued in his favour in the meantime. This view we take because when the court exercises its powers under S. 151 of the Code, it so exercises for doing justice to the parties including the defendant.

9. The decision of the Supreme Court in the case of Mahanth Ram Das v. Ganga Das, AIR 1961 SC 882, in our view, does not support the extreme proposition contended for by Mr. Lahiri. In that case upon the finding of the court there was no final order in substance and again the application for extension of the time was filed even before the expiry of the time followed by another application which was filed after the expiration of the time. In such a situation, the Supreme Court held that an order made under Sec. 149 of the Code can be modified and the time originally granted can be extended on either of the two applications filed therefor. The Supreme Court itself was making a dis-

inction between peremptory procedural orders and final orders as in the case of conditional decrees. The facts in the present case are totally different because here the plaintiffs not only failed to put in the deficit court-fee within the extended time given by the court under Sec. 149 but they were called upon to show cause why the plaint should not be rejected in terms of O. 7, R. 11 of the Code. Cause shown being considered unsatisfactory, the court passed a final order rejecting the plaint and the application filed under Sec. 151 of the Code is one for recalling the said order and restoration of the plaint. Such being the position, the view we have taken is in no way inconsistent with the above decision of the Supreme Court.

10. In the result, the revisional application succeeds and is allowed. The impugned order being set aside, the application of the defendant No. 1 made under Sec. 151 of the Code dated Mar. 23, 1981, is allowed. The ex parte order passed by the learned Judge D/- Mar. 22, 1980, being vacated, the plaintiffs' application under Sec. 151 of the Code dated Feb. 25, 1980, is remanded for reconsideration on its merits upon notice to the defendants in accordance with law.

11. No order is made as to costs in this revisional application.

B. C. CHAKRABARTI, J.:— I agree.

Revision allowed.

AIR 1982 CALCUTTA 294

P. K. BANERJEE AND

B. N. MAITRA, JJ.

Dukhram Dey, Appellant v. Mrityunjoy Prosad Daw and others, Respondents.

A. F. O. D. No. 196 of 1970, (Analogous to A. F. O. D. No. 78 of 1978), D/- 12-1-1982.

(A) Evidence Act (1 of 1872), S. 50 — Relationship — Opinion as to — Competent witness — He must fulfil conditions laid down in the latter part of the section — Neighbour is a competent witness — Persons residing 100/150 cubits away from disputed property, are not neighbours, hence, not competent witnesses. AIR 1959 SC 914 Rel. on. (Paras 8, 11)

BZ/CZ/A750/82/VCD

(B) Evidence Act (1 of 1872), Sections 35, 74, 114—Entries in revenue record — Conflict between entry in C. S. Khatian and R. S. Khatian—Latter entries recorded in record of rights are presumed to be correct.

Where there is a conflict between the entry in the C. S. Khatian and the R. S. Khatian, the latter entries recorded in the record of rights are presumed to be correct and not the earlier ones. AIR 1963 SC 361 Rel. on. (Para 9)

In the instant case there was conflict between two R. S. Khatians, viz., one prepared in 1964 in A's name, and the second one in B's name in 1966. "B" had not filed any case for correction of entry. No suo motu proceeding was initiated for deleting A's name from first R. S. Khatian and for making such entry in the next R. S. Khatian in favour of "B." Consequently, such unauthorised entry in the subsequent R. S. Khatian had no value in the eye of law. Therefore, entry in the first R. S. Khatian prepared in 1964, in A's name would prevail, and not the later one in B's name. (Para 9)

(C) Evidence Act (1 of 1872), Sections 35, 74—Entries in revenue record—Correction of Revenue Officer not being a Court cannot exercise jurisdiction under Sec. 151 C. P. C. for correction of any previous entry. AIR 1975 Cal. 257 Rel. on. (Civil P. C. (1908), Sec. 151).

(Para 9)

(D) Evidence Act (1 of 1872), Ss. 3, 114 — Adverse inference — Suit for declaration of title — Vendor of plaintiff is material witness — Vendor not examined by plaintiff — No explanation for his non-examination given — Address given by vendor in his affidavit and kobala found not in existence — Held, the vendor of plaintiff was fictitious person and his affidavit had no value.

(Paras 10, 12)

(E) Evidence Act (1 of 1872), Sections 35, 74 — Certified copies of Assessment Register of Municipality and tax receipts are relevant. (1977) 1 Cal. LJ 578 Rel. on. (Para 16)

(F) Evidence Act (1 of 1872), S. 13 (a) — Certified copies of decrees recognizing interest of a person in the disputed property are admissible in evidence under Sec. 13 (a). (Para 17)

(G) Benami — A person who is not a party to a document is not debarred

from challenging it as a benami and fictitious document. AIR 1942 Cal 514, Rel. on. (Para 18)

(H) Benami — Transaction whether sham — Determination of.

In the instant case, though the first kobala purported to be executed by "A" in favour of "B" on the 2nd Feb. 1965, was for a paltry sum of Rs. 1,000/- within the Baranagore Municipality, in the year 1966 the sale was made by "B" in favour of the plaintiffs on the 30th April 1966, for a sum of Rs. 11,500/-. As such there was no manner of doubt that it was absolutely a sham and fictitious transaction made without payment of any consideration. (Para 18)

(I) Evidence Act (1 of 1872), Ss. 31, 33 — Admission in prior suit — Statement of a witness made in Court in a previous suit that a certain person was a tenant of the disputed property — Can be taken as his admission in a subsequent suit against same property after confronting him with such statement. AIR 1921 Cal 781; AIR 1966 SC 405; AIR 1977 SC 409 and AIR 1977 SC 1712 Rel. on. (Para 20)

(J) Limitation Act (9 of 1908), Art. 142 — Limitation Act (1963), Sec. 31 (a), Art. 64 — Applicability of Art. 142 — Suit for recovery of possession — Article applies if plaintiff has discontinued possession — Onus is on plaintiff to prove his possession of the property within 12 years. (Evidence Act (1872), Secs. 101-104).

Where in a suit for declaration of title and recovery of possession it was clear from the evidence that a fictitious sale was made by "A" in favour of plaintiff's vendor "B", after the statutory period of 12 years, "B" acquired no interest by his purchase from "A" and the plaintiffs acquired no title to the suit land on the footing of the purchase made by them from "B". Since, "A" or "B" or the plaintiffs had no possession in the suit land within 12 years of the filing of the plaint, the suit was barred by limitation.

(Paras 22, 24)

Cases Referred: Chronological Paras

AIR 1977 SC 409	20
AIR 1977 SC 1712	20
(1977) 1 Cal LJ 578	6, 16
AIR 1975 Cal 257	9
AIR 1974 SC 706	22
AIR 1966 SC 405	20

AIR 1966 SC 605	22
AIR 1966 Cal 488	25
AIR 1965 Cal 11: 68 Cal WN 1071	6, 25
AIR 1963 SC 361	9
AIR 1959 SC 914	8, 14
AIR 1949 Cal 457	10
AIR 1942 Cal 514: 46 Cal WN 798	18
AIR 1940 Mad 798 (FB)	6
AIR 1939 Cal 354	22
AIR 1938 Cal 206: 66 Cal LJ 359	22
AIR 1928 Cal 118: 31 Cal WN 806	22
AIR 1923 Cal 521: 37 Cal LJ 122	18
AIR 1921 Cal 781: 36 Cal LJ 186	20

Sudhis Das Gupta and Amiya Narayan Mukherjee, for Appellant; A. Gangulie, P. L. Sharma and N. K. Mitra, for Respondents.

B. N. MAITRA, J.:— Title Suits Nos. 73 of 1966 and 102 of 1967 were heard analogously. In the former suit, the plaintiffs are Mrityunjoy Prosad and Bhairab Nath. Their case is that the disputed plot No. 4162 was duly recorded in the C. S. Khatian in the name of one Sheikh Hamizuddin, who was its owner under the landlords, who were Kandu Chaudhuris. In 1945, he expired leaving one Sheikh Akbar as his son. Akbar used to possess the land till 1950, when on account of communal disturbance in the locality, he left the place. The property in suit together with the structures standing thereon remained vacant and unoccupied. By a registered kobala executed on the 2nd Feb. 1965, Sheikh Akbar sold the property for Rs. 1000/- to one Tara Prasad Sarkar, who took possession thereof. Then by a registered sale deed dated 30th Apr. 1966, Tara Prasad sold that property to the plaintiffs for a sum of Rs. 11,500/-. The plaintiffs obtained possession. In the R. S. Khatian, the land was recorded in Sk. Akbar's name. Tara Prasad filed an application in the Baranagore Municipality for mutation of his name. The plaintiffs also filed similar application in that Municipality, but the same is pending. Defendant No. 1, Dukhi Ram Dey, has been declaring that he is the owner of the property on the footing of a kobala executed by the heirs of Sheikh Mofijuddin on the 19th Nov. 1952; and Tara Prasad and plaintiffs also did not acquire any title. The plaintiffs took out a copy of that kobala and noticed that Dukhi Ram purported to purchase both the plot No. 4162 and the adjoining plot

No. 4163 taking advantage of Sk. Akbar's absence from the locality. Sk. Mofijuddin or his heirs never had any interest or possession and consequently, Dukhi Ram also did not acquire any title thereto. The suit is for declaration of title to the property in question. Subsequently, the plaint was amended and it was asserted that should the plaintiffs be found to be out of possession, a decree might be passed for recovery of possession.

2. Defendant No. 1 filed a written statement denying the plaintiffs' allegations. The defence, *inter alia*, is that Sk. Mofijuddin, who was a tenant of the property, possessed the plots Nos. 4162 and 4163 exclusively by paying rent and municipal taxes. Sheikh Hamijuddin or Sheikh Akbar had no title or possession. Sheikh Akbar is a fictitious person. After Mofijuddin died, his sons, Sk. Mansur Ahammad, Sk. Bechu and Sk. Raja and his widow, Hamidun Bibi, inherited the property and possessed the same exclusively. Then Sk. Mansur and others sold those two lands together with the structures standing thereon to him by a registered kobala dated 19th Nov., 1952. He possessed the same and paid the rent and the municipal taxes. The kobalas executed in favour of Tara Prasad and of the plaintiffs are collusive and bogus documents executed without consideration. The suit is barred by time. Moreover, the suit is also barred by adverse possession. After the purchase he evicted a tenant and some trespassers, who remained in unauthorized occupation of the property. The R. S. Khatian was prepared in his name.

3. It is necessary to state some other facts. Dukhi Ram evicted one Atindra Nath Datta from the property and obtained possession. Then the plaintiffs filed a misc. case under O. 21 R. 100 of Civil P. C. against him complaining of dispossession and won that case. That decision was challenged by Dukhi Ram by filing the Title Suit No. 102 of 1967 under O. 21, R. 103 of the Code. He has repeated his statements which he had engrafted in his written statement in Title Suit No. 73 of 1966. He has prayed for declaration of his interest in the property and for a permanent injunction.

4. The plaintiffs contested that suit by filing a written statement.

5. The learned Subordinate Judge accepted the plaintiffs' version, rejected Dukhi Ram's contention, decreed Title Suit No. 73 of 1966 and dismissed Dukhi Ram's Title Suit No. 102 of 1967. The correctness of these decisions has been challenged by Dukhi Ram by filing present appeals.

6. It has been contended on behalf of the appellant (Dukhi Ram) that the evidence given on behalf of the plaintiffs cannot be accepted. It is clear case of discontinuance of possession within the meaning of the provisions of Article 142 of the old Limitation Act of 1908. Reference has been made to the Bench case of *Jyoti Mojumder v. Girija Bhushan* in (1964) 68 Cal WN 1071 at pages 1074 and 1075: (AIR 1965 Cal 11 at pp. 12,13) to show that the new Limitation Act does not take away the petitioner's right to appeal. Sheikh Hamijuddin was not the owner of the disputed property. Sk. Akbar was a fictitious person and he was not Hamijuddin's son. The purchase made by Tara Prosad from him is a sham and collusive transaction and the same is the position regarding the plaintiffs' purchase from Tara Prosad in 1966. Dukhi Ram purchased the property in Nov. 1952, possessed it, evicted the tenant, Atindra Datta, and some trespassers, paid rent to the Government and taxes to the Baranagore Municipality. The documentary evidence filed by him will clearly show Sk. Akbar was not a resident of 22/1/H or of 22/H, though in his kobala, Ext. 1 (a), and (in ?) his alleged affidavit Ext. 4, his address had been given at 22/1/H, Cossipore Road, Holding No. 85 consisted of plots Nos. 4162 and 4163. Dukhi Ram purchased both the plots from the lawful owner's heirs. Reference has been made to the Full Bench case of *Official Receiver v. Govindaraju* in AIR 1940 Mad 798 at page 801 to show that in a suit for ejectment by a person out of possession, he cannot succeed unless he proves that he was in possession within twelve years of the suit and the burden is not on the defendant to prove adverse possession. The Bench case of *Kanai Lal v. Nityananda* in (1977) 1 Cal LJ 578 has been referred to show that the certified copies of Assessment Registers of a Municipality, where the provisions of the Bengal Municipal Act are applicable, are admissible under Sec. 35 of the Evidence Act

because they are entries made in a register prescribed to be maintained under Sec. 136 of the Bengal Municipal Act and such entry is an authorized one.

7. The learned Advocate appearing on behalf of the plaintiff-respondents has stated that the C. S. Khatian, Ext. 6 (a), shows that Sk. Hamijuddin was the recorded owner regarding the disputed plot No. 4162. Then the R. S. Khatian, Ext. 6 (b), was also prepared in Sk. Akbar's name. The court must hold that Sk. Hamijuddin was the previous owner and Sk. Akbar was his son. This has been stated by P. W. 2, Sanwar Ali, and P. W. 6, Anil Chandra Mitra, who are Akbar's neighbours. They are competent witnesses within the meaning of Sec. 50 of the Evidence Act to depose about the relationship of Akbar with Sk. Hamijuddin. The order passed in the misc. case filed under O. 21 R. 100 of the Code is against Dukhi Ram. The evidence adduced by Dukhi Ram cannot be believed. There is no reason why the court should not accept the oral and documentary evidence given by P. Ws. The case is not governed by the provisions of Art. 142 of the old Limitation Act.

8. The first question is whether Sk. Akbar is a fictitious person and who was the real owner of the disputed plot No. 4162. Sec. 50 of the Evidence Act says that the opinion regarding the relationship is relevant. The section was considered by S. K. Das, J, in the well-known case of *Dol Gobinda v. Nermal* reported in AIR 1959 SC 914 at page 918. It has been stated at page 918 of the report that under Sec. 50 of the Evidence Act, when the court has to form an opinion about the relationship expressed by conduct as to the existence of such relationship by any person, who has special means of knowledge, it is relevant. The person whose opinion is expressed by conduct is relevant when he is a member of the family or otherwise, has special means of knowledge on the particular subject of relationship. In other words, the person must fulfil the conditions laid down in the later part of this section.

9. It is common ground that only the C. S. Khatian, Ext. 6 (a), stands in Sheikh Hamijuddin's name. But on this also, there is a conflict between the entry in the C. S. Khatian and the R. S. Khatian. It has been stated by

Mudholkar, J. in the well-known case of Durga Singh v. Tholu in AIR 1963 SC 361 at page 364 that where there is such conflict, the latter entries recorded in the record of rights are presumed to be correct and not the earlier ones. Now, the important question arises which entry in the three R. S. Khatians, Ext. 6 (b), Exts. 1 and 1/1, will prevail. The first one prepared first in 1964 is in Dukhi Ram's name. The next is in Sk. Akbar's name, Ext. 6 (b). Then an application was made by Dukhiram for correction of name. The Revenue Officer purported to exercise jurisdiction under Sec. 151 of the Civil P. C. corrected the previous entry in Akbar's name and passed an order that the R. S. Khatian be prepared in Dukhiram's name, vide the decision, Ext. J. But the Revenue Officer is not a court. This principle was laid down in the case of Adinath v. State of West Bengal in AIR 1975 Cal 257 at page 259. After relying on the decision of my Lord, Banerjee, J, it has been stated that such power under Section 151 of the Code cannot be invoked by the Revenue Officer for there is no such provision in the West Bengal Estates Acquisition Act. Hence that judgment, Ext. J, and the R. S. Khatian prepared in Dukhi Ram's name in 1967 must be left out of the picture. So, the conflict remains between two R. S. Khatians, viz., one prepared in 1964 in Dukhi Ram's name, and the second one in Sk. Akbar's name in 1966. But there is a snag in the matter. Akbar did not file any case, No suo motu proceeding was initiated under Sec. 44 (2a) of the Act for deleting Dukhiram's name from first R. S. Khatian and for making such entry in the next R. S. Khatian in favour of Sk. Akbar. Consequently, such unauthorised entry in the subsequent R. S. Khatian has no value in the eye of law. The upshot of such discussion is that the first R. S. Khatian prepared in 1964, Ext. 1, will prevail, and not the later one in Sheikh Akbar's name.

10. Sk. Akbar was not examined as a P. W. and there is no explanation of the same. In the case reported in AIR 1949 Cal 457 at page 461, Bajranglal v. Sitaram, it has been stated that if a party fails to call a material witness, who is in a position to throw light on the transaction and to refute the allegations of the other side, there will be adverse inference under Sec. 114 of

the Evidence Act. His affidavit, Ext. 4, and kobala, Ext. 1 (a) give his address as 22/1H Cossipore Road, Calcutta. But the evidence of D. W. 1 Nihar Bose, Superintendent of Archives Dept., and of D. W. 2, Krishna Nath, employee of the Assessment Dept. of the Calcutta Corporation, shows that there is no existence of premises Nos. 22H and 22/1H Cossipore Road in the Cossipore Assembly Constituency and in the Assessment Register of the Corporation respectively.

11. The learned Advocate appearing on behalf of the respondents tried to bank on the evidence given by P. W. 2, Sanwar Ali, and P. W. 6, Anil Chandra Mitra. But P. W. 2, Sanwar, is not a neighbour because he says that his house is about 100/150 cubits away from the disputed land. He is a man of straw and is a rickshaw-puller. This is Calcutta property and not a mofussil land where the residents generally know the other residents. Similarly P. W. 6, Anil Chandra Mitra, is not a man of substance as he says that he is a bidi binder and previously, he worked as a labourer for about 12/14 years. He states that his house is about 100 cubits from the property in question, and he deposed for the plaintiffs in the Sealdah Court. So, none of them is a competent witness within the meaning of the provisions of S. 50 of the Evidence Act and the conditions given in the later part of the section have not been fulfilled.

12. Sk. Akbar's affidavit, Ext. 4, has no value in the eye of law because he was not examined as a P. W. and there is no explanation why he did not enter into the witness-box. So, we disbelieve the plaintiffs' version on this and hold that Akbar was a fictitious person and was not a son of Sk. Hamijuddin.

13. Then the question arises whether the defendant and before him his predecessors had any interest in the land in question and who has title to the property. In this respect, the R. S. Khatian, Ext. 1, is in the defendant's name. D. W. 5, Sanat Kumar Nandy, who lives at 66, Maharaja Nanda Kumar Road, says that the disputed holding No. 85 covering 4 or 4½ cottahs of land which is to the south of his house, is being possessed by Dukhi Ram for the last 17/18 years and before him, Mofijuddin possessed the same. After Mofijuddin, his heirs Sheikh Mansur, Sheikh

Bechu and Sheikh Raja possessed it. He has also stated that Hamijuddin or Akbar, Tara Prosad or Mrityunjoy (plaintiff No. 1) never possessed the holding.

14. D. W. 7, Jagannath Nath, lives at 265 Maharaj Nanda Kumar Road (South). He says that his house is to the opposite of 85, Maharaj Nanda Kumar Road intervened by a road and that premises has an area of 4 to 4½ cottahs of land. Dukhiram has been possessing the same for the last 17 years. Mansur and Bechu possessed the property before Dukhiram started possessing it and he did not see Hamizuddin or Sk. Akbar on this land. He further says that Tara Prosad or Mrityunjoy never possessed the property. They are the neighbours and thus had special means of knowledge within the meaning of the principles enunciated in the aforesaid case of *Dol Gobinda v. Nemai* (AIR 1959 SC 914) (supra) and the conditions of the later part of S. 50 of the Evidence Act have been fulfilled. We accept their testimony and find that the disputed property was owned by Sheikh Mofijuddin and after his death, by his heirs, Sk. Mansur and others and they were the owners of the property in question, and Sheikh Akbar or Sk. Mofijuddin was not its owner. defendant purchased the property from those heirs by a registered kobala, Ext. D, executed on the 19th Nov. 1952.

15. Now about some documentary evidence. On behalf of the plaintiffs, only two dakhilas of 1372 and 1373 B. S., Exts. 3, 3 (a), were put in the suit was instituted in 1966 and both the dakhilas are of that year. P. W. 7, Mrityunjoy says that Government did not accept any rent from him. No tax receipt has been put in to show that taxes were ever paid by Sk. Akbar or by Tara Prosad or by the plaintiffs to Baranagore Municipality.

16. The Assessment Register, Ext. L, of 1948-1949, is in the name of defendant's predecessor. It will appear therefrom that both the plots Nos. 4162 and 4163 comprised holding No. 85. The next copy of the Assessment Register of Baranagore Municipality of 1953-54, Ext. L/1, stands in Dukhiram's name. The next copy, Ext. L/2, is also in defendant's name for 1963-1964. That was an area where the Bengal Tenancy Act applied up to its repeal in Nov. 1965. The municipal tax receipts, Ext. H

series, stand in Dukhiram's name regarding the holding No. 85. In view of the bench case of *Kanailal v. Nitya Nanda* ((1977) 1 Cal LJ 578) (supra) these entries are relevant as the provisions of the Bengal Tenancy Act are applicable there. He filed dakhilas, Ext. F series, to show that from 1368 B. S. rent was being paid by his previous tenant Atin Datta and then by him.

17. He also filed the copy of the suit register, Ext. R. of Title Suits Nos. 167 of 1955 and 316 of 1954 regarding the disputed holding No. 85. He instituted that suit for recovery of possession and a decree was passed in his favour. He also filed certified copies of the decrees in Title Suits Nos. 361 of 1964, 268 of 1954 and 246 of 1955 to show that he obtained decrees for eviction against some trespassers and also against one Atin Datta, vide Ext. E series. Surely, these decisions are admissible in evidence under S. 13 (a) of the Evidence Act because Dukhiram's interest regarding holding No. 85 was recognized by the court by some transactions.

18. It has been contended on behalf of the respondents that Dukhiram is not a party to the plaintiff's kobala, Ext. 1. So, as a third party, he has no locus standi to challenge that kobala as a fictitious document. Similar contention advanced in this Court was repelled by relying on the decision in (1923) 37 Cal LJ 122: (AIR 1923 Cal 521), it has been stated in the case in (1942) 46 Cal WN 798 at page 800: (AIR 1942 Cal 514) that a person, who is not a party to a document, is not debarred from challenging it as a benami and fictitious document and he can say that no consideration was paid. The first kobala, Ext. 1 (a), executed on the 2nd Feb. 1965, by Sk. Akbar was for a sum of Rs. 1,000/- only. P. W. 7, Mrityunjoy, plaintiff No. 1, says that the land was sold at Rs. 6,000/- per cottah in 1965 or 1966 and he cannot say what was the price in 1965. Though the first kobala purported to be executed by Sheikh Akbar on the 2nd Feb. 1965, was for a paltry sum of Rs. 1,000/- within the Baranagore Municipality, in 1966 the sale was made by Tara Prosad in favour of the plaintiffs on the 30th April, 1966, for a sum of Rs. 11,500/- There is no manner of doubt that it was absolutely a sham and fictitious transaction made without payment of

any consideration, and we hold accordingly.

19. The learned Advocate appearing on behalf of the respondent laid emphasis on the point that possession was delivered to Tara Prosad, Akbar's transferee by P. W. 1 Sri Jatindra Mohan Mukherjee, an Advocate. But his evidence shows that he cannot say who was in previous possession of the land. He says that he drafted the kobala, Ext. 1, and there was no tea shop on that land at that time, though in the kobala itself, it has been stated that there is a tenant of the property. It is common ground that Atin Datta was a tenant of that property and he was evicted by Dukhiram in execution of a decree with police help, vide Ext. E, which is the copy of the decree in Dukhiram's favour in Title Suit No. 361 of 1965. That gave rise to the Misc. case under O. 21, R. 100 of the Code on the allegation that plaintiff's possession was disturbed by Dukhiram. Hence, the evidence given by P. W. 1. Mr. Jatindra Mohan Mukherjee, that he delivered possession to Tara Prosad by handing over the key cannot be relied upon.

20. P. W. 2, Sanwar, and P. W. 6, Anil, say that they do not know if there was a tea stall of Atin Datta on that land. P. W. 7, Mrityunjoy, (Plaintiff No. 1) stated in the Seldah Court that Atin was a tenant of that property, vide Ext. O, though he denied the same in the trial court while he was confronted with that statement. In view of the bench case in (1922) 36 Cal LJ 186: (AIR 1921 Cal 781) Supreme Court cases of Bharat in AIR 1966 SC 405, Union of India in AIR 1977 SC 409 and Sitaram v. Ramchandra Nag in AIR 1977 SC 1712 such statement can be taken as P. W. 7, Mrityunjoy's admission.

21. Then about the evidence of possession, which is linked with the important question whether the suit is barred by time and whether the provisions of Article 142 of the old Limitation Act will be attracted.

22. Reference may be made to the cases in (1927) 31 Cal WN 806: (AIR 1928 Cal 118), (1937) 66 Cal LJ 359: (AIR 1938 Cal 206), AIR 1939 Cal 354, AIR 1966 SC 605 and AIR 1974 SC 706. The principle of law enunciated under the provision of Article 142 of the old Limitation Act of

1908 is that that article applies if the plaintiff has discontinued possession and the onus is on him to prove his possession of the property within twelve years.

23. The quality of evidence given by P. W. 1, Mr. Jatindra Mohan Mukherjee, and P. W. 2, Sanwar Ali, has already been discussed. P. W. 3, Tara Prosad Sarkar, is the plaintiff's vendor and is an interested witness. He says that he purchased the land in 1965 and before that he had no knowledge of the property. P. W. 6, Anil, says that after 1950, Akbar came occasionally and plucked cocoanuts and sajnās. But P. W. 4, Indra Kumar, has clearly stated that he did not see Akbar possessing the land, though he knows it from 1950. Any way this evidence clearly shows that Akbar did not exercise possession for over 12 years. This witness says that in 1956, no Muslim lived on the land and a Hindu lived there. It has already been stated that the defendant filed copies of the decrees, Ext. E series, to show that he evicted the unauthorised occupants from the property and obtained possession. P. W. 7, Mrityunjoy, being plaintiff No. 1 is an interested witness. We disbelieve their evidence.

24. It is clear from the aforesaid discussion that a fictitious sale was made by him in favour of Tara Prosad in 1965, i.e., after the statutory period of twelve years. The case is squarely covered by S. 31 (a) of the New Limitation Act. We hold that Tarapada acquired no interest by his purchase from Akbar and the plaintiffs have acquired no title to the suit land on the footing of the purchase made by them from Tara Prosad. The earlier registered kobala of 1952 in Dukhiram's favour operated as notice under explanation I of Section 3 of the Transfer of Property Act and his actual possession of the property was tantamount to constructive notice under explanation II of that section. P. W. 7, Mrityunjoy, says that he did not even enquire at the Municipal Office or make any search about Dukhiram. We further hold that Akbar or Tara Prosad or the plaintiffs had no possession in the suit land within 12 years of the filing of the plaint and hence, the suit is barred by limitation.

25. Then about the alternative case of advance possession. S. 31 (a) of the

new Limitation Act says that nothing in the Act shall enable any suit to be filed for which the period of limitation prescribed by the Limitation Act of 1908 expired before its commencement. The principles laid down in the cases of *Jyoti v. Girija Bhusan* (AIR 1965 Cal 11) (supra) and of *Ram* in AIR 1966 Cal 488 may be referred to. The new Act came into force with effect from 1st Jan. 1964, and the suit was instituted in Aug. 1966. The position will not improve even if it be assumed that the new Act applies. This has already been discussed. The evidence of D. W. 5, Sanat, and D. W. 7, Jagannath, clearly shows that Dukhiram was in possession of the property and before him, his predecessors were in possession thereof to the exclusion of others for over 12 years. We believe their evidence and hold that Dukhiram has title to and possession in the disputed property and before him, his predecessors had interest and possession therein and the suit No. 73 of 1966 is also barred by adverse possession.

26. Appeal No. 196 of 1970 be allowed with costs throughout. Title Suit No. 73 of 1966 is dismissed. Appeal No. 78 of 1978 is allowed with costs throughout and Title Suit No. 102 of 1967 decreed. The judgment passed on 29-7-1967 in the misc. case No. 163 of 1966 be hereby set aside. It is hereby declared that the plaintiff has title to the property in question. The defendants be permanently restrained from interfering with his possession therein.

BANERJEE, J.:— I agree.

Order accordingly.

AIR 1982 CALCUTTA 301

RAMENDRA MOHAN DATTA AND

C. K. BANERJI, JJ.

Hindusthan Steel Works Construction Ltd., Appellant v. G. Sreenivasulu Reddy & Co., Respondent.

Appeal No. 44 of 1982, D/- 15-2-1982.

(A) Arbitration Act (10 of 1940), Ss. 4, 5, 11, 12 and 39, Sch. 2 — Appeal against order passed in application filed under Ss. 4, 5, 11 and 12 for removal of umpire — Order while dismissing application directing extension of time to make and publish award —

CZ/CZ/B129/82/SNV

Direction is incidental to main order and is under the Act — Another direction given in excess of jurisdiction but severable — No appeal lies against order of the earlier direction.

(Paras 12, 13)

(B) Arbitration Act (10 of 1940), S. 11 — Application for removal of umpire — Court while dismissing application, directing umpire to give hearing to parties — Direction is without jurisdiction as it related to conduct of proceedings by umpire. Judgment dated 12-1-1982 (Cal) Reversed. (Para 13)

Cases Referred: Chronological Paras
AIR 1973 Cal 248 12
AIR 1963 Cal 642 12

RAMENDRA MOHAN DATTA, J.:—

This interlocutory application has now come up before us, inter alia, for stay of the operation of the judgment and order dated Jan. 12, 1982 passed by Deb J. The application before the learned Judge was for leave to revoke the authority of the respondent No. 2 who had been acting as the umpire in the pending arbitration proceedings arising out of the arbitration agreement dated Dec. 31, 1979. The prayer in the alternative is for removal of the umpire and for the appointment of a fit and proper person as the umpire and to continue the proceedings. There are other prayers, inter alia, for stay of the arbitration proceedings and for an injunction restraining the respondents Nos. 1 and 2 from proceeding with the arbitration proceedings. The learned Judge passed the ad interim order restraining the umpire from proceeding with the arbitration reference until further orders. At the final hearing, however, the learned Judge dismissed the application making cost in the arbitration proceedings. He also extended the time to make the award till 15th March, 1982 and directed the respondent No. 2 to give reasonable opportunity to both the parties of being heard before making his award.

2. When the matter was moved before us for interim orders, we passed an order, inter alia, restraining the Umpire from proceeding with the arbitration reference until the disposal of this application.

3. The facts shortly are, that both the appellant and the respondent appointed their respective arbitrators who after making the appointment of the Umpire differed amongst themselves leav-

ing the matter to be decided by the Umpire one S. Rama Chandran. Before the said arbitrators statements and counter-statements were filed sometime in October and November 1980, Documents were also filed before them round about such time. In May 1981 the umpire S. Ramachandran entered upon the reference and directed the parties to submit their respective documents and papers. A meeting was sought to be fixed on 29th May, 1981 but due to the inconvenience of the appellant the same was adjourned and thereafter it was fixed on 7th to 9th June, 1981. The appellant then requested the umpire to fix the last week of June for inspection of site. On 8th June, 1981 the umpire visited the site in the presence of the representatives of both the parties but on that date the case was not discussed. Thereafter the umpire fixed 27th to 30th June, 1981 for meetings to be held at Calcutta giving liberty to the parties to file further statements or documents, if so desired. The appellant again prayed for extension of time to submit further paper by a fortnight. The umpire thereupon gave liberty to the appellant to produce all papers and documents on the date of hearing. On July 4, 1981 the meeting was held at Calcutta in which the parties virtually agreed that the statements and documents already filed by them before the arbitrators would be held to be good for hearing before the umpire. Time to make the award was extended by consent up to Aug. 31, 1981. On July 25/26, 1981 meetings took place in which the appellant opened its case and made submissions and filed counter-statements and other papers which were filed before the arbitrators. Thereafter on July 26, 1981 the umpire for the second time visited the site and on 23rd, 24th and 25th Aug. 1981 meetings were fixed for hearing at Calcutta. Directions were given that books, papers and documents intended to be relied on must be produced and oral evidence, if any, should be made available at the hearing.

4. On 23rd Aug. 1981 the meeting was held when the appellant made further submissions and tendered a counter claim. The umpire directed that further documents, if any, were to be submitted on or before 7th Sept. 1981. The umpire thereupon expressed his gratitude to the parties and their lawyers for the co-

operation and fine exposition of the case on behalf of their clients. According to the umpire and the respondent the hearing was concluded on that date.

5. On Sept. 3, 1981 the appellant intimated the umpire that the minutes of the meeting supplied by him did not reflect all the points argued by the counsel. It was further informed that as the minutes did not give the correct picture due to various typographical errors a fresh meeting should be held for necessary correction thereof. On Sept. 4, 1981 the respondent No. 1 filed its counter statement and also filed documents as per leave given by the umpire in the meeting held on Aug. 23rd, 1981. By its letter dated Sept. 9, 1981 the respondent No. 1 required the umpire to make his award by Sept. 30, 1981 being the last extended date mutually agreed by and between the parties. The respondent, inter alia, wrote:

"You asked certain information from H. S. C. L. and ourselves. While we had sent our documents vide letter dated 4-9-1981, we find H. S. C. L. is delaying the matter in sending the required information/documents. We request you to stick to the date mutually agreed at the Calcutta meeting without any further extension."

By his letter dated Sept. 10, 1981 written to the appellant the umpire, inter alia, intimated that the minutes were dictated in the presence of all the parties and no objections were raised at that time. The umpire informed that no meeting was necessary to be held merely to correct the minutes and stated that the hearing had already been closed. The umpire, inter alia, wrote:

".....It may be that there are few typographical errors. I see no reason for fixing a meeting merely to correct the minutes. It was expressly understood that the hearings are closed and parties were merely given liberty to submit any documents which they want, before 7-9-1981. *** ** However, you are granted further time till 20-9-1981 for filing documents if any. No further time will be granted. You may also send me the corrections required to be made in the minutes of last meeting.

As I am committed to issue the award on or before 30-9-81 I request you to send me the documents required immediately."

On Sept. 17, 1981 the appellant filed two documents and requested the umpire to grant six weeks time to file its rejoinder of the counter-statement of the respondent No. 1. The appellant requested the umpire for giving a hearing. The appellant wrote:

"We pray to you for affording us an opportunity to substantiate our counter claim after submission of our rejoinder and/hold hearing for such purposes. Furthermore, we pray to you for offering us opportunity to make our submissions to the various documents filed by the claimants by their letter dated 4-9-81."

Thereafter on Sept. 21, 1981 by telex the umpire informed the appellant that the statements, if any, should reach the umpire before Sept. 27, 1981 and liberty was given to the appellant to indicate all its points in such statements. The umpire also intimated that the case was fully argued on all counts and was closed by counsel of the appellant at the Calcutta sitting. It was intimated that no further meeting was required. By its letter dated Sept. 22/24, 1981 the appellant wrote to the umpire:

"We further state and submit that there is no commitment to issue the award on or before 30-9-1981 and in the event of our prayer as made in our previous correspondence are not granted we will suffer irreparable loss and prejudice."

On Sept. 24, 1981 the appellant prayed for six weeks' time to file its rejoinder intimating that such time was required in view of the preoccupation of counsel and due to the intervening Puja holidays.

6. It will be noticed from the aforesaid events that had happened that the respondent No. 1 made it clear that the award be made within the last extended time and if it was not so done they would not consent to any further extension. There was no corresponding assurance from the appellant that they would (not?) apply for extension of time from court. All that was said was that there was so commitment on the part of the umpire to issue the award on or before Sept. 30, 1981. That was too vague to be acted upon. The umpire did appreciate that unless the award was made within the extended time that is, Sept. 30, 1981 he would become functus

officio and unless there were impelling reasons so to do it was his discretion to consider whether the making of the award would be postponed further or not. It appears that the umpire had before him the following considerations, (a) that if another hearing would have to be given that would mean an enormous expenditure with which both the parties would be saddled; (b) At the last sitting, at his desire, the parties were asked to send some documents to him; (c) According to the umpire the mistakes complained of in the minutes of the last meeting could be corrected without holding a meeting if the details of such correction were made known to him. The appellant did not co-operate in that respect; (d) Under the circumstances, the parties could as well submit their written submissions before him which would obviate the necessity of a hearing particularly when no oral evidence was to be adduced. In any event, the allegations about the mistakes in the minutes being without any particulars whatsoever and the proceedings having been closed as minuted by the umpire and the expenses involved in holding another meeting being enormous and time consuming, he could reasonably think that such a meeting would be unnecessary and written submissions could make it up. In any event, it is within the knowledge of the umpire as to on what basis he gave his directions but from the facts as placed before us it can safely be concluded that a reasonable man placed in the position of an umpire under the circumstances has acted reasonably and honestly.

7. Mr. Gupta contends that the umpire is guilty of legal misconduct because he did not give hearing as asked for regarding the various documents filed by the claimants by their letter dated Sept. 4, 1981. The umpire should also have given a hearing so that the appellant might have an opportunity to substantiate its counter claim after submissions of its rejoinder. The legal misconduct was committed when the umpire refused to give a hearing on the fresh documents filed by the respondent No. 1 and it was no ground to say that the court below by its order had directed the umpire to give a hearing as asked for. In other words, by refusing to give a hearing he committed legal misconduct and thereby made himself

liable to be removed or his authority being revoked.

8. As stated hereinabove on Sept. 24, 1981 in spite of the urgency of the matter and knowing full well that the time available to the umpire was to expire on Sept. 30, 1981, the appellant asked for six weeks' time to file its rejoinder and put forward the plea of the intervening long holidays for taking such a long time.

9. On the next day i.e. on Sept. 25, 1981 the appellant moved this court orally and obtained an ad interim order restraining the umpire from making the award. The umpire was immediately informed about it but no step was taken to file the petition before the vacation Bench. Instead, the appellant waited till No. 3, 1981 when the court reopened and filed its written application for which it gave an undertaking to court on Sept. 25, 1981.

10. In the written application the appellant took the plea of bias and of legal misconduct. The learned Judge after considering the facts in details found that there was no case on the question of bias. From the prima facie point of view we take the same view. The learned Judge has noted that the allegation of dishonesty in the petition was not pressed. The learned Judge, however, was of the view that in so far as the plea of legal misconduct was concerned the umpire did not get any opportunity to consider whether he should allow the aforesaid prayers of the appellant and held that, accordingly, no ground had been made out for his removal. In that view of the matter the learned Judge by dismissing the application gave two directions in the matter. The time to make and publish the award was extended till March 15, 1982 and the umpire was directed to give a reasonable opportunity to both the parties of being heard before making the award.

11. In so far as the last direction was concerned Mr. Gupta contends that the learned Judge had no power to give such direction to the umpire and as such he acted without and/or in excess of jurisdiction. That being so, it became an appellable order under clause 15 of the Letters Patent and the appeal is maintainable.

12. We have noted from the cause title in the petition of the lower court that this application was made under

Ss. 4, 5, 11 and 12 of the Arbitration Act, 1940 and as such S. 39 read with Sch. II thereof would apply and no appeal would lie from the order made in such an application. The order of dismissal and the direction for extension of time to make and publish the award were clearly under the said Act. Regarding the second direction of the learned Judge to the umpire to give a hearing, we are of the view that even assuming the same to have been passed without and/or in excess of jurisdiction yet that part of the order is severable and cannot vitiate the whole order so as to make the whole order without jurisdiction and as such appealable. Mr. Gupta has cited the case of *Rawatmal v. Rajputana Trading Co. Ltd.*, AIR 1973 Cal 248 and *Rebati Ranjan Chakravarti v. Suranjan Chakravarti*, AIR 1963 Cal. 642 but, in our opinion, such cases are distinguishable and have no application to the facts of this case. Mr. Bhabra argues that the part of the direction to the umpire should come under S. 41 (b) of the Arbitration Act. We do not think that such an argument is tenable. We should observe that the memorandum of appeal should have indicated the nature of the application made before the trial court indicating thereby that the application was made under those provisions.

13. In so far as the first direction is concerned we are of the view that the extension of time to make and publish the award is an order under the Arbitration Act and as such incidental to the main order and no appeal lies therefrom. Accordingly, the same does not affect the legality of the order but from a prima facie point of view, in our opinion, possibly the learned judge exceeded his jurisdiction in giving direction to the umpire as to the conduct of the proceedings before him and to that extent Mr. Gupta's argument that it is without jurisdiction appears to be sound. It seems that it is within the domain of the umpire to decide the question himself and to take upon himself the responsibility of deciding whether or not any further opportunity should be given in pursuance of the letter dated Sept. 24, 1981 and that the court is incompetent to give any direction to him to act in a particular manner. The appellant has made the prayer before the umpire and he has to allow it or to refuse it himself. After such decision if

any party would challenge the same then the question would arise whether he has committed any legal misconduct or not and the court would be competent to decide that question.

14. It would seem that this part of the order is definitely severable from the main order. The learned Judge has clearly found that the case of bias has not been established and has recorded that the allegation of dishonesty was not pressed. In effect he has held also that the case of legal misconduct was not sustainable as the umpire could have changed his mind upon receipt of that letter dated Sept. 24, 1981.

15. Mr. Gupta contends that the umpire has already committed legal misconduct and, accordingly, in what manner he would act after receiving the letter dated Sept. 24, 1981 would be another question and that would not affect his past conduct. In the facts of this case it would seem, from a prima facie point of view, that this contention may not hold good. Mr. Gupta's client could have come up before the court before writing the letter dated Sept. 24, 1981 but having written that letter his client would be held to have sought for another opportunity from the umpire in getting its grievances redressed. We are of the opinion that although that part of the order might have been without jurisdiction but the same did not create any prejudice so far as the appellant is concerned.

16. Taking into consideration the fact that the umpire is free to decide the question himself without being guided by the court we stay that part of the order which directs the umpire "to give a reasonable opportunity to both the parties of being heard before making his award". Accordingly, we make it clear that in spite of such stay the umpire would be free to decide the question himself and would be at liberty to cancel the notice which he gave pursuant to such direction of the court below and would be free to decide whether or not any fresh opportunity should be given to the parties and as to his own course of action. Save as aforesaid the rest of the order of the court below will remain in force. There will be a partial order for stay as aforesaid. All interim orders are vacated. Costs will be costs in the appeal. The umpire and all par-

ties to act on a signed copy of the minutes.

17. We put it on record that various case laws have been cited at the bar and arguments have been advanced at length and as such we have gone into the details of the facts herein to give our reasons but inasmuch as the principles are well established we did not discuss the various case laws cited before us at this interlocutory stage.

C. K. BANERJI, J. :— I agree.
Order accordingly.

AIR 1982 CALCUTTA 305

B. C. RAY, J.

In re: Chandidas Ghosh, Petitioner.
D/-10-5-1982.

W. B. Board of Secondary Education Act (5 of 1963), Ss. 28 (2), 24 (as amended in 1979) — Rules for Management of Non-Government Institutions (Aided and Unaided) (1969), R. 28 (8) — President according approval to disciplinary proceedings against teacher of school — Matter ordered to be placed before Committee of Education Board instead of Board itself — Order is invalid.

Where the President of the Secondary Education Board after according approval to the disciplinary proceedings against a teacher under S. 28 (2) has instead of placing the matter with his report stating the reasons for the exercise of emergency power before the next meeting of the Board placed the matter before a Committee constituted under S. 24 to which power of the Board has been delegated under Proviso to sub-rule (8) of R. 28, the order would not be in accordance with the provisions of the rules and as such it could not be sustained.

(Para 2)

The real position in law is that the power to accord approval of the disciplinary proceedings that are initiated against a teacher of a school under the Board is vested in the Board i.e. the Board of Secondary Education, West Bengal. This has been clearly provided for in R. 28 (8). The Board may either exercise this power itself or it may delegate it to any committee constituted under the provisions of S. 24. Therefore, if a committee has been vested with the power of the Board conferred on it under R. 28 (8) of the Rules by the Board then in that case such committee is quite competent to consider the

EZ/EZ/C188/82/SNV.

papers of the relevant proceeding initiated by the managing committee of the school against members of the teaching and non-teaching staff of a school and can accord the approval. This is one way of exercising the power conferred by R. 28 (8). In case where the Board has not for some reason or other been able to exercise this power either by itself or through a committee constituted with the approval of the State Govt. by delegating its power to the committee the President has been empowered under S. 28 to exercise the powers of the Board in case there is an emergency or in other words to meet an emergent situation and in that case immediately after exercise of such power of the Board the President shall have to place a full report before the Board of the action taken by him stating the reasons therefor. There is no other third method of exercising such power as conferred by R. 28 (8).

(Para 2)

H. Chakraborty with H. Barua, for Petitioner; A. P. Sircar with A. N. Banerjee, for the State; J. K. Banerjee, for Respondent No. 9.

ORDER:— A short question though, of course, of point of law is involved in this application namely whether the approval that has been accorded by the President of the West Bengal Board of Secondary Education as communicated by the letter of the Secretary of the Board of Secondary Education on 19-8-81 to the Secretary, Managing Committee of Uttar Ful-sara Jr. High School in the District of 24 Parganas for terminating the service of the petitioner who is the headmaster of the said school is in accordance with law and is sustainable.

2. Mr. Sircar, learned Advocate appearing on behalf of the West Bengal Board of Secondary Education, has in his usual frankness candidly placed before this Court the records of the Board including the order passed by the President of the Board on 4-8-81. It appears from the said order that the President of the Board after considering the relevant papers including the explanation submitted by the teacher and also the recommendation of the committee proposing the action to be taken against the petitioner, the delinquent employee, the President passed an order to the effect that as all the steps have been taken by the managing committee of the school in accordance with the procedure prescribed by R. 28 (8) of the Rules for Management of Non-Government Institutions (Aided and Unaided), 1969 the President there-

fore approves of the proposed action of the committee to pass the order of termination of the petitioner from service as proposed by them. It has been further stated that this matter will be in due time reported to the meeting of the Board. This order was made on 4-8-81. Thereafter on a misappreciation of the provisions of the Act and the Rules this matter was placed in the meeting of the committee which was constituted by the Board u/s. 24 of the West Bengal Secondary Education Act, 1963 to whom the Board delegated its power and functions conferred on it by R. 28 (8) instead of placing the matter before the meeting of the Board as required under the provisions of Sec. 28 (2) as substituted by S. 16 (2) of the Act of 1979. Therefore this step taken by the President of the Board by placing the matter before the committee constituted u/s. 24 of the Act is not in accordance with law. The real position in law is that the power to accord approval of the disciplinary proceedings that are initiated against a teacher of a school under the West Bengal Board of Secondary Education is vested in the Board i.e. the Board of Secondary Education, West Bengal. This has been clearly provided for in Rule 28 (8) of the Rules for Management of Non-Govt. Institutions (Aided and Unaided), 1969 as amended in 1979. The Board may either exercise this power itself or it may delegate it to any committee constituted under the provisions of Sec. 24 of the said Act. Sec. 24, as I have stated hereinbefore, clearly confers power on the Board with the approval of the State Govt. to constitute such other committee as the Board may think fit and the Board with the approval of the State Govt. may delegate to any such committee any of its powers or functions including the power conferred by R. 28 (8) of the said Rules. Therefore if a committee has been vested with the power of the Board conferred on it under R. 28 (8) of the Rules by the Board then in that case such committee is quite competent to consider the papers of the relevant proceedings initiated by the managing committee of the school against members of the teaching and non-teaching staff and can accord the approval. This is one way of exercising the power conferred by Rule 28 (8) of the said Rules. In case where the Board has not for some reason or other been able to exercise this power either by itself or through a committee constituted with the approval of the State Govt. by delegating its power to the committee the President has been

empowered u/s. 28 of the said Act to exercise the powers of the Board in case there is an emergency or in other words to meet an emergent situation and in that case immediately after exercise of such power of the Board the President shall have to place a full report before the Board of the action taken by him stating the reasons therefor. These are the two modes or ways provided in the Act and the Rules laid down thereunder for exercising the powers of the Board. There is no other third method for exercising such power as conferred by R. 28 (8) of the said Rules. In this case as I have stated hereinbefore that the President after exercising his emergency powers u/s. 28 (2) of the said Act has instead of placing the matter with his report stating the reasons for the exercise of such power before the next meeting of the Board has placed the matter before a committee constituted u/s. 24 of the said Act to which power of the Board has been delegated under proviso to sub-rule (8) of Rule 28 of the said Rules. Therefore this is not in accordance with the provisions of the said rules and as such it cannot be sustained. This might have been due to a mis-apprehension or misconception of the legal position with regard to this matter.

3. In these circumstances it is just and proper to quash and set aside the order of the President of the Board dated 4-8-1981 and to direct the Board since a committee has been constituted according to the provisions of Sec. 24 and powers of the Board under Rule 28 (8) have been delegated to that committee to place all the relevant papers and also the proposed action against the delinquent employee i.e. the petitioner before that committee which will consider and dispose of the same by either granting or refusing to grant or accord approval for taking the action proposed against the petitioner in accordance with the provisions of R. 28 (8) of the Rules. It is also directed since the matter is pending for a long time that the committee will consider and dispose of the matter as early as possible preferably within a period of eight weeks from today.

4. Let a writ of certiorari be issued directing the respondents to set aside and/or cancel the impugned order of the President dated 4-8-81 as communicated by the letter of the Secretary dated 19-8-81 and to reconsider the matter as directed hereinbefore. The application is therefore allowed to the extent indicated above without any order as to costs. L/A for

State may take a plain copy of this order as prayed for.

Petition allowed.

AIR 1982 CALCUTTA 307

SABYASACHI MUKHARJI AND

C. K. BANERJI, JJ.

Kumar Veda Kantha Sinha Roy, Appellant v. The State of West Bengal and others, Respondents.

A.F.O.O. No. 26 of 1978, D/- 25-9-1981.

Constitution of India, Art. 226 — Delay — Question whether delay is fatal to maintainability of petition — Principles stated — Petitioner complaining of non-payment of compensation under Requisitioning and Acquisition of Immovable Property Act — On facts, held, petition should not have been dismissed on ground of delay. Order of Basu, J., Reversed. (Requisitioning and Acquisition of Immovable Property Act (1952), S. 8).

If a person has a good case on the merit, a good case in the sense that it is otherwise entitled to be considered by the Government, then, normally his petition should be entertained and should be examined. Secondly, delay is a relevant and material factor. While the claimants and the persons who are assertive of their rights should not be disentitled to the exercise of discretion by the courts under Art. 226 of the Constitution in order to consider whether the delay should defeat the right of the claimant, it is material to bear in mind whether by the conduct or delay in the conduct of the petitioner or the appellant, the other side, viz. the Government or the respondents have been prejudicially affected or they have altered their position thereby or if the damage has been caused to the respondent or who is to pay compensation by the delay on the part of the petitioner or the claimant. Thirdly, it appears that in considering the question of delay, the merits of the case of the petitioner or claimant should be taken into consideration, the nature of it, how it has been caused and what would be the effect of delayed grant of relief. Grant of relief under Art. 226 is discretionary and an exercise of such discretion by the learned trial Judge should not be interfered with normally by an appellate authority. But it has also to be emphasised that the power which is given to the Court must

BZ/EZ/A801/82/JHS

be exercised on intelligible and rational basis and on sound legal principle. It is true that the party affected must be diligent in asserting and pursuing his claim. This right, however, is coupled with the fundamental obligation of the State to pay compensation for acquisition and requisition of the property. It is asserted that it is the citizen's duty to prefer his claim if his claim has been denied. It has, however, also to be borne in mind that in a society governed by rule of law it is the Government's primary obligation to pay for any property acquired if the parties are entitled under the provisions to the compensation. This principle is clearly enjoined by S. 8 of the Requisitioning and Acquisition of Immovable Property Act, 1952 under which the State has in this case acquired the property. It imposes a reciprocal obligation and reciprocal right that while one should be diligent in pursuing its right the other should be equally diligent in discharging its obligation. In this case the indisputable fact is that in the apportionment case, as it stands, the appellant has been declared to be entitled to a share in the 44 C. S. Plots. The appellant has not been paid compensation in respect of the entirety of the said 44 Plots. The appellant might have pursued his claim more vigilantly. There is nothing to show that in 1957 when the alleged payment was made to the Hercules Trading Corporation by the State Government the appellant was aware of it. The adjudication in the adjudication reference holding that the petitioner is entitled to compensation in 44 C. S. plots stands. If that fact stands, this cannot be consistent with the alleged payment in respect of the petitioner's share to the Hercules Trading Corporation. (Para 12)

In the premises, the ground upon which the learned trial Judge has exercised his discretion is not a proper ground, in the facts and circumstances of the case. The petitioner (appellant) is certainly entitled to a proper adjudication by a proper authority on the question whether the petitioner (appellant) is entitled to any compensation lawfully under the provisions of the law in respect of C. S. plots in respect of which he has been adjudged in the apportionment case as a shareholder. In the premises the order and the judgment of the learned trial Judge dismissing the writ petition on ground of delay must be set aside. Order of Basu, J. Reversed. (Para 13)

Cases Referred: Chronological Paras
AIR 1980 SC 367 11

AIR 1979 SC 621: 1979 All LJ 368 11
AIR 1979 SC 1144 11
AIR 1977 SC 2050: (1977) 2 Serv LR 698
(2): 1977 Lab IC 1366 11
1977 Lab IC 803 (Pat) 11
AIR 1976 Punj & Har 22 11
1973 Lab IC 1253: (1973) 1 Serv LR 359 11
AIR 1972 SC 908: 1972 Lab IC 437 11
AIR 1971 SC 1021 11
(1971) 75 Cal WN 94 11
AIR 1970 SC 898 11
AIR 1967 SC 249 11

P. K. Dutta and B. Banerjee, for Appellant; Gopal Chakraborty with Shyamal Sen, (for Nos. 1 to 4) and N. C. Roy Chowdhury with P. Majumdar (for No. 2), for Respondents.

SABYASACHI MUKHARJI, J.:— This is an appeal arising out of an order passed and judgment delivered by T. K. Basu, J., on 9th Dec., 1977. By the said judgment and order Basu, J. has dismissed the writ application of the appellant on the ground of delay. The learned trial Judge has observed that though there was some confusion as to facts, he was not pursuing the aspect about the facts, because he was dismissing the application on the ground of delay. His Lordship observed that the factual aspect regarding 9 C. S. Plots, there were serious controversies raised. But the learned Judge made it clear that he was not pronouncing on the merits of the controversies, as he was dismissing the application on the ground of delay. With great respect it is difficult to appreciate this part of the observation of the learned trial Judge. It is not possible to find out whether the learned Judge held that the factual controversies were such which disentitled the appellant to seek relief under Art. 226 of the Constitution or not. Be that as it may, it would be profitable to refer to certain facts in order to appreciate the contentions raised in this appeal and the points upon which the learned Judge has proceeded.

2. It appears that on or about 18th April, 1921 a permanent lease (Mokarari Mourasi Patta) was granted of Touzi No. 2402 within the District of 24 Parganas, of which the appellant was Touzi holder and/or absolute proprietor to the extent of 1/3rd. The said lease provided that in the event of permanent acquisition the appellant would be entitled to the share of compensation to the ratio of 6:10. On the 19th Dec., 1946, 44 C. S. Plots pertaining to the said Touzi comprising of an

area of 68 bighas 15 cottahs 3 chittacks were permanently acquired by the Central Government without notice. Permanent Acquisition Case No. 27/4 of 1946-47 was started before the Land Acquisition Collector, 24 Parganas, who had assessed the land value at the flat rate of Rs. 4000 per bigha. On the 15th March, 1955 the appellant was served with a notice of acquisition and the Land Acquisition Collector on being moved directed the appellant to move the proper court of law. This appears from the averments made in para 14 of the petition and this averment is not seriously disputed on behalf of the respondents. On the 3rd May, 1962 the State Government issued a notification appointing an arbitrator for determination of the compensation payable in respect of the said Touzi land. On the 11th August, 1962 the arbitrator sent back the case to the State Government for re-submission, determination and apportionment of respective shares of the persons interested in the said Touzi land from the highest chain to the lowest. It appears that on the 11th March, 1963 a writ petition was filed by one Abhoy Singh Shahela. Thereafter on 19th April 1964 the appellant moved the Land Acquisition Collector for award of compensation. This would appear from the judgment of the learned trial Judge at p. 177 of the Paper Book. The petition of Shahela was marked C. R. No. 125 (W) of 1963 and came up for hearing before B. N. Banerjee, J. on the 27th Sept. 1965. Banerjee, J. directed that the respondent-State Government would appoint another Arbitrator with a direction on him to determine compensation payable for the share of the petitioner in that case which share the petitioner in that case should establish before the arbitrator. The learned Judge had, further, ordered that if for the purpose it was necessary to add other parties to the reference, the arbitrator would be at liberty to do so or the respondent-State Government should itself do so. On the 29th August, 1966 apportionment case being Arbitration Case No. 67 of 1966 (A) and Arbitration Case No. 64 of 1966 (V) were started. The appellant was already a party, i.e., the referring claimant No. 2, in the valuation case, but was left out in the apportionment case. On the 22nd June, 1967 the appellant applied to the Collector for being included in the apportionment case. On the 14th June, 1968 the terms of reference was issued to the arbitrator. Again on 7th Oct. 1971 the appellant again applied for being included as a

party referring claimant in the apportionment case. On the 29th Dec. 1972 the State Government accepted the appellant's representation and held that the appellant and the original referring claimant were jointly interested in the said acquired land. The appellant should also be included as a party referring claimant in the Arbitration Case No. 67 of 1966 (A) arising out of Arbitration Case No. 64 of 1966 (V). In this connection, reference may be made to page 113 of the Paper Book, wherein in the award Sri S. S. Ganguly, the Arbitrator observed that he had been appointed Arbitrator in Arbitration Case No. 64/66(V) for apportionment and determination of compensation payable in respect of a number of plots and went on to say that as per the order of appointment he was required to determine the amount of compensation payable in respect of the interest of only the referring claimants involved in such acquisition of such properties. Thereafter he mentioned the different plot numbers which appear at page 114 of the Paper Book. Then he gave reference to the rights of the parties with reference to the genealogical table and thereafter at page 116 of the Paper Book he had stated that the parties were interested in the following shares and it may be necessary to set out the said portion of the order in the said award:—

"4. From the above table, the shares of the descendants of Raja Bara Kantha and purchasers from them may be described in the following way:—

1. Kumar Veda Kantha	1/3rd share
2. (a) Satish Kantha by purchase from him Bahadur Singh Singhee by deed dated 7-9-1934	1/9th share
(b) Nirmal Kantha	1/9th share
(c) Rani Jotirupa	1/9th share
3. Purchasers in Revenue sale of the share of Hemada Kantha	1/3rd share

Total 1

5. Kumar Veda Kantha and Nirmal Kantha are referring Claimants Nos. 2 and 3 in this case. Admittedly, their shares in the touzi as shown in the above table were never transferred. It may be safely held, therefore, that they are entitled to get 1/3rd and 1/9th shares respectively out of the touzi holder's or landlord's share in the amount of compensation payable for the disputed plots."

3. After referring to the several deeds and other documents, he decided the apportionment case as under:—

"Ordered that the apportionment case is hereby decided in favour of referring Claimants Nos. 2 & 3 without contest and in favour of referring Claimant No. 1 on contest between him and Craig Jute Mills only. It is hereby declared that the referring claimants have the following shares, mentioned against the names of each, in the amount of land-value payable as compensation for the disputed lands covered by Touzi No. 2402 of the 24-Parganas Collectorate:—

- | | |
|--------------------------------|-----------|
| 1. Shri Abhoy Singh Sahela | 511/144th |
| 2. Kumar Veda Kantha Sinha Roy | 2/16th |
| 3. Kumar Nirmal Kantha Roy | 1/24th |

Parties do bear their own costs up to this stage."

4. Accordingly, the appellant was asked to submit a formal petition duly stamped and signed by him. On the 11th Jan. 1973 the appellant duly filed a stamped petition for being included as a referring claimant in the apportionment case. On the 19th Feb. 1973 the appellant was included as a referring Claimant No. 2 in the said Apportionment Case No. 67/66(A). On the 4th July, 1973 the appellant was declared to be entitled to receive 2/16th share for compensation of all the 44 C. S. plots. In this connection, reference may be made to the observations of the learned trial Judge appearing at page 178 of the Paper Books. This award, according to the appellant, was not challenged by the Union of India or any party. The award appears at p. 112 of the Paper Book. The material portions of the award I have set out hereinbefore. On the 31st Aug. 1973 a notification was issued by the State Government appointing one Sri B. K. Sengupta as the Arbitrator in respect of only 29 C. S. plots and not 44 C. S. plots i.e. about 15 plots were left out. From Nov. 1973 to Mar. 1974 the said Arbitration Case No. 64/66(V) was heard and on the 26th Mar. 1974 it was detected by the Arbitrator for the first time on the last day of the hearing that only 29 plots had been included in the notification appointing him as the Arbitrator on the 31st Aug. 1973. This point is also noted in the judgment of the learned trial judge.

5. Thereafter on the 24th April, 1974 the appellant represented to the State of West Bengal for issuing a Corrigendum to include the said 15 plots after the notification dt. Aug. 31, 1973. On the

16th May, 1974 the State of West Bengal wrote a letter whereby, according to the appellant, the State of West Bengal promised in writing to issue a necessary corrigendum shortly pursuant to the representation of the appellant dt. 24th April, 1974. It would, therefore, be necessary to refer to the said corrigendum which has been referred to in page 163 of the Paper Book. But before that letter dt. 16th May, 1974, there is a letter we must take note of which is dt. 21st Aug. 1964 dealing with the petition of the petitioner dt. 19th Apr. 1964, wherein it was stated that from the records it appeared that compensation payable in respect of the award had already been paid to the assessee after assessment by the Land Acquisition Collector. As the stipulation as referred to in the said noted petition was not brought to the notice of the office at the time of preparation of assessment, nothing could be done at the stage by the office as this was written by the Land Acquisition Collector, 24-Parganas. But on the 16th May, 1974 the Deputy Secretary, Government of West Bengal wrote to the petitioner regarding his petition dt. 29th Apr. 1974 to say that the Land Acquisition Office, 24-Parganas had been requested to send a proposal for appointment of an Arbitrator in view of what was stated in the petition of the petitioner dt. 8th Apr. 1974 and a proposal was still being awaited and necessary action would be taken as soon as the revised proposal was received from the Collector to remind the submission of the proposal.

6. Thereafter again after 1964's letter the State Government issued a corrigendum adding only 6 plots being C. S. Plots Nos. 321 to 325 and 329, leaving out still 9 plots as mentioned in para 29 of the petition which appears at page 13 of the Paper Book. It has been found by the learned trial Judge that on the last day of the hearing on the 16th March, 1974 it was noted by the Arbitrator that in the valuation case unlike in the apportionment case the terms of reference were limited to only 29 C. S. plots and not 44 C. S. plots. On the 20th Jan. 1975 the said valuation award was made and published and limited to 35 C. S. plots only. As a result of that, out of 44 C. S. plots valuation was awarded in respect of an area of 52 bighas 16 kattahs and 3 chittacks of land and the valuation of an area covered by the said 9 plots left out was not awarded. Therefore the appellant's grievance was that he had been

deprived of the said 9 C. S. plots measuring an area of 15 bighas 17 kattahs. On the 7th Feb. 1975 the appellant obtained the certified copy. All the said 9 C. S. plots were danga lands and the Arbitrator, according to the appellant, had awarded compensation @ Rs. 6,500/- per bigha. It appears at page 151 of the Paper Book. But we are not concerned at this stage with this part of the award of Sri B. K. Sengupta.

7. On the 22nd Mar. 1976, the appellant issued a notice demanding justice. Thereafter on the 30th Apr. 1976 the appellant moved an application under Article 226 of the Constn. claiming, *inter alia*, that a writ of or an order in the nature of mandamus should be issued commanding the respondents and in particular the respondent No. 1, that is, the State of West Bengal and each of them and/or their agents and/or their servants to issue and/or cause to be issued necessary notification in the manner and according to the provisions of the Act and/or otherwise as may be enjoined upon by law upon them, as referred to, in *inter alia*, paragraph 29 of the petition for computation, determination and assessment of the compensation of the land value of the 9 C. S. plots and other consequential reliefs. The particulars of the said 9 C. S. plots are as follows :

"Outstanding C. S. Plots for determination of the said compensation :

1130, 1131, 1143, 1141, 1330, 1332, 1334, 1335 and 1140."

In the said application under Art. 226 of the Constn., the State of West Bengal, the Union of India for whose purpose the land in question was acquired, the Land Acquisition Collector, the Court of the Arbitrator, Abhoy Singh Shahela and Nirmal Kantha Sinha Roy were added as respondents.

8. The learned Trial Judge by the judgment and order dt. 25th July, 1977 discharged the rule nisi which had been issued on 30th April, 1965 on the ground of delay. The learned trial Judge mainly based his decision on the ground of 14 months unexplained delay, that is to say, the delay between 20th Jan. 1975 being the date of valuation award and 22nd Mar. 1975 the date of demand for justice. This appears from page 181 of the Paper Book. The learned Judge therein had observed as follows :

"Unfortunately for the petitioner this story of his inaction does not stop there. As pointed out by Mr. Roy Chowdhury

on the 22nd June, 1967 the petitioner filed a petition before the Arbitrator in the apportionment case for being added as a referring claimant. It is the petitioner's own case that notwithstanding the application no steps were taken by the appropriate respondents to add the petitioner as a party. Notwithstanding the above as Mr. Roy Chowdhury points out, the petitioner took no steps whatsoever till the 5th Oct. 1971 when he made a representation to the respondent No. 1 on this question. Therefore even at this stage the petitioner chose to keep quiet and take no steps whatsoever for a period of over 4 years. No explanation of any kind whatsoever is given either in the petition or in the course of the argument as to why the petitioner chose to wait for four long years before a pursuing this remedy."

Though the learned trial Judge has indicated in the judgment that all throughout the period the appellant was not diligent in pursuing its remedy, the appellant states that the State of West Bengal had not taken the plea of delay however.

9. Before we deal with the points raised in this appeal, it will be necessary for us to refer to one important aspect, that is to say, the statement contained in the affidavit made by the Land Acquisition Collector, District 24-Parganas in answer to the rule nisi affirmed on the 9th Nov. 1976. In paras 16 and 18 therein, it was stated as follows :

"16. Save that the said 29 C. S. Plots referred to in para 26 of the petition became subject matter of the jurisdiction of the learned Arbitrator in a reference made by the Collector upon the application of the petitioner and that 15 C. S. plots were left out of the jurisdiction of the Arbitrator on the ground that the Arbitrator is incompetent to go into the question of the said C. S. Plots and save what has been stated hereinbefore and save that are matters of record, I make no admission of the statements contained in paras 19, 20, 21, 22, 23, 24, 25, 26 and 27 of the petition.

18. The allegations contained in paragraph 29 of the petition are denied and disputed. I say that on scrutiny by Land Acquisition Collector's Department it appeared that land value compensation in respect of the said 9 C. S. plots were already paid to Hercules Trading Corporation Ltd. and others on the basis of the assessment as far back as on 13th Nov. 1957. I further say that the said assessee

M/s. Hercules Trading Corporation Ltd. and others were also not parties in the corresponding apportionment Case No. 67 of 1966 (A). The prayer for reference to arbitration in respect of these plots were therefore not allowed."

While we are on this aspect, we may also refer to the affidavit filed on behalf of Union of India by one Harsharan Gangwar affirmed on the 10th Sept. 1976 wherein he stated inter alia as follows :

"6. From the said records it appears that the said nine C. S. plots which were the subject matter of the 226 application had already been assessed for compensation and compensation paid. The said assessment was made in the name of Hercules Trading Corporation Ltd. and payment was made to it on 13th Nov. 1957 by account payee cheque. The assessment of compensation so far as the landlord's interest is concerned was paid to Sri Rajendra Singh Singhee and Sri Narendra Singh Singhee. If necessary the petitioner will crave leave to refer to the records."

Two important facts emerge out of this narration of facts. The apportionment case was initiated on or about 29th Aug. 1967. The appellant had applied to the Collector for being included as a party in the apportionment case though the appellant had been referred to as the claimant No. 2 in the valuation case. In the apportionment case the appellant was included as a party on the 19th Feb. 1973, and on the 4th July, 1973, the appellant was declared entitled to receive 2/16th share of compensation for all the 44 C. S. Plots. This appears from the award at page 114 of the Paper Book as also from the judgment and order of the learned trial Judge.

10. Now, it appears from other documents, which we have referred to, that sometimes in 1957 certain amounts were alleged to have been paid to M/s. Hercules Trading Corporation. It is not apparent that in the subsequent apportionment case, the case which determined the share of the parties in the land in question including other C. S. Plots M/s. Hercules Trading Corporation was even adjudicated as a party entitled to any share of compensation. It does not also appear that such alleged compensation which was alleged to have been paid to M/s. Hercules Trading Corporation by the State Government sometime in 1957 was done in any proceedings as a result of adjudication, notice in respect of which was given to the appellant. How there-

fore and under what circumstances could the Hercules Trading Corporation come to receive any compensation, if it had received it at all, is not clarified either from the averments made in the affidavit filed on behalf of the State Government or from the affidavit filed on behalf of the Union of India. Therefore, the facts remain that so long as the apportionment award remains which has held as mentioned hereinbefore and accepted by the Government the appellant was entitled to compensation, according to his share, in respect of 44 C. S. Plots. It has been further held that he had shares in respect of 44 C. S. Plots. It is indisputable that appellant has not been paid his full share in respect of the entirety of 44 C. S. Plots. This, in our opinion, entitles the appellant to claim for adjudication before the appropriate authority of his right to compensation.

11. A large number of authorities were cited, before us, on the plea that delay is a relevant consideration in an application under Art. 226 of the Constitution. It is not necessary to refer to all the decisions. But the Courts have taken different views in the background of the various facts and circumstances of the case. In some cases, delay of one year or less than one year has been considered to be fatal. In respect of compensation cases, in some cases, delay extending over 35 years have not been considered to be fatal. We will only note the numerous decisions, not because they are very relevant for the purpose of our decision in the facts of this case but out of deference to the arguments advanced by learned advocates on both sides. Reference was made to the decision of the Supreme Court in the case of M/s. Tilokchand Motichand v. Commr. of Sales Tax, Bombay, AIR 1970 SC 898. Our attention was drawn to paras 9, 10 & 11 of the decision in the case of P. B. Roy v. Union of India, AIR 1972 SC 908 in the case of Nirmala Khosla v. Union of India, AIR 1976 Punj & Har 22 where delay between the period of 35 to 71 years was not considered to be fatal in respect of an award of compensation. Our attention was also drawn to the decision in the case of Sualal Yadav v. State of Rajasthan, AIR 1977 SC 2050 and to the case of Smt. Hemlata Basu v. State of West Bengal, (1971) 75 Cal WN 94 where it was held that the conduct of the petitioner was a relevant factor and the relief under Art. 226 of the Constitution was discretionary and should be granted more or less on similar ground, though not on identical ground

on which the courts of Chancery in England exercised jurisdiction. Reference was also made to para 12 of the decision in the case of Madras Port Trust v. Hymanshau International, AIR 1979 SC 1144, in the case of State of Gujarat v. Bhogilal Keshavlal, AIR 1980 SC 367, in the case of Motilal Padampat Sugar Mills Co. Ltd. v. State of U. P., AIR 1979 SC 621 which was relied on in aid of the proposition that in case of promissory estoppel Government was bound to perform its part. We do not think it is relevant for our present purpose. Reliance was placed on the observations of the Supreme Court in the case of Century Spg. & Mfg. Co. Ltd. v. Ulhasnagar Municipal Council, AIR 1971 SC 1021 at pp. 1023-1024 to highlight that it is necessary to find out whether there was a good case for the petitioner and whether he should be heard by the Court. Reference was also drawn to the decision in the case of R. L. Gupta v. Municipal Corporation, Delhi, (1973) 1 Serv LR 359: (1973 Lab IC 1253) (Delhi) to the case of State of Bihar v. Presiding Officer, Industrial Tribunal, Patna, 1977 Lab IC 803 (Pat), in the case of Sualal Yadava v. State of Rajasthan, 1977 (2) SLR 698 (2): (AIR 1977 SC 2050). Reference was also made to the observations of the Supreme Court in the case of Uttar Pradesh Co-operative Federation Ltd. v. Sunder Bros., Delhi, AIR 1967 SC 249 in aid of the proposition that the grant of relief under Art. 226 of the Constitution was discretionary and unless such discretion was exercised, the exercise of the discretion by the learned trial Judge should not be interfered with. These propositions are well settled.

12. In our opinion, the following propositions can well be applied out of the principles enunciated in different cases in the background of the facts of this case. If a person has a good case on the merit, a good case in the sense that it is otherwise entitled to be considered by the Government, then, normally his petition should be entertained and should be examined. Secondly, delay is a relevant and material factor. While the claimants and the persons who are assertive of their rights should not be disentitled to the exercise of discretion by the Courts under Art. 226 of the Constitution in order to consider whether the delay should defeat the right of the claimant, it is material to bear in mind whether by the conduct or delay in the conduct of the petitioner or the appellant, the other side, viz. the Government or the respon-

dents have been prejudicially affected or they have altered their position thereby or if the damage has been caused to the respondent or who is to pay compensation by the delay on the part of the petitioner or the claimant. Thirdly, it appears that in considering the question of delay, the merits of the case of the petitioner or claimant should be taken into consideration, the nature of it, how it has been caused and what would be the effect of delayed grant of relief. Grant of relief under Art. 226 of the Constitution is discretionary and an exercise of such discretion by the learned trial Judge should not be interfered with normally by an appellate authority. But it has also to be emphasised that the power which is given to the Court must be exercised on intelligible and rational basis and on sound legal principle. It is true that the party affected must be diligent in asserting and pursuing his claim. This right, however, is coupled with the fundamental obligation of the State to pay compensation for acquisition and requisition of the property. It is asserted that it is the citizen's duty to prefer his claim if his claim has been denied. It has, however, also to be borne in mind that in a society governed by rule of law it is the Government's primary obligation to pay for any property acquired if the parties are entitled under the provisions to the compensation. This principle is clearly enjoined by S. 8 of the Requisitioning & Acquisition of Immovable Property Act, 1952 under which the State has in this case acquired the property. It imposes a reciprocal obligation and reciprocal right that while one should be diligent in pursuing its right the other should be equally diligent in discharging its obligation. In this case the indisputable fact is that in the apportionment case, as it stands, the appellant has been declared to be entitled to a share in the 44 C. S. plots. The appellant has not been paid compensation in respect of the entirety of the said 44 Plots. The appellant might have pursued his claim more vigilantly. There is nothing to show that in 1957 when the alleged payment was made to the Hercules Trading Corporation by the State Government the appellant was aware because in the subsequent documents that we have mentioned the Government did not make any reference of this. The adjudication in the adjudication reference holding that the petitioner is entitled to compensation in 44 C. S. plots stands. If that fact stands, this cannot be consistent with the alleged payment in respect of the petitioner's

share to the Hercules Trading Corporation.

13. In the premises, we are of the view that the ground upon which the learned Trial Judge has exercised his discretion is not a proper ground, in the facts and circumstances of the case. The petitioner is certainly entitled to a proper adjudication by a proper authority on the question whether the petitioner is entitled to any compensation lawfully under the provisions of the law in respect of C. S. plots in respect of which he has been adjudged in the apportionment case as a share-holder. In the premises the order and the judgment of the learned trial Judge dated July 25, 1977 are hereby set aside. The appeal is allowed to that extent.

14. Let a writ be issued directing the respondents 1, 2, 3, 4 and 5 to issue or cause to be issued necessary notification in the manner and in accordance with the provisions of the Requisitioning and Acquisition of Immovable Property Act, 1952 in respect of the plots mentioned in paragraph 29 of the petition and in case it is determined that the petitioner is entitled to compensation in respect of the 9 C. S. plots he should be paid such compensation. As the matter has prolonged for a long time, let the notification and steps as indicated above to be taken by the respondents be issued as expeditiously as possible. After that the Arbitrator will decide the matter as expeditiously as possible. The Rule is made absolute to the extent indicated above.

15. In the facts and circumstances of the case the parties will pay and bear their own costs.

16. Learned advocate on behalf of the Union of India prays for certificate for leave to appeal to the Supreme Court. As we have determined the case on the facts and circumstances of the case and as no principle of law requires interpretation by the Supreme Court, we decline to grant any certificate.

C. K. BANERJI, J.:— I agree.

Order accordingly.

AIR 1982 CALCUTTA 314

M. M. DUTT AND MONOJ KUMAR
MUKHERJEE, JJ.

Ram Awatar Agarwal and others, Appellants v. Corporation of Calcutta and others, Respondents.

F.M.A.T. Nos. 540 and 588 of 1982, D/- 7-4-1982.

DZ/EZ/B651/82/LGC

(A) Calcutta Municipal Act (33 of 1951), S. 414 — Demolition of unauthorised construction — Construction of building up to 6th storey adjudicated as unauthorised construction — Order confirmed upto Supreme Court — Demolition order — Proceedings before Building Tribunal in respect of subsequent unauthorised construction and stay order, held, became infructuous and inoperative.

The construction of the building up to the 6th storey was adjudicated as unauthorised construction having been made in violation of the provisions of the Act and the Building Rules. It was not disputed that all further constructions upon the 6th storey are also unauthorised. The Corporation became entitled to execute the two orders of demolition regarding the 7th to 14th storeys of the building. It is true that the Building Tribunal has stayed the subsequent orders for demolition but, as the first demolition order was pending before the High Court in appeal, the Building Tribunal had no other alternative than to stay the subsequent demolition orders. But, after the first demolition order was confirmed up to the Supreme Court, the Building Tribunal will have no option in the matter, but has to vacate the stay order. The Corporation has not, however, moved the Building Tribunal for vacating the stay order but, that is not necessary. The illegality and unauthorisedness of the construction of the building up to the 6th storey having been confirmed up to the Supreme Court, the proceedings before the Building Tribunal in respect of the subsequent unauthorised constructions up to the 14th storey and the stay order have become infructuous and inoperative. The Building Tribunal will not have any jurisdiction to continue the stay order which will defeat the order of the High Court as affirmed by the Supreme Court. The Corporation, therefore, need not wait for the disposal of the appeals before the Building Tribunal or to take any step for the vacation of the stay order, for the said appeals and stay order have become infructuous and inoperative. The demolition of the building on the strength of the first order would be quite consistent with the provisions of the Act and the Building Rules. (Paras 12, 16)

(B) Calcutta Municipal Act (33 of 1951), S. 414 (1) (c) — Demolition of unauthorised construction — Fresh demolition proceeding not necessary for each addition to an unauthorised construction. (Para 16)

(C) Calcutta Municipal Act (33 of 1951), Ss. 414, 414-A — Demolition of unauthorised construction — Written notice under Sec. 414 (1) to person responsible to demolish or alteration etc. — “Person responsible”, connotations of — Occupier if can challenge order of demolition — Occupier whether entitled for opportunity of being heard. (Constitution of India, Art. 226).

It is clear from the provisions of sub-section (1) and sub-section (5) of S. 414 that the expression “person responsible” only relates to a person who has something to do with the work of construction or who is in a position to comply with an order of demolition. The said expression does not include an occupier of the unauthorised construction, who has nothing to do with the work of such construction or any addition to it. (Para 19)

The first proviso to sub-sec. (3) of Section 414 clearly provides for the service of a copy of the demolition order on the owner and the occupier and enjoins that no action shall be taken until the expiry of thirty days from the date of service of the order. The object of the service of the copy of the demolition order on the owner and the occupier is clear, namely, it will enable them to vacate the structure within thirty days of such service. (Para 22)

Section 414A confers a right of appeal to the Building Tribunal on “any person” dissatisfied with the order of demolition. The expression “any person”, will undoubtedly include an occupier. But, where an occupier is not a person responsible, he cannot challenge the demolition order on the ground that the construction is authorised and lawful as having been made in accordance with the provisions of the Act and the Building Rules. In such an appeal preferred by an occupier, other than a person responsible, the only relief that can be sought for by him is some more time so as to enable him to vacate the unauthorised structure. In any event, in the instant case, the building being admittedly unauthorised, there will be no scope for any argument in any appeal by an occupier in justification of the construction of the building. (Para 23)

An occupier not being a person responsible will have no say against an order of demolition of the unauthorised structure, except that he can ask for some time to vacate. The first proviso to sub-sec. (3) of S. 414 in effect gives a period of thirty days to the owner and the occupier. It cannot be contended that no demolition

order can be enforced without giving the occupier an opportunity of being heard. S. 414 (1) provides for the service of a notice on the person responsible so as to give him an opportunity of being heard. The appellants who are the occupiers of the building in question and having no connection whatsoever with the construction of the building have no right to claim an opportunity of being heard against the demolition orders of the building. They are only entitled to a reasonable time to shift to some other place. The first proviso to sub-section (3) of Section 414 has prescribed a period of thirty days from the date of service of a copy of the order of demolition on the occupier during which the demolition order will not be enforced. This really means that the occupier is given a reasonable time to vacate the unauthorised structure. (Paras 24, 33)

(D) Calcutta Municipal Act (33 of 1951), S. 414 (3) — Demolition order — Service on owner and occupier — Corporation not required to serve copy of demolition order on every occupier found in unauthorised building at the time of execution of order.

On a proper construction of the first proviso to S. 414 (3) it seems that after a demolition order is passed and copies of which are served on the owner and the occupiers for the time being of the unauthorised structure, the Corporation will be entitled to start the demolition work after the expiry of 30 days from the date of service of the demolition order. No further copy of the demolition order is required to be served by the Corporation on any person who comes to occupy the unauthorised structure during the period of thirty days or during the period between the service of the copies of the demolition order and the execution of the work of demolition. (Para 27)

(E) Constitution of India, Art. 226 — Relief under — Grant of relief under Art. 226 is discretionary — Nobody can claim as a matter of right that he must be given the relief he asks for in his writ petition. (Para 29)

(F) Calcutta Municipal Act (33 of 1951), Ss. 414; 392 and Sch. 16, Rr. 59, 60 — Demolition of unauthorised construction — Occupiers of unauthorised structure if can claim infringement of fundamental rights to carry on business, their personal liberty or their right to property. (Constitution of India, Arts. 19 (1) (g), 21 and 300-A).

The fundamental rights cannot be availed of in justification of an unlawful

act or in preventing a statutory authority from lawfully discharging its statutory duty. The occupation of the appellants in the unauthorised structure is unlawful in view of Rules 59 and 60 of the Building Rules read with S. 392 of the Act.

(Para 36)

A citizen whose occupation of a place is unlawful cannot claim fundamental right to carry on business in such place. Personal liberty as contemplated by Article 21 of the Constitution does not include any liberty to be in unlawful occupation. Even assuming that there is any such liberty, there cannot be any grievance of the appellants that they are being deprived of such liberty by the Corporation without following the procedure established by law. The procedure laid down in S. 414 including the first proviso to sub-sec. (3), is quite reasonable, fair and just from the point of view of Art. 21 of the Constitution and consequently, satisfies the test of reasonableness. (Para 36)

It is, however, significant to be noticed that the appellants have not challenged the constitutional validity of S. 414 on any ground. So the question of reasonableness of the procedure provided in S. 414 of the Act does not arise. Be that as it may, the Corporation has acted in accordance with the procedure prescribed by S. 414 of the Act and, accordingly, there can be no question of infringement of Art. 21 of the Constitution. The same reason applies with equal force to the contention of the appellants based on their purported right to property under Art. 300A of the Constitution. There is no merit in the contention of the appellants that their fundamental rights or their right of property are being interfered with by the Corporation. (Para 36)

(G) Calcutta Municipal Act (33 of 1951), Ss. 568 and 414 — Demolition of unauthorised construction — Occupiers of unauthorised building cannot claim compensation under S. 568.

A person to whom compensation may be given by the Corporation under S. 568 refers to a person who is a stranger to the act in respect of which a municipal authority or municipal officer exercises any of the powers vested in him by the Act. When such a person suffers damage, the Corporation may pay compensation to him, but a person who is directly or indirectly connected with an illegal act for which the municipal authority or officer has to exercise the powers under the Act, such a person cannot claim compensation on the ground that he has suffered

damage. The owner of an unauthorised structure cannot insist on payment of compensation under S. 568 on the ground that the unauthorised structure having been demolished he has suffered damage. The appellants, in the instant case, are in unlawful occupation of the unauthorised building in question. They do not come within the purview of S. 568 for the purpose of maintaining a claim for compensation for the damage that they may suffer on account of their dispossession from the unauthorised structure.

(Para 38)

Cases Referred: Chronological Paras

AIR 1981 SC 746: 1981 Cri LJ 306	36
AIR 1981 SC 2041: 1981 Cri LJ 1501	36
AIR 1978 SC 597	35, 36
AIR 1972 SC 2538	32, 33
AIR 1969 SC 267	10
AIR 1969 SC 401: 1969 Cri LJ 659	32
AIR 1965 SC 1008	24
AIR 1963 SC 1295: 1963 (2) Cri LJ 329	35, 36
AIR 1960 SC 576: 1960 Cri LJ 752	10
(1940) 1 Ch 70: 162 LT 29: 56 TLR 68, Urban Housing Co. v. Oxford City Council	31
AIR 1938 Cal 385: ILR (1938) 1 Cal 476	32
AIR 1936 PC 253 (2): 37 Cri LJ 897	10, 15
(1890) 24 QBD 712: 62 LT 783: 59 LJ QB 250, Hopkins v. Smethwick	31, 32
(1882) 7 AC 345, Benjamin Scarf v. Alfred George Jardine	17
(1863) 143 ER 414: 8 LT 278: 32 LJ CP 85, Cooper v. Wandsworth Board of Works	31, 32
S. D. Banerjee, D. Ghosh, Samarjit Gupta and Tapan Kumar Sen (in F.M.A.T. No. 540 of 1982) and D. Ghosh and O. P. Jhunjhunwala (in F.M.A.T. No. 588 of 1982), for Appellants; P. K. Ghosh, Barin Banerjee and Ajit Basu, Chief Law Officer, Corporation of Calcutta, for Respondents.	

M. M. DUTT, J.:— The appellants, who are 60 in number, have preferred this appeal against the judgment of B. C. Ray J., whereby the learned Judge dismissed the application of the appellants under Article 226 of the Constitution of India.

2. The appellants claim to be the tenants of premises No. 174, Chittaranjan Avenue, Calcutta, which is a 14-storeyed building. It is not disputed that the said building has been constructed without any sanctioned plan and in violation of the provisions of the Calcutta Municipal

Act, 1951, hereinafter referred to as the Act, and the Building Rules under Schedule XVI of the Act. Admittedly, one Smt. Durga Devi is the owner of the land, comprising the said building being premises No. 174, Chittaranjan Avenue, Calcutta. The respondent No. 11, Shyam Lal Agarwalla, took a lease of the land with an old structure standing thereon from the said Durga Devi on June 27, 1977. The old structure was demolished by him and, thereafter, he started the construction of the disputed building without any sanctioned plan and in violation of the Building Rules. The Corporation of Calcutta tried to prevent the respondent No. 11 from constructing the building in defiance of the provisions of the Act and the Rules, but all attempts of the Corporation were defeated by the respondent No. 11, and he succeeded in erecting the building up to the sixth storey. After the service of statutory notice, the Corporation started a demolition case and on May 15, 1978 the Deputy Commissioner of the Corporation passed an order of demolition.

3. The said order of demolition dated May 15, 1978 could not stop the respondent No. 11, Shyam Lal Agarwalla, from going on with further constructions up to the 10th storey and, thereafter up to the 14th storey. On April 21, 1981, the Corporation passed two other demolition orders, one for the 7th to 10th storeys and the other for the 11th to 14th stories. In the meantime, Shyam Lal Agarwalla filed an appeal before the Building Tribunal of the Corporation against the first demolition order of the building up to the sixth storey. He also filed two other appeals before the Building Tribunal against the other two demolition orders, both dated April 21, 1981, relating to 7th to 10th stories and 11th to 14th stories.

4. On May 29, 1981, the Building Tribunal dismissed the appeal of the respondent No. 11, Shyam Lal Agarwalla, filed against the first demolition order dated May 15, 1978 in respect of the demolition of the building up to the sixth storey. Against the said order of the Building Tribunal, the respondent No. 11 filed a writ application in this Court, which was dismissed by P. C. Barooah J. on June 22, 1981. Being aggrieved by the said order of Barooah J., the respondent No. 11 preferred an appeal before a Division Bench of this Court under Clause 15 of the Letters Patent. The said appeal and an application for interim order were both dismissed by the Appeal Court by its

judgment dated November 16, 1981. A special leave petition was filed by the respondent No. 11 before the Supreme Court against the judgment of the Appeal Court dismissing the appeal. On February 15, 1982, the Supreme Court summarily dismissed the special leave petition.

5. While the appeal preferred by the respondent No. 11 against the judgment of Barooah J. was pending before the Appeal Court, he filed an application before the Building Tribunal of the Corporation praying for stay of the said two demolition orders dated April 21, 1981. At the hearing of the said application for stay, it was contended on behalf of the respondent No. 11 that the issue whether the construction of the building up to the 6th storey was illegal or not was sub judice before the High Court and as such, the Tribunal should not act on the assumption that such construction up to the 6th storey was unlawful and unauthorised. Considering the said contention, the President of the Building Tribunal by his order dated September 9, 1981 directed that the execution of the said two demolition orders would remain stayed until further orders.

6. After the special leave petition filed by the respondent No. 11 against the judgment of the Appeal Court dismissing the appeal and the application for interim order relating to the demolition of the building up to the 6th storey was dismissed by the Supreme Court on February 15, 1982, the Corporation started demolition of the 14th storey of the building on February 17, 1982. On that day, the appellants moved an oral application before B. C. Ray, J. at his residence at about 8-30 P.M. and obtained an ex parte interim order of injunction restraining the Corporation from demolishing the building. Thereafter, they filed the writ petition. Ultimately, B. C. Ray, J., by his judgment dated March 1, 1982 dismissed the writ petition of the appellants. Hence this appeal.

7. In the appeals, an application for interim order of stay of the demolition of the building has been filed. We granted an ad interim order and fixed the hearing of the application. The respondents Nos. 1 to 5 including the Corporation of Calcutta have filed an affidavit-in-opposition to the application for interim order of stay. As the disposal of the application would virtually mean disposal of the appeal, by our order dated March 10, 1982 we directed the hearing of the appeal and the application together.

8. On behalf of the appellants, the appeal has been argued by Mr. Sankar Das Banerjee, assisted by Mr. Dipankar Ghosh who, to a great extent, supplemented the argument of Mr. Banerjee. The first point that has been urged on behalf of the appellants is that in view of the order dated September 9, 1981 of the Building Tribunal staying the two demolition orders of the building, one from 7th to 10th stories and the other from 11th to 14th stories, the Corporation has no authority to start demolition of the building as it did on February 17, 1982. It is not disputed that the Building Tribunal has not yet vacated the said order for stay. It is, accordingly, contended by the appellants that so long as the stay order remains operative, the action of the Corporation to commence demolition of the building will be highly illegal. In this regard, we may notice the contention of the Corporation as made in paragraph 23 of the affidavit-in-opposition affirmed by Sri Debabrata Banerjee, the City Architect and Special Officer, Multi-storeyed Building Cell of the Corporation. It has been stated in paragraph 23, *inter alia*, that the last two demolition cases need not have been initiated at all if the first demolition order dated May 15, 1978 had not been under challenge in the appeal. The subsequent demolition proceedings were initiated by way of abundant caution, so that even if the first demolition order was set aside on any ground, further unauthorized constructions made upon the existing unauthorized structure could not evade the process of law. Any construction made upon an existing unauthorized structure is *ipso facto* unauthorized, and the additional construction having merged in the original unauthorized construction is liable to be demolished along with the same. No further demolition proceeding was necessary for such additional unauthorized construction. It was only as a precautionary measure against any possible violation of the first demolition order that the subsequent demolition proceedings had to be initiated.

9. Mr. Dipankar Ghosh, learned counsel for the appellants has criticised the contention of the Corporation as made in paragraph 23 of the affidavit-in-opposition. It is submitted by him that the merger of one unauthorized construction with another is unknown in legal jurisprudence. The learned counsel submits that the Corporation cannot rely on the first demolition order dated May 15, 1978 relating to the 1st to 6th stories of the building. It is urged that in respect of

every addition to an unauthorized construction, a fresh demolition order is necessary under Section 414 (1) (c) of the Act. It is submitted that there is no substance in the contention made on behalf of the Corporation that no further demolition proceeding was necessary for the demolition of additional unauthorized constructions. The Corporation, counsel submits, is bound to obey the order of the Building Tribunal and cannot ignore such order on the ground that no further demolition order was necessary.

10. The further contention of the appellants in this regard is that the Corporation is a statutory body, and when the statute lays down the manner in which the powers conferred on it by the statute should be exercised, such powers can be exercised in that manner only and in no other manner. Reliance has been placed on behalf of the appellants on the decision of the Privy Council in *Nazir Ahmed v. King Emperor*, AIR 1936 PC 253 (2). It has been observed by the Privy Council that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all, and that other methods of performance are necessarily forbidden. The said principle has been followed by the Supreme Court in *Ballabhdas Agarwala v. J. C. Chakravarty*, AIR 1960 SC 576 and *Gujarat Electricity Board v. Girdharilal Motilal*, AIR 1969 SC 267. Relying on the above principle of law, it has been contended on behalf of the appellants that the attitude of the Corporation that in view of the first order of demolition of 1st to 6th stories of the building, there is no need for any demolition order or to start any demolition proceeding in respect of the 7th to 14th stories which are the subsequent unauthorized constructions upon the original six storeyed unauthorized construction, is illegal. It is submitted that the Corporation could only proceed for the demolition of the 7th to 14th stories in accordance with the provision of Section 414 of the Act and not in any other manner according to its sweet will.

11. The learned counsel for the appellants has also placed much reliance on the doctrine of election. It is contended that when the Corporation has taken recourse to Section 414 of the Act, it cannot give the go-by to the procedure for demolition as laid down in that section and proceed to demolish 7th to 14th stories without an order of demolition, even assuming that such an order of demoli-

tion was not necessary. In other words, the Corporation having a choice either to proceed under Section 414 or not, and it having elected to proceed under Section 414 cannot now proceed without conforming to the procedure laid down in the section.

12. We may now consider the above contentions of the appellants. We have already noted the circumstances under which the Building Tribunal granted stay of the two subsequent demolition orders dated April 21, 1981. As the first demolition order was the subject matter of an appeal pending before this Court which was filed by the respondent No. 11, the Building Tribunal, in our opinion, had some justification for granting stay of the subsequent demolition orders dated April 21, 1981. After this Court dismissed the appeal and the Supreme Court dismissed the special leave petition regarding the first demolition order dated May 15, 1978, it became final. In other words, the construction of the building up to the 6th storey was adjudicated as unauthorized construction having been made in violation of the provisions of the Act and the Building Rules. It is not disputed before us that all further constructions upon the 6th storey are also unauthorized. As soon as it is conceded, the Corporation become entitled to execute the two orders of demolition regarding the 7th to 14th storeys of the building. It is true that the Building Tribunal has stayed the subsequent orders for demolition but, as the first demolition order was pending before this Court in appeal, the Building Tribunal had no other alternative than to stay the subsequent demolition orders. But, after the first demolition order was confirmed up to the Supreme Court, the Building Tribunal will have no option in the matter, but has to vacate the stay order. The Corporation has not, however, moved the Building Tribunal for vacating the stay order but, in our opinion, that is not necessary. The illegality and unauthorizedness of the construction of the building up to the 6th storey having been confirmed up to the Supreme Court, the proceedings before the Building Tribunal in respect of the subsequent unauthorized constructions up to the 14th storey and the stay order have become infructuous and inoperative. The Building Tribunal will not have any jurisdiction to continue the stay order which will defeat the order of this Court as affirmed by the Supreme Court.

13. The contention in this regard may be examined from another point of view.

The appeals before the Building Tribunal were filed and the stay order was obtained by the respondent No. 11, Shvam Lal Agarwalla. The stay order bound the Corporation vis-a-vis the respondent No. 11 and not the appellants. The appellants, therefore, in our opinion, have no locus standi to rely on the stay order of the Building Tribunal in respect of the subsequent unauthorized constructions up to the 14th storey.

14. The criticism of the appellants of the statements of the respondents Nos. 1 to 5 in paragraph 23 of the affidavit-in-opposition is not justified. It may be that the contention of the respondents Nos. 1 to 5 that the subsequent unauthorized constructions up to the 14th storey have merged in the original unauthorised construction up to the 6th storey is not technically correct, but what has been meant by the said contention is quite clear. The subsequent unauthorized constructions being the extension of the original unauthorized construction, all these constructions up to the 14th storey should be treated as one single unauthorized construction. Indeed, the structure comprising 7th to 14th stories cannot have any separate and independent existence without the first six stories of the building. Obviously, that is what the respondents Nos. 1 to 5 went to mean by the said contention in paragraph 23.

15. There is also justification for the Corporation to take steps against the subsequent unauthorized constructions. The contention of the appellants is that the Corporation cannot give the go-by to the subsequent demolition orders which are now pending before the Building Tribunal in appeals and proceed to demolish the building from the 14th storey relying on the first demolition order which has become final and conclusive. It is submitted that the Corporation being a statutory body has to proceed in accordance with the provisions of the Act and cannot adopt a procedure of its own dehors the provisions of the Act and the Rules. It is true, as observed by the Privy Council in Nazir Ahmad's case (AIR 1936 PC 253 (2)) (supra), where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all, and that other methods of performance are necessarily forbidden. We are, however, unable to accept the contention of the appellants that the Corporation has been proceeding in violation of the provisions of the Act and the Building Rules. It has been earlier observed that

for the subsequent unauthorised constructions no demolition order was required to be made by the Corporation. The Corporation, in our opinion, can proceed on the basis of the first demolition order of the building up to the 6th storey, regard being had to the fact that the subsequent constructions are, admittedly, unauthorized having no separate and independent existence apart from the original unauthorized construction up to the 6th storey. In other words, the unauthorized constructions from 7th to 14th stories come within the purview of the first demolition order.

16. It is difficult to accept the contention of the appellants that for each addition to an unauthorized construction a fresh demolition proceeding has to be started. Section 414 does not lay down any such procedure. To accept the contention of the appellants would be to defeat the purpose for which S. 414 has been enacted by the legislature. To say that at each step of addition to an unauthorized construction a demolition proceeding has to be started would, undoubtedly, lead to a manifest absurdity completely defeating the power of the Corporation and the provisions of the Act. We, therefore, hold that the Corporation need not wait for the disposal of the appeals before the Building Tribunal filed by the respondent No. 11 or to take any step for the vacation of the stay order, for the said appeals and stay order, have become infructuous and inoperative. The demolition of the building on the strength of the first order would be quite consistent with the provisions of the Act and the Building Rules. The contention of the appellants in this regard is unsound and is rejected.

17. The doctrine of election which has been relied on by the appellants has no manner of application to the instant case. The said doctrine will apply when two courses are open to a party and, if he chooses to follow one in preference to the other, he cannot give up that course and take resort to the other. The Corporation being a statutory body, it has to act in accordance with the provisions of the statute by which it has come into existence. The provision of S. 414 does not lay down two different procedures for demolition of an unauthorized structure and does not empower the Corporation to pursue either of such procedures at its choice. There is, therefore, no question of putting the Corporation to election. As has been already observed by us, the

Corporation has proceeded in accordance with the provision of S. 414 by taking steps to demolish the unauthorized structure by virtue of the first demolition order. We do not think that the legislature can put a statutory body to election for the purpose of adopting one or other procedure for an action at its volition or choice. Such a provision would be discriminatory and ultra vires Art. 14 of the Constitution. There is, therefore, no substance in the contention made on behalf of the appellants on the basis of the doctrine of election. The decision of the Privy Council in *Benjamin Scarf v. Alfred George Jardine*, (1882) 7 AC 345, on which reliance has also been placed on behalf of the appellants has no manner of application to the Corporation, a statutory body.

18. The next point that has been urged on behalf of the appellants is based on the ground of non-service of the copies of the two subsequent demolition orders in regard to the 7th to 14th stories of the building. Before we consider the contention of the appellants on the point, we may refer to the provisions of Ss. 414 and 414A of the Act which are set out below :

"414. If the Commissioner is satisfied—

(i) that the erection of any building—

(a) has been commenced without obtaining any permission required to be obtained by or under this Act, or

(b) is being carried on or has been completed otherwise than in accordance with the particulars on which such permission was based, or

(c) is being carried on or has been completed in breach of any provision contained in this Act or in any rules or by-laws made thereunder or, of any direction or requisition lawfully given or made under this Act or under such rules or by-laws, or

(ii) that any alteration of, or addition to, any building or any other work made or done for any purpose in, to or upon any building, has been commenced or is being carried on or has been completed in breach of, or otherwise than in accordance with, any sanction granted under S. 387 in contravention of the provisions of S. 396 or 397, or

(iii) that any alteration required by any notice issued under R. 22 of Schedule XVI has not been duly made, he may, without prejudice to any action that may be taken under any other provision of this Act, by written notice require the person responsible to demolish

such erection, alteration, addition or other work or to make the alteration, as the case may be, or to show cause why such erection, alteration, addition or other work should not be demolished or the alteration should not be made.

(2) The Commissioner may issue a notice under sub-sec. (1) notwithstanding the fact that the valuation of such building has been made under Chap. XI for the assessment of the consolidated rate.

(3) If the person responsible fails—

(a) to demolish such erection, alteration, addition or other work, or to make the alteration, or

(b) to show sufficient cause to the satisfaction of the Commissioner as the case may be, why such erection, alteration, addition or other work, should not be demolished, or the alteration should not be made, the Commissioner may order—

(i) the demolition of the erection, alteration, addition or other work, or

(ii) the making of the alteration ;

Provided that a copy of the order shall be served upon the owner and the occupier thereof and no such action shall be taken until the expiry of thirty days from the date of the service of the said order.

Provided further that where the structure does not contravene any of the provisions of this Act or the Rules made thereunder, the Commissioner may, without prejudice to any other action that may be taken against the person concerned under the provisions of this Act or the Rules made thereunder, allow him to submit proper plan under the rules referred to in Sch. XVI and sanction such plan.

(4) Notwithstanding anything contained in the foregoing sub-sections, no action shall be taken under this section in respect of any erection, alteration, addition or other work executed more than twelve years before the issue of the notice under sub-sec. (1) :

Provided that the onus of proving that the work was done more than twelve years previously shall lie on the person responsible.

(5) In this section the expression "person responsible" include the owner, the occupier and any other person who executes the erection, alteration, addition or other work or who is liable to mark any alteration required by any notice issued under R. 22 of Schedule XVI.

414A. Appeal. Any person dissatisfied with the order of the Commissioner made under sub-sec. (3) of S. 414 may, within thirty days from the date of the order, present an appeal accompanied by a copy of the order of the Tribunal constituted under S. 391B, and the President of the Tribunal may stay the execution of the order for such period or periods as he may think fit or until the disposal of the appeal."

19. Section 414 provides for demolition or alteration of building work unlawfully commenced, carried on or completed. Under sub-sec. (1) of S. 414, the Commissioner may by written notice require the person responsible to demolish such erection, alteration, addition or other work or to make the alteration, as the case may be, or to show cause why such erection, alteration, addition or other work should not be demolished or the alteration should not be made. The written notice will be served only on the person responsible. Under sub-sec. (3) of S. 414, if the person responsible fails to demolish or to show sufficient cause to the satisfaction of the Commissioner, as the case may be, the Commissioner may order the demolition of the erection, alteration, addition or other work, or the making of the alteration. Under the first proviso to sub-sec. (3), a copy of the order shall be served upon the owner and the occupier thereof and no such action shall be taken until the expiry of thirty days from the date of the service of the said order. Sub-sec. (5) of S. 414 defines the expression "person responsible". It is clear from the provisions of sub-sec. (1) and sub-sec. (5) of S. 414 that the expression "person responsible" only relates to a person who has something to do with the work of construction or who is in a position to comply with an order of demolition. The said expression does not include an occupier of the unauthorized construction, who has nothing to do with the work of such construction or any addition to it. There is no dispute with regard to the above interpretation of the expression "person responsible". It is not also disputed by the appellants that none of them is a "person responsible" within the meaning of sub-sec. (5) of S. 414 of the Act. The appellants claim to be the occupiers of the building in respect of all the floors excepting the first floor of which the Rajasthan Bank of India Ltd. is the occupier. It is also claimed by the

appellants that they became tenants of the said building under the respondent No. 11, Shyam Lal Agarwalla, before the first demolition order dated May 15, 1978 was passed by the Corporation.

20. The contention of the appellants is that, as the copies of the subsequent demolition orders dated April 21, 1981 were not served on them, the action of the Corporation in proceeding to demolish the building is highly illegal and ultra vires the first proviso to sub-section (3) of S. 414 of the Act. It is submitted on behalf of the appellants that if the copies of the demolition orders had been served on them they could have preferred appeals before the Building Tribunal under S. 414A of the Act. In this connection, it may be stated that although S. 414A provides that the appeal shall be filed within thirty days from the date of the order, in our opinion, on a proper construction of the provision, it should be held that the period of thirty days should be computed not from the date of the order, but from the date of the service of the copy of the order on the owner and the occupier or from the date of knowledge of the order of such owner and occupier. It is, accordingly, submitted on behalf of the appellants that so long as the copies of the subsequent demolition orders are not served on the appellants, the Corporation has no jurisdiction to demolish the further unauthorized construction. It is urged that non-service of the copies of the demolition orders on the appellants has deprived them of their valuable right of appeal under S. 414A of the Act. On this ground, the appellants submit that the Corporation should be prohibited from demolishing the building without complying with the provision of the first proviso to S. 414 (3). The further submission of the appellants is that the copy of the demolition order has to be served not only on the occupier who was in occupation of the unauthorized structure at the time when the demolition order was passed, but also on the occupier who came later. In other words, the contention of the appellants is that whenever any occupier comes to occupy the unauthorized structure before the execution of the demolition order, the execution should be deferred until the expiry of thirty days from the date of service of the order on such occupier.

21. On the other hand, Mr. Pradip Ghosh, learned counsel appearing on behalf of the respondents Nos. 1 to 5 in-

cluding the Corporation of Calcutta submits that on a proper construction of the first proviso to sub-sec. (3) of S. 414 of the Act, it should be held that only that occupier who was there in the unauthorized structure at the time of passing of the demolition order is required to be served with a copy of the demolition order, and not any other occupier who comes to occupy the unauthorized structure subsequent to the demolition order. It is the case of the respondents Nos. 1 to 5 that at the time the first demolition order dated May 15, 1978 was passed, there was only one recorded occupier viz., Shyam Lal Agarwalla, the respondent no. 11, and a copy of the demolition order having been served on him, the corporation is not required to serve copies of the subsequent demolition orders on any other occupier or the appellants who were not in occupation of the unauthorized structure before May 15, 1978. So it is contended on behalf of the said respondents that there is no substance in the contention of the appellants about non-service on them of the copies of the demolition orders.

22. One significant fact that may be noticed is that although the appellants claim to be in occupation of the building from before the first demolition order, they have not made any grievance on account of non-service of the copies of the first demolition order. They are only insisting on the service of copies of the two subsequent demolition orders, both dated April 21, 1981. The first proviso to sub-sec. (3) of S. 414 clearly provides for the service of a copy of the demolition order on the owner and the occupier and enjoins that no action shall be taken until the expiry of thirty days from the date of service of the order. The object of the service of the copy of the demolition order on the owner and the occupier is clear, namely, it will enable them to vacate the structure within thirty days of such service.

23. It is contended on behalf of the appellants that if the copies of the demolition orders had been served on them, they could have preferred appeals under S. 414A of the Act. Section 414A confers a right of appeal to the Building Tribunal on "any person" dissatisfied with the order of demolition. The expression "any person", in our opinion, will undoubtedly include an occupier. But, where an occupier is not a person responsible, he cannot, in our opinion, challenge the demolition order on the ground that the con-

struction is authorized and lawful as having been made in accordance with the provisions of the Act and the Building Rules. In such an appeal preferred by an occupier, other than a person responsible, the only relief that can be sought for by him is some more time so as to enable him to vacate the unauthorized structure. In any event, in the instant case, the building being admittedly unauthorized, there will be no scope for any argument in any appeal by an occupier in justification of the construction of the building.

24. It is, however, submitted by the learned counsel for the appellants that as the appellants and other occupiers are persons affected, they should be given an opportunity of being heard before the enforcement of any demolition order. Section 414 including the first proviso to sub-sec. (3) does not provide for such hearing being given to the occupiers. As has been observed before, an occupier not being a person responsible will have no say against an order of demolition of the unauthorized structure, except that he can ask for some time to vacate. The first proviso to sub-sec. (3) of S. 414 in effect gives a period of thirty days to the owner and the occupier. We are unable to accept the contention of the learned counsel for the appellants that no demolition order can be enforced without giving the occupier an opportunity of being heard. The decision of the Supreme Court in the *Municipal Corporation of Greater Bombay v. Lala Pancham*, AIR 1965 SC 1008, on which much reliance has been placed by the learned counsel for the appellants, is not applicable to the facts and circumstances of the case for the reasons stated hereafter. Sub-sec. (4) of S. 354R of the Bombay Municipal Corporation Act, 1888 confers powers on the Commissioner of the Bombay Municipal Corporation to order demolition of a building in the area declared to be a clearance area. Clause (b) of sub-sec. (4) of S. 354RA provides for the service of notice, inter alia, on every person whose name appears in the assessment book as primarily liable for payment of property tax and for specifying the time within and the manner in which the objection to the demolition order can be made to the Commissioner. Clause (b) of sub-section (4) of S. 354A of the said Act does not provide for service of any notice on the tenants of the building ordered to be demolished. On a construction of the said provision and the provision of Sec-

tion 354R and in view of the fact that the tenants of the building are persons who would be affected by the order of demolition, it has been held by the Supreme Court that they are also entitled to lodge an objection to the order of demolition. Further, under the provision of S. 354R, a demolition order can be passed on the ground that the residential buildings are by reason of dis-repair not fit for human habitation or for like reason dangerous or injurious to the health of the inhabitants of the area, and that the conditions in the area can be effectively remedied by the demolition of all the buildings in the area without making an improvement scheme. When, therefore, a demolition order is passed under the said Act the tenants of the building which has been ordered to be demolished, may have many things to say against the order of demolition. It may be shown by them that the building is not unfit for human habitation or dangerous or injurious to the health of the inhabitants. In the instant case, however, the occupiers of the building in question will have nothing to say against the demolition order. If the legislature had intended to give such an opportunity to the occupier, it would have specifically provided for the same as it has provided in the case of a person responsible in S. 414 (1) of the Act. So, in our opinion, there is no question of giving the occupiers an opportunity of being heard before the enforcement of the demolition order.

25. In support of his contention that the occupiers should be given an opportunity of being heard by the Corporation before the enforcement of any demolition order, the learned counsel for the appellants has drawn our attention to clause (b) of S. 557 (1) and S. 560 (1) of the Act. Section 557 confers on the Commissioner power of entry into any premises, inter alia, for the purpose of execution of any work which is authorized by the Act. Clause (b) of S. 557 (1) provides, inter alia, that no dwelling-house and no public building or hut which is used as dwelling place shall be entered without giving the occupier at least twenty-four hours' previous written notice of the intention to make such entry. Section 560 (1) provides, inter alia, that when any requisition or order is made under the Act or any rule or by-law made thereunder, a reasonable period shall be prescribed in such notice for carrying such requisition order into effect, and a reasonable period shall be prescribed in such notice

within which any written objection thereto shall be received by the municipal authority or the municipal officer issuing the notice. We fail to understand how these provisions are of any help to the contention of the appellants. So far as S. 557 (1) (b) is concerned, it is conceded by Mr. Pradip Ghosh, learned counsel for the respondents Nos. 1 to 5 that at the time of actual demolition of the building in enforcement of the demolition order, written notice mentioned in S. 557 (1) (b) will be given to the occupiers of the dwelling units in the building. He, however, submits and, in our opinion, rightly that S. 560 (1) has no bearing on the question with which we are concerned. Section 560 (1), as has been noticed already, only provides for specifying a reasonable period in the notice for carrying the requisition or order into effect and for the submission of any written objection thereto. S. 560 (1) has, therefore, no manner of application to the facts and circumstances of the instant case. The contention of the appellants, in our opinion, is not tenable and is rejected.

26. In this connection, we may consider one contention of Mr. Pradip Ghosh, learned counsel for the respondents Nos. 1 to 5. He has drawn our attention to Rules 59 and 60 of the Building Rules contained in Sch. XVI of the Act. R. 59 directs the owner of a building to send to the Commissioner a written notice by registered post with acknowledgment due informing him of the fact of the completion of the building; Rule 60 provides for the issuance of an occupancy certificate by the Commissioner after he is satisfied on inspection that the building has been constructed strictly in accordance with the Building Rules. Section 392 of the Act enjoins that no new building or part of a new building shall be occupied for use until and unless a certificate of completion of the building or that part of it has been submitted to the Corporation. The cumulative effect of S. 392 and Rules 59 and 60 is that so long as the Corporation does not issue an occupancy certificate no one can occupy the building. It is not disputed that no notice was served by the respondent No. 11 on the Commissioner as to the completion of the building and, consequently no occupancy certificate has been issued. Indeed, there is no question of the granting of any occupancy certificate inasmuch as the building has been constructed in defiance of the provisions of the Act and the Build-

ing Rules. The learned counsel for respondents Nos. 1 to 5 submits that occupation of the appellants and of is wholly illegal and unlawful. It contended by him that the first proviso to S. 414 (3) does not contemplate service of the copy of the order of demolition on an occupier whose occupation is unlawful. We are unable to accept this contention. The demolition order can be passed only in respect of unauthorized construction. When a construction is unauthorized, no occupancy certificate can be issued by the Corporation under Rule 60 of the Building Rules and, accordingly, the occupation of occupier of such construction will be unlawful. In spite of that, the first proviso to S. 414 (3) provides for the service of a copy of the demolition order on such occupier. As has been already observed the first proviso, in effect, gives the owner and the occupier of an unauthorized construction in respect of which demolition order has been passed, a period of thirty days to vacate the same so that the demolition order can be enforced. It is, therefore, not correct to say that because the occupation of appellants of the building in question is unlawful the Corporation is not required to serve the copies of the demolition orders on them under the first proviso to S. 414 (3) of the Act.

27. Now the question is whether every and every occupier who is found in unauthorized building at the time of execution of the demolition order should be served with a copy of the order. If the contention of the appellants that any person comes to occupy the building before the execution of the demolition order, he has to be served with a copy of the order and, consequently execution will have to be deferred for thirty days as provided in the first proviso to S. 414 (3) of the Act. This will mean that every time the Corporation proceeds to demolish the building, if a new occupier is found in the building, he will have to be served with a copy of the demolition order and the work has to be postponed for thirty days from the date of service. In our opinion, if such a contention is accepted, it will defeat the purpose and object of S. 414 of the Act. In that case a demolition order may be defeated by the owner of an unauthorized building structure or a person responsible by introducing a new occupier each time. If the Corporation starts the demolition work, a statutory provision should not be

interpreted in such a way as will render it nugatory. The interpretation should be such as to make the provision workable and consistent with the object and purpose for which it has been enacted. On a proper construction of the first proviso to S. 414 (3) of the Act, it seems that after a demolition order is passed and copies of which are served on the owner and the occupiers for the time being of the unauthorized structure, the Corporation will be entitled to start the demolition work after the expiry of thirty days from the date of service of the demolition order. No further copy of the demolition order is required to be served by the Corporation on any person who comes to occupy the unauthorized structure during the period of thirty days or during the period between the service of the copies of the demolition order and the execution of the work of demolition. Any other interpretation of the first proviso to S. 414 (3) of the Act will frustrate the very object and purpose of the provision and the intention of the legislature. In other words, the provision of S. 414 will be rendered inoperative.

28. The appellants have not admittedly been served with the copies of the demolition orders as mentioned in the first proviso to S. 414 (3) of the Act. It is urged on behalf of the appellants that, in any event, the Corporation cannot execute the demolition work without serving copies of such orders. We have already discussed the object of service of the copies of the demolition order on the occupiers. It has been held by us that the only object is to give the occupiers a reasonable time to vacate the unauthorized structure. The appellants are quite aware of the demolition orders that have been passed and they have got plenty of time to vacate the building. For the last few months litigations are going on and from time to time, there had been publications in almost all the newspapers of the city of the reports of Court proceedings. Indeed, on Feb. 17, 1982 the Corporation actually started the demolition of the 14th Storey. The appellant No. 60 also filed a suit in the City Civil Court, Calcutta on Feb. 5, 1982. From the above facts, it can be reasonably inferred that all the other occupiers of the building are quite aware of the demolition orders and they have got plenty of opportunity to vacate the building. The question, therefore, is whether the Corporation shall be directed to serve on the appellants and other occupiers of the building copies of the demolition orders. In

the circumstances stated above and, in view of the object of the service of the copy of the demolition order, we do not think the Corporation should be directed to serve copies of the demolition orders on the occupiers of the building.

29. It is contended on behalf of the appellants that the occupiers have a statutory right to claim service of the copies of the demolition orders on them. Technically it may be correct, but the grant of any relief under Art. 226 of the Constitution is discretionary with this Court. Nobody can claim as a matter of right that he must be given the relief he asks for in his writ petition. After considering the facts and circumstances of the case, we are of the view that it is a fit case where we should not exercise our discretion by issuing a mandate on the Corporation to serve copies of the demolition orders on the occupiers of the building.

30. The next contention of the appellants is that even assuming that the Act does not make any provision for giving an opportunity of being heard, rules of natural justice require such opportunity being given to the occupiers of an unauthorized structure before the structure can be demolished. To substantiate this contention, the learned counsel for the appellants has placed reliance on some English and Indian decisions which will be stated presently.

31. In *Cooper v. Wandsworth Board of Works*, (1863) 143 ER 414, the 76th Section of the Metropolis Local Management Act empowers the District Board to alter or demolish a house, where the builder has neglected to give a notice of his intention to build seven days before proceeding to lay or dig the foundation. Willes, J. observes "I apprehend that a tribunal which by law invested with power to affect the property of one of Her Majesty's subjects is bound to give such subject an opportunity of being heard before it proceeds : and that that rule is of universal application, and founded upon the plainest principles of natural justice." The principles of law laid down in *Cooper's* case has been followed in *Hopkins v. Smethwick*, (1890) 24 QBD 712, where it has been observed by Wills, J. that in condemning a man to have his house pulled down, a judicial act is as much implied as in fining him 5l; and as the local board is the only tribunal that can make such an order, its act must be a judicial act, and the party to be affected should have a

notice given him; and there is no notice, unless notice is given of time when, and place at which the party may appear and show cause. The decisions in Cooper's case and in Hopkings's case have been followed in *Urban Housing Co. v. Oxford City Council*, (1940) 1 Ch. 70. It has also been followed by the House of Lords in *Ridge v. Baldwin*, 1964 A. C. 40, where Lord Morris observes that it is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charge or allegation or suggestion which he has to meet.

32. So far as the Indian decisions are concerned, the learned counsel for the appellants has placed reliance on a decision of Panckridge, J., in *Indumati Debi Chaudhuri v. Bengal Court of Wards*, ILR (1938) 1 Cal 476 : (AIR 1938 Cal 385), where the learned Judge, relying on the principles of law in Cooper's case and Hopkings's case and some other English decisions, held that the making of an order of the Court of Wards declaring that a female was incompetent to manage her property without notice to or hearing the person affected by it constituted a breach of the principles of natural justice and was in excess of any jurisdiction conferred by the Court of Wards Act and the Court of Wards should be restrained from acting under it. Now we may refer to two Supreme Court decisions which have been relied on by the appellants. In *State Bank of India v. Rajendra Kumar Singh*, AIR 1969 SC 401, the High Court directed disposal of property consisting of some currency notes under S. 517 read with Section 520 of the Criminal Procedure Code without giving notice to the person to whom the property was directed to be delivered by the Sessions Court. In setting aside the order of the High Court, the Supreme Court observed that though the statute, i.e., the Criminal Procedure Code was silent and did not expressly require issue of any notice, there was in the eye of law a necessary implication that the parties adversely affected should be heard before the Court makes an order of return of the seized property. In *State of J & K v. Haji Vali Mohammed*, AIR 1972 SC 2538, the Municipality sought to demolish the structures in question which were in a dilapidated and dangerous condition by serving

24 hours' notice u/s. 129 of the Jammu & Kashmir Municipal Act. It was held by the Supreme Court that the time of 24 hours which was given for demolition was so short that it could not be held to be a reasonable time. The respondents had to make some arrangements for removal of either their goods or business equipment or whatever articles that were lying in these buildings or structures. So it was held that notices issued to the respondents did not comply with the provision of S. 238 of the said Act, and that the time which was granted was so short that it was not possible for the respondents either to comply with the notices or to take any effective steps in the matter of filing any appeal or revision to the appropriate authorities.

33. We have already discussed above that S. 414 (1) provides for the service of a notice on the person responsible so as to give him an opportunity of being heard. The appellants who are the occupiers of the building in question and having no connection whatsoever with the construction of the building have no right to claim an opportunity of being heard against the demolition orders of the building. They are only entitled to a reasonable time to shift to some other place. The first proviso to sub-sec. (3) of S. 414 has prescribed a period of thirty days from the date of service of a copy of the order of demolition on the occupier during which the demolition order will not be enforced. This really means that the occupier is given a reasonable time to vacate the unauthorized structure. In the circumstances, we do not think that the above decisions cited on behalf of the appellants are of any help to them. In the Supreme Court decision in *Haji Vali Mohammed's case* (supra) 24 hours' notice for the purpose of vacating the buildings or structures in question were considered to be not reasonable. But, in the instant case, the first proviso to sub-sec. (3) of S. 414 of the Act gives to the occupier a period of thirty days to leave the building or structure in question. So we do not find any merit in the contention of the appellants based on the ground that the principles of natural justice have been violated.

34. In challenging the action of the Corporation in the enforcement of the demolition order, the appellants also take resort to fundamental rights guaranteed by the Constitution. It is submitted on behalf of the appellants that the action of the Corporation interferes with

their fundamental rights to carry on business under Art. 19 (1) (g) and their personal liberty under Article 21 of the Constitution of India. They also rely on right to property under Art. 300A of the Constitution. It is contended that as some of the appellants have been carrying on their business in the building in question, the Corporation cannot interfere with their fundamental right to carry on business save in accordance with law. Further, it is submitted that the demolition of the building will deprive them of their personal liberty and, as such, the action of the Corporation in enforcing the demolition order is ultra vires Art. 21 of the Constitution of India unless such demolition is carried out according to the procedure established by law.

35. The further contention of the appellants is that they are not trespassers, but they have lawfully acquired their tenancy right in the building, and that such right to property of the appellants cannot be interfered with save by authority of law as provided in Art. 300A of the Constitution. In support of the above contentions, the appellants have placed reliance on the decision of the Supreme Court in *Kharak Singh v. State of U. P.* AIR 1963 SC 1295. In that case, the constitutional validity of Regn. 236 of U. P. Police Regulations came up for consideration before the Supreme Court. By virtue of the said regulation, the petitioner was subjected to surveillance by the police. The police constable entered his house, knocked and shouted at his door, waked him up during the night and disturbed his sleep. On a number of occasions the police had compelled him to get up from his sleep and to accompany them to the police station to report his presence. The majority view of the Supreme Court was that Regulation 236 (b) which authorizes "domiciliary visits" was ultra vires Art. 21 of the Constitution and was struck down. Reliance has also been placed on behalf of the appellants on the decision of the Supreme Court in *Smt. Maneka Gandhi v. Union of India*, AIR 1978 SC 597. In that case, the petitioner's passport was impounded. It was held by the Supreme Court that there was no good reason for impounding the passport of the petitioner and, furthermore, the petitioner had no opportunity of showing that the grounds for impounding it, either did not exist or had no bearing on public interest.

36. We are unable to accept the above contentions of the appellants. The fundamental rights cannot be availed of in justification of an unlawful act or in preventing a statutory authority from lawfully discharging its statutory duty. The occupation of the appellants in the unauthorized structure is unlawful in view of Rules 59 and 60 of the Building Rules read with S. 392 of the Act. In *Kharak Singh's* case or in *Maneka Gandhi's* case referred to above, it has not been laid down by the Supreme Court that a citizen can conveniently rely on his fundamental right in defending his illegal act. A citizen whose occupation of a place is unlawful cannot claim fundamental right to carry on business in such place. Personal liberty as contemplated by Art. 21 of the Constitution does not include any liberty to be in unlawful occupation. Even assuming that there is any such liberty, there cannot be any grievance of the appellants that they are being deprived of such liberty by the Corporation without following the procedure established by law. The procedure laid down in S. 414 including the first proviso to sub-sec. (3), is quite reasonable, fair and just from the point of view of Art. 21 of the Constitution and, consequently, satisfies the test of reasonableness, as laid down by the Supreme Court in *Francis Coralie v. Administrator, Union Territory of Delhi*, AIR 1981 SC 746 and in *Nand Lal Bajaj v. State of Punjab*, AIR 1981 SC 2041 relied on by the appellants. It is, however, significant to be noticed that the appellants have not challenged the constitutional validity of S. 414 on any ground. So the question of reasonableness of the procedure provided in Section 414 of the Act does not arise. Be that as it may, the Corporation has, in our opinion, acted in accordance with the procedure prescribed by S. 414 of the Act and, accordingly, there can be no question of infringement of Art. 21 of the Constitution. The same reason applies with equal force to the contention of the appellants based on their purported right to property under Art. 300A of the Constitution. In our opinion, there is no merit in the contention of the appellants that their fundamental rights or their right of property are being interfered with by the Corporation, and we overrule the same.

37. Lastly, it is argued on behalf of the appellants that before enforcing the order of demolition, the Corporation should have provided the appellants with alternative accommodation. It is submit-

ted that although the Corporation has the power to demolish an unauthorized structure, such power is coupled with a duty, that is to say, the duty to provide alternative accommodations or, at least, to grant compensation to the occupiers of the building, who will be dispossessed therefrom. This argument seems to be an argument of despair. The Act does not make any provision for alternative accommodation. The Corporation is a statutory body and it has to act in accordance with the provisions of the statute. As the Act does not make any provision for alternative accommodation, the Corporation has no right to provide alternative accommodation to the occupiers, who will be displaced from the said building.

38. As regards the claim of the appellants to compensation, our attention has been drawn to Section 568 of the Act which provides, *inter alia*, that the Corporation may pay compensation to any person who sustain damage by person of the exercise of any of the powers vested by the Act, or by any rule or by-law, in any municipal authority or in any municipal officer or servant. A person to whom compensation may be given by the Corporation under S. 568 refers to a person who is a stranger to the act in respect of which a municipal authority or municipal officer exercises any of the powers vested in him by the Act. When such a person suffers damage, the Corporation may pay compensation to him, but a person who is directly or indirectly connected with an illegal act for which the municipal authority or officer has to exercise the powers under the Act, such a person cannot claim compensation on the ground that he has suffered damage. The owner of an unauthorized structure cannot insist on payment of compensation under S. 568 on the ground that the unauthorized structure having been demolished he has suffered damage. The appellants are in unlawful occupation of the unauthorized building in question, and in our opinion, they do not come within the purview of S. 568 for the purpose of maintaining a claim for compensation for the damage that they may suffer on account of their dispossession from the unauthorized structure. There is, therefore, no substance in the above contention of the appellants.

39. It is pointed out in the letter of the Chief Law Officer of the Calcutta Corporation dated December 31, 1981 to the respondent No. 11, Shyam Lal Agarwalla (Annexure H/1 to the affidavit-in-

opposition) that the building is standing practically on the support of the two adjoining premises on both sides of it and it may fall to the ground at any moment on the slightest change in the soil structure in the foundation and, as such, it is unsafe. Further it is pointed out that besides the building being insecure and exposed to fire-hazard, it is really a death-trap for the inmates of the building as well as the passers-by. Cracks have already developed in the adjoining premises and the building itself may crumble down at any moment like a pack of cards. It appears also from the report of Shri R. S. Gupta, the Adviser (Fire), Government of West Bengal, that there is no fire detecting or extinguishing system in the building, as also no Fixed Fire-Fighting Installation, in the form of Rising Mains, being kept charged with water by means of pump, for all time, with Hydrant outlets/hose reels connecting all the floors. There are also no portable fire extinguisher for first-hand fire fighting on any of the floors. The existing water tank on the ground floor with a small electrical pump as was found, is totally insufficient to meet the fire-fighting requirements. There is also no alternative means of escape in the building, in the form of an additional stair-case, connecting all the floors, as also no "Fire Lift" for use by Fire Services Personnel, in the event of any fire, with the exception of only one stair-case and lift, located at one end on the southern side. The occupants including those in the adjacent buildings are likely to be affected by hot air, smoke and heat in case of a fire. It has been observed that the building is considered to be unsafe.

40. It, therefore, appears that not only that the building was constructed in violation of the provisions of the Act and the Building Rules, it is also unsafe for human habitation.

41. After considering the facts and circumstances of the case and the submissions made on behalf of the parties, we are of the view that there is no merit in this appeal. The appeal, therefore, fails and is dismissed. There will, however, be no order as to costs. No order need be made on the application for interim order which shall be deemed to have been disposed of along with the appeal.

42. We, however, direct that the Corporation shall not enforce or execute the demolition order for a period of thirty days from date so as to enable the owner and the occupiers of the building to

vacate the same. On the expiry of the period of thirty days the Corporation will be at liberty to execute the demolition order.

F.M.A.T. No. 588 of 1982.

43-44. In this appeal, the same arguments have been made by Mr. Dipankar Ghosh, learned counsel for the appellant, the Bank of Rajasthan Ltd., and by Mr. Pradip Ghosh, learned counsel for the respondents Nos. 1 to 4 including the Corporation of Calcutta as in Ram Awtar Agarwal v. The Corporation of Calcutta, F.M.A.T. 540 of 1982. For the same reasons as in Ram Awtar Agarwal's appeal, this appeal is dismissed. There will, however, be no order for costs.

45. The respondents Nos. 1 to 4 shall not execute the order for demolition for thirty days from date so as to enable the appellant to vacate the first floor of the building in question being premises No. 174, Chittaranjan Avenue, Calcutta.

MONOJ KUMAR MUKHERJEE, J.:—
I agree.

Appeals dismissed.

AIR 1982 CALCUTTA 329

S. G. GHOSE, C. J. AND R. N. PYNE, J.

Ritu Sachdev, Appellant v. Anita Jindal and others, Respondents.

Appeal No. 154 of 1980, D/- 25-2-1982.

(A) Letters Patent (Cal.) Cl. 15—Appeal — Plaintiff besides seeking amendment of plaintiff praying for joinder of new party and grant of fresh leave under Cl. 12 — Order be appealable.

Where the plaintiff apart from seeking amendment of the plaintiff in a suit for partition and administration of the estate left by her father, also prayed for joinder of a new party and for grant of fresh leave under Cl. 12, the order rejecting the prayer would not be an order in amendment of the plaintiff simpliciter but it also involved the question of refusal of grant of fresh leave under Cl. 12 and, as such, the question of procedure was mixed with the question of jurisdiction and hence the order would be appealable. Case law discussed. (Para 12)

If an order allowing the amendment of plaintiff in a suit instituted with leave under Cl. 12 is an order of amendment simpliciter such an order is not an appeal-

able order. But where the question is further complicated by the fact that fresh leave under Cl. 12 was granted in respect of the amendment, as such leave was found necessary in view of the provisions of Cl. 12, the question of amendment of the pleading and the question of leave under Cl. 12 are inter-connected or in other words when the question of procedure and the question of jurisdiction are mixed up and one cannot be dissociated from the other, the order dealing with such question of procedure and the jurisdiction is an appealable order and it is a judgment within the meaning of Cl. 15.

(Para 10)

(B) Letters Patent (Calcutta), Cl. 12 — Amendment of plaintiff — Permissibility. Decision of single Judge D/- 19-2-1980, Reversed. (Civil P. C. (1908), O. 1, R. 10 and O. 6, R. 17).

Where an heiress of the deceased governed by Mitakshara, in a suit for partition, sought amendment of plaintiff to have dissolution of partnership owned by the deceased and also the transfer of tenancy rights in properties owned by the deceased declared void, the amendment could not be disallowed on the ground that the other heiresses were not interested parties as they themselves were parties to such dissolution and transfer. Decision of single Judge, D/- 19-2-1980, Reversed.

(Para 16)

If the deed of dissolution of partnership of firm of which the deceased during his lifetime was the sole owner and the transfer of the tenancy rights in respect of the immovable properties of the deceased in favour of the added new party were set aside, the same would be in its entirety and not merely in respect of the concerned heiress' share therein. That being the position, it could not be said that the other co-sharers were not interested in the dispute concerning the said tenancy rights. Therefore if the concerned heiress' challenge succeed, all the co-sharers would be interested in the tenancy right of the properties. (Para 16)

Further, inasmuch as by any decision on the question regarding the validity of the transfer of the tenancy rights, the transferee who was sought to be added as new party would be affected; he would be a proper party if not a necessary party, to the suit. (Para 17)

Cases Referred: Chronological Paras

AIR 1963 Cal 337	8, 10
AIR 1958 Cal 710	7, 11

S. K. Gupta, for Appellant; B. N. Sen, for Respondents.

R. N. PYNE, J.— This appeal is directed against the judgment and order dated 19th Feb., 1980 of Mrs. P. Khastgir, J. dismissing the appellant's application made in the court of the first instance for amendment of the plaint filed in Suit No. 576 of 1979 (hereinafter referred to as 'the said suit') and for addition of party. In the said application the appellant also prayed for fresh leave under Clause 12 of the Letters Patent against the added defendant.

2. The appellant as the plaintiff in the court of the first instance filed the said suit for partition and declaration of the shares in the estate of her father, Baldev Raj Sachdev, as also for a declaration that the partnership business of Printers Emporium, created by the Deed dated 1st September, 1975 was illegal, void and not binding on the plaintiff and for other reliefs as would fully appear from the plaint.

3. The appellant's father, Baldev Raj Sachdev, (hereinafter referred to as 'the said deceased') died on the 17th August, 1975 leaving his widow Bimala Sachdev, the respondent No. 2 in this appeal and three daughters namely, the appellant Ritu Sachdev, the respondent No. 1 Anita Jindal nee Sachdev and the respondent No. 3 Vanita Kuckreja nee Sachdev as his heiresses and legal representatives under the Hindu Law. According to the appellant, she was born on 21-10-60 and, therefore, was a minor at the time of the death of her father, the said deceased. In the Schedule to the plaint, the appellant has stated various properties belonging to and comprising the estate of the said deceased. They are premises No. 53, Block 'D', New Alipore, Calcutta, monthly rent due and payable by the tenants of the said property, tenancy of the shop-room at premises No. 14/2, Old, China Bazar Street, Calcutta and of the godown at No. 22, Sukeas Lane, Calcutta and No. 52A, Block 'D', New Alipore, Calcutta, assets and stock-in-trade of the firm of Printers Emporium of which the said deceased during his lifetime was the sole owner, several cars and other furniture and fixtures as fully stated in the said schedule to the plaint. The said premises Nos. 14/2, Old China Bazar Street and 22, Sukeas Lane are within the original side jurisdiction of this Court. New Alipore, properties are outside the said jurisdiction. In the plaint the plaintiff has claimed for partition of the proper-

ties left by the said deceased. It is also stated in the plaint that after the death of the said deceased at the instance of defendant No. 1 Anita Jindal and her husband one Satish Kant Jindal, the said business of the Printers Emporium was converted into a partnership with three partners namely, the appellant's mother and her two sisters. The appellant was admitted to the benefit of the said partnership. In the plaint, the appellant has claimed a declaration that the said partnership namely Printers Emporium created by the deed dated 1st September, 1975 and the power of attorney of the same date given to the husband of the respondent No. 1 are illegal, void and not binding on the plaintiff or the estate of the said deceased. The said suit was filed after obtaining leave under Cl. 12 of the Letters Patent. Leave under Cl. 12 of the Letters Patent was obtained on the basis that the immoveable properties being the tenancy rights in respect of the said shoproom and godown at No. 14/2, Old China Bazar Street and No. 22, Sukeas Lane respectively are within the original side jurisdiction of this court.

4. It appears that in Dec. 1979 the respondent No. 1, Anita Jindal (defendant No. 1 in the said suit) made an application, inter alia, for revocation of leave granted under Cl. 12 of the Letters Patent to institute the said suit. Thereafter, on or about 18th Feb., 1980 the appellant made the application out of which the present appeal has arisen. In the petition of the application the appellant has made the following prayers:—

"(a) Leave be given to the petitioner to amend the cause title and body of the plaint herein in the manner as shown in Red Ink in a copy of the plaint annexed to the petition and marked 'B';

(b) the amendments in pursuance of the order to be made directed to be incorporated in the plaint within a fortnight from the date of the filing of order to be made herein;

(c) the register of the suit be also amended accordingly;

(d) fresh leave under Cl. 12 of the Letters Patent be granted;

(e) leave be given to reverify the amended plaint;

(f) that Writ of Summons be issued for service upon the added defendant and the same is made returnable by nine weeks from the date of issue and Sheriff of Calcutta do accept the same for service if lodged with him within 14 days from the date of issue;

(g) that the other defendants be given liberty to file Written Statement within such time or this Hon'ble Court fix after service of the amended copy of the plaint upon them;

(h) such further order or orders be made or directions given as this Hon'ble Court may deem fit and proper."

5. From the proposed amendment indicated in the plaint as will appear from pages 34-36 of the Paper Book it appears that the appellant has challenged a deed of dissolution dated April 1, 1978 whereby partnership of Printers Emporium was dissolved. By the said deed the assets and properties of the said firm of Printers Emporium including the tenancy right of the said shoproom were conveyed to Satish Kant Jindal the husband of the respondent No. 1. The appellant has further challenged the purported transfer of the tenancy of the godown in premises No. 22, Sukeas Lane, Calcutta in the name of the said Satish Kant Jindal. The appellant has also challenged the misappropriation of various money belonging to the said firm by the husband of the respondent No. 1. By the amendments the appellant has sought to introduce two further prayers in the plaint as follows:—

"(cc) A declaration that the purported Deed of Dissolution of Partnership dated April 1, 1978 is non-genuine, illegal, void and not binding on the plaintiff and/or the estate of Baldev Raj Sachdev and the same be cancelled and/or rescinded;

(ccc) A declaration that the purported transfer of tenancy in respect of the godown at No. 22, Sukeas Lane, Calcutta in favour of the defendant No. 4 is illegal, fraudulent, void and of no effect and not binding on the plaintiff or the estate of Baldev Raj Sachdev and the same be set aside."

6. It, therefore, appears that by the said application the appellant has prayed for amendment of the plaint, addition of said Satish Kant Jindal as a party to the said suit as also for fresh leave under Cl. 12 of the Letters Patent.

7. The said application was heard by Mrs. P. Khastgir, J. and Her Lordship by the judgment and order dated 19th Feb., 1980 dismissed the said application. It appears that Her Lordship mainly relying on the case of Ranjit Kumar Pal Chowdhury v. Murari Mohan Pal Chowdhury, AIR 1958 Cal 710 and an unreported judgment of a Division Bench of this Court in the case of Promode Kumar Jalan and Shyam Lal Jalan held that so far as the tenancy right in respect of the two premises within the jurisdiction of this court

was concerned, only the appellant and the proposed defendant No. 4, Satish Kant Jindal, would be entitled to and that all the co-sharers of the estate of the said deceased would not be entitled to the same and in that view of the matter Her Lordship dismissed the said application.

8. Mr. S. K. Gupta, the learned counsel appearing on behalf of the appellant, has submitted that in the present application the appellant has prayed not only the amendment of the plaint but also addition of a new party and for grant of fresh leave under Cl. 12 of the Letters Patent. Relying on a decision reported in the case of Daulatram Agarwalla v. Champalal Jugraj, AIR 1963 Cal 337 it was submitted that inasmuch as in the instant case the appellant has prayed for fresh leave under Cl. 12 of the Letters Patent the impugned order is appealable. Mr. Gupta has further submitted that the plaintiff has challenged the deed of dissolution dated April 1, 1978 and if the challenge succeeds and the deed is set aside then that would be with regard to all the co-sharers and not in respect of the appellant's share or interest only in the property in question. In this connection reliance was placed on a passage in Mullah's Hindu Law, (14th Edition) Article 269, page 337. Mr. Gupta has also submitted that, in the instant case, as leave under Cl. 12 of the Letters Patent has been revoked the appellant cannot agitate the question of dismissal of the prayer of the amendment in an appeal from any decree in the suit.

9. Mr. B. N. Sen, learned counsel appearing for Satish Kant Jindal (Proposed defendant No. 4 in the suit) has submitted that by the proposed amendment the appellant has sought to introduce an inconsistent case. It has been further submitted that if the said deed of dissolution is set aside it would be only with respect of appellant's interest in the said business and not in respect of the interest of other parties to the said deed because they have executed the said deed and obtained benefit thereunder. Therefore, excepting the appellant all other co-sharers cannot be said to have any interest in the said business of Printers Emporium of which at present Satish Kant Jindal is the sole owner. So far as the disputes regarding the tenancy rights of the said shoproom and the said godown are concerned the appellant and Satish Kant Jindal only are the interested parties. Other co-sharers have no interest in the

said tenancy rights and are not interested in the dispute regarding the same. It is also submitted that a new cause of action is sought to be introduced by the proposed amendment.

10. In the case of *Daulat Ram v. Champa Lal*, AIR 1963 Cal 337 it has been held that if an order allowing the amendment of plaint in a suit instituted with leave under Cl. 12 of the Letters Patent is an order of amendment simpliciter such an order is not an appealable order. But where the question is further complicated by the fact that fresh leave under Cl. 12 of the Letters Patent was granted in respect of the amendment, as such leave was found necessary in view of the provisions of Cl. 12 of the Letters Patent, the question of amendment of the pleading and the question of leave under Cl. 12 of the Letters Patent are inter-connected or in other words when the question of procedure and the question of jurisdiction are mixed up and one cannot be dissociated from the other, the order dealing with such question of procedure and the jurisdiction is an appealable order and it is a judgment within the meaning of Cl. 15 of the Letters Patent.

11. In the case of *Ranjit Pal Chowdhury v. Murari Mohan Pal Chowdhury* AIR 1958 Cal 710 relying on the earlier decisions it was observed as follows:—

"The true meaning of this rule is not that no property could be brought into hotchpot in which all the defendants do not claim interest but that no property can be so brought in which all the co-sharers do not claim interest. In a partition suit the defendants may include co-sharers as well as strangers. It is not the law that those properties in which all the defendants do not claim interest have to be left out in a suit for partition but it is the law that only those properties have to be left out which upon the allegations in the plaint, are not held in common by the co-sharer defendants. Otherwise no question of title or benami could be investigated in a suit for partition where as it is the settled law that such question can and should be decided in a partition suit"

In the unreported decision in the case of *Promode Kumar Jallan v. Shyam Lal Jallan* the principle laid down in AIR 1958 Cal 710 was followed. In that case all the defendants were not interested in one of the two properties which was outside the jurisdiction although the said property along with one property within

the jurisdiction were joined for partition. In view of the aforesaid fact the court held that since all the co-sharers were not interested in the property outside the jurisdiction, the same could not be joined along with the property within the jurisdiction and on that basis leave under Cl. 12 of the Letters Patent was revoked.

12. In the instant case, the appellant in her application made in the court of the first instance, apart from amendment of the plaint, also prayed for joinder of a new party namely, the said Satish Kant Jindal and for grant of fresh leave under Cl. 12 of the Letters Patent. Therefore, the order appealed against is not an order for amendment of the plaint simpliciter but it also involves the question of refusal of grant of fresh leave under Cl. 12 of the Letters Patent. Hence the question of procedure is mixed with the question of jurisdiction. In the aforesaid view of the matter we are of the opinion that the impugned order is appealable.

13. By the proposed amendment, the appellant has sought to challenge the deed of dissolution dated April 1, 1978 whereby the firm of Printers Emporium was dissolved and all its assets and stock-in-trade (including the tenancy right of the shoproom at No. 14/2, Old China Bazar Street) were transferred to Satish Kant Jindal, the proposed defendant No. 4 as also the transfer of tenancy right of the godown at No. 22, Sukeas Lane. The appellant's allegations is that the properties belonging to the estate of the said deceased were wrongfully and illegally transferred and/or conveyed to Satish Kant Jindal, the proposed defendant No. 4.

14. The question, therefore, is if the said deed of dissolution is declared void and the transfer of the tenancy rights in respect of the said shoproom and the godown are set aside, whether that would affect only the appellant's share or the shares of all the co-sharers of the estate of the said deceased.

15. In *Mulla's Hindu Law*, 14th Edition, Article 269 page 337 it is observed that where a member of joint family governed by Mitakshara law as administered in Bengal, Bihar and Uttar Pradesh sells or mortgages the joint family property or any portion thereof without the consent of his coparcener, the alienation is liable to be set aside wholly unless it is for legal necessity or for payment by father of an antecedent debt and it does not pass the share even of the alienating coparcener. The result is that if the alie-

nation is neither for legal necessity nor for payment of the antecedent debt the other coparceners are entitled to a declaration that the alienation is void in its entirety.

16. Therefore, it would appear that if the deed of dissolution and the transfer of tenancy rights in respect of the said shoproom and the said godown are set aside the same would be in its entirety and not merely only in respect of the plaintiff's 1/4th share therein. That being the position, it cannot be said that the other co-sharers are not interested in the dispute concerning the said tenancy rights. Therefore, if the appellant's challenge succeeds all the co-sharers would be interested in the tenancy right of the shoproom and the godown.

17. Inasmuch as by any decision on the question regarding the validity of the transfer of the tenancy rights Satish Kant Jindal would be affected; he is a proper party, if not a necessary party, to the suit.

18. For all the reasons stated hereinbefore, in our view, the appeal should be allowed and the same is allowed. There will be an order in terms of clauses (a), (b), (c), (d), (e) and (f) of the Master's Summons filed in the court of the first instance. The defendants Nos. 1, 2 and 3 will be at liberty to file their respective addl. written statement to the amended plaint and such addl. written statement should be filed within two weeks from the date of service of a copy of the amended plaint upon them. Cost of the appeal as also of the application made in court of the first instance will abide by the result of the suit.

S. C. GHOSE, C. J.:— I agree.

Appeal allowed.

AIR 1982 CALCUTTA 333

S. C. GHOSE, C. J. AND R. N. PYNE, J.
Ritu Sachdev v. Anita Jindal and others.

Appeal No. 136 of 1980, D/- 25-2-1982.

Letters Patent (Cal.), Cl. 12 — Leave to file suit — Revocation of, on ground of absence of territorial jurisdiction — Principles regarding. Decision of single Judge, D/- 19-2-1980, Reversed.

The question of jurisdiction must be decided on the allegation in the pleadings and it must be decided before the case begins whether or not there is a jurisdiction.

If, on the face of the pleading, the court has jurisdiction, it matters not that later the suit as against the person who carried on business or resided within the jurisdiction is dismissed. Where leave has been granted under Cl. 12 an application by defendant for revocation may raise questions far too difficult to determine upon affidavit evidence and in such case the question should not be decided on affidavit evidence. In a proper case an application to revoke the leave granted under Cl. 12 may be entertained by the court, but the question of difficulty and importance should not be dealt with by an application to revoke the leave under Cl. 12 and to take the plaint off the file. The proper course is to dismiss the application to take the plaint off the file and to direct that the cases do proceed on all points in the usual way. Decision of single Judge, D/- 19-2-1980, Reversed.

(Para 9)

Cases Referred:	Chronological	Paras
AIR 1981 Cal 146		6, 9
AIR 1958 Cal 710		7
AIR 1949 Cal 622: 84 Cal LJ 175		6, 9
(1946) 50 Cal WN 624		6, 9
AIR 1932 Cal 47		6
AIR 1932 Cal 146		9

R. N. PYNE, J.:— This appeal is directed against the judgment and order dated 19th February, 1980 of Mrs. Padma Khastgir, J. allowing the application made by the respondent No. 1, Smt. Anita Jindal, inter alia, for revocation of leave under Cl. 12 of the Letters Patent and for other reliefs as will appear from the petition of the said application.

2. The appellant, Ritu Sachdev, filed Suit No. 576 of 1979 for partition and administration of the estate left by her deceased father, one Baldev Raj Sachdev. Baldev Raj Sachdev, since deceased, (hereinafter referred to as the said deceased) died on 17th August 1975 leaving the respondent No. 2 (his wife) and the appellant and the respondent Nos. 1 & 3 (his three daughters) as his heiresses and legal representatives and various properties as will appear from the schedule to the plaint. In the suit the plaintiff claimed partition of various properties including immovable properties situated at New Alipore outside the jurisdiction and tenancy rights in respect of shop-room at premises No. 14/2, old China Bazar Street where the said deceased used to carry on business under the name and style of printers emporium and of the godown at No. 22, Sukeas Lane, Calcutta. The premises No. 14/2, old China Bazar Street.

and 22, Sukeas Lane, Calcutta are situate within the jurisdiction of this court and on that basis leave under clause 12 was obtained by the appellant.

3. The respondent No. 1, Anita Jindal, made the said application for revocation of the leave under clause 12 of the Letters Patent on the ground that after the death of the said deceased the business of Printers Emporium was converted into a partnership whereof the respondents were partners and the appellant, then being a minor, was admitted to the benefit of partnership and thereafter by a deed of dissolution dated 1st April, 1978 the said firm was dissolved and the entire assets of the said firm including the tenancy right in respect of the shop-room in premises No. 14/2, Old China Zazar Street were transferred to one Satish Kant Jindal, the husband of the respondent No. 1. The tenancy in respect of the godown at No. 22, Sukeas Lane, Calcutta was surrendered and thereafter it was given to Satish Kant Jindal. The said Satish Kant Jindal became and is the tenant in respect of the said shoproom and the godown. As, according to the respondent No. 1, no immovable property belonging to the estate were situate within the jurisdiction of this court she made the said application for revocation of the leave under Cl. 12 of the Letters Patent.

4. Mrs. Padma Khastgir, J. by the judgment and order dated February 19, 1980 dismissed the said application. According to her Lordship, inasmuch as no part of the immovable property was situate within the jurisdiction and further the application for amendment of the plaint and addition of the parties made by the appellant was dismissed it could not be said that any part of the cause of action arose within the jurisdiction of this Court.

5. Counsel for the appellant has submitted that for the purpose of an application for revocation of leave on the ground of lack of jurisdiction the allegation in the plaint must be deemed to be admitted. So far as the present case is concerned it is clear from paragraph 2 read with schedule item Nos. 3 & 4 that some of the immovable properties are situate within the jurisdiction of this court. Therefore, on the basis of the allegations made in the plaint it is not open to any party to challenge the said allegation or to urge that this court has no jurisdiction. It was further submitted that if the court wanted to decide the question of jurisdiction it should not have been done so merely on the allegation by

one of the defendants to the effect that under the deed of dissolution dated 1-4-1978 the tenancy rights in respect of the shoproom at 14/2, Old China Bazar Street was assigned in favour of the husband of the defendant No. 1, Satish Kant Jindal or on the allegation of the surrender of the tenancy in respect of 22, Sukeas Lane and its subsequent mutation in the name of Satish Kant Jindal, the husband of the defendant No. 1, in view of the fact that the deed of partnership itself was challenged in the plaint. According to counsel, it should have been ascertained whether the properties continue to form part of the joint estate and as such liable to partition. Further, and in any event, the deed of dissolution was voidable because the plaintiff was a minor and the alleged transfer was done without court's permission and was hit by S. 8 (2) of the Hindu Minority and Guardianship Act, 1956. It was also the submission of the counsel that the deed of dissolution was not admissible in evidence for want of registration under Section 49 read with Section 17 (1) (b) of the Indian Registration Act in so far as it related to the assignment of tenancy. The assignment of tenancy is also invalid in view of Section 14 (1) (b) of the West Bengal Premises Tenancy Act, 1956. Counsel has, therefore, submitted that all these are questions which should be decided in the suit and not in a summary manner in an application. It has also been submitted that the judgment is erroneous because it proceeds on the basis of fact collateral to the matter in issue and the appeal court is entitled to examine the reasons and if the appeal court finds these reasons are unwarranted it should set aside the order.

6. In support of his above submissions, counsel has referred to the cases, *Dominion of India v. Jagadish Prosad Pannalal*, (1949) 84 Cal LJ 175: (AIR 1949 Cal 622); *United Commercial Bank v. Sanatan Bastushilpa Pratisthan*, AIR 1981 Cal 146; *Himatsinghka Timber Ltd. v. Narendranath*, (1946) 50 Cal WN 624 at p. 626 and *Basanta Kumar Biswas v. Prosonna Kumar Guha*, AIR 1932 Cal 47.

7. Counsel for the respondent has submitted that in the instant case as the two immovable properties namely, the tenancy rights in respect of two premises No. 14/2, Old China Bazar Street and No. 22, Sukeas Lane, Calcutta do not form part of the estate and all the co-sharers are not interested therein inasmuch as the tenancy rights belong to the

husband of the defendant No. 1 Satish Kant Jindal. Further in the dispute regarding the tenancy right only the appellant and Satish Kant Jindal are interested. The other co-sharers are not interested in the said dispute. Therefore, inasmuch as no immovable property belonging to the estate is situate within the jurisdiction the court has no jurisdiction to decide this suit and leave u/cl. 12 should be revoked. Counsel has relied on the case of Ranjit Kumar Palchowdhury v. Murari Mohan Pal Chowdhury, AIR 1958 Cal 710 and an unreported Bench decision of this Court in the case of Promod Kumar Jalan v. Shyam Lal Jalan. It was further submitted that the appellant's application for amendment of the plaint was dismissed the question of validity with regard to the dissolution of partnership and assignment of the tenancy right in respect of the shop room and the godown cannot be decided in this suit.

8. From the judgment and order appealed against it appears that the leave under Clause 12 was revoked on the ground that the tenancy right in respect of the shoproom and the godown belonged to Satish Kant Jindal and not to the estate and that the application for amendment of plaint and addition of party was rejected. According to the learned trial Judge, the only property that remained to be partitioned by and between the parties is the property situated at New Alipore outside the original side jurisdiction of this Court.

9. From the decided cases it appears that the question of jurisdiction must be decided on the allegation in the pleadings and it must be decided before the case begins whether or not there is a jurisdiction. If, on the face of the pleading, the court has jurisdiction, it matters not that later the suit as against the person who carried on business or resided within the jurisdiction is dismissed. Where leave has been granted under Cl. 12 of the Letters Patent and application by defendant for revocation may raise questions far too difficult to determine upon affidavit evidence and in such case the question should not be decided on affidavit evidence. In a proper case an application to revoke the leave granted under Cl. 12 may be entertained by the court, but the question of difficulty and importance should not be dealt with by an application to revoke the leave under Cl. 12 and to take the plaint off the file. The proper course is to dismiss the application to

take the plaint off the file and to direct that the cases do proceed on all points in the usual way. See the cases of Dominion of India v. Jagdish Prosad Pannalal, (1949) 84 Cal LJ 175 : (AIR 1949 Cal 622); Himatsinghka Timber Ltd. v. Narendra Nath Banerjee, (1946) 50 Cal WN 624; Secretary of State v. Golabari Poliram, AIR 1932 Cal 146 and United Commercial Bank v. Sonaton Bastushilpa Pratisthan Pvt. Ltd., AIR 1981 Cal 146.

10. Applying the above principle it appears that on the basis of the allegations made in the plaint it cannot be said that this court has no jurisdiction to entertain the suit because part of the immovable property namely, the tenancy rights are in respect of the shoproom and the godown situated within the jurisdiction. Further, we have by our judgment and order made today allowed the appeal No. 154 of 1980 preferred against the judgment and order dismissing the appellant's application for amendment of the plaint and addition of parties. In that view of the matter the question will arise in the suit as to whether the tenancy rights in respect of the shoproom and the godown belong to all the co-sharers or not. In view of our judgment at this stage it cannot be said that all the co-sharers are not interested in the tenancy rights of the said shoproom and the godown. In our view, the question as to whether the said tenancy rights belong to the estate or not or in other words, all the co-sharers are interested in the said tenancy rights or not are complicated questions of fact and law which, in our view, should be decided in the suit itself and not on affidavits in the application. For the aforesaid reasons and in view of our judgment in Appeal No. 154 of 1980, in our view, it cannot be said at this stage on the basis of the plaint that this Court has no jurisdiction to try the suit.

11. For all the reasons stated above, in our view, this appeal should succeed. The appeal, therefore, is allowed. The cost of the appeal will abide by the result of the suit.

S. C. GHOSE, C. J. :— I agree.

Appeal allowed.

AIR 1982 CALCUTTA 336**ANIL K. SEN AND B. C. CHAKRABARTI, JJ.**

Smt. Gita Mitra, Petitioner v. Hemanta Kumar Mitra, Opposite Party.

C. R. No. 44 of 1979, D/- 24-9-1981.

Civil P. C. (5 of 1908), S. 60 (1), Cl. (h) r/w Cl. (i) — Applicability of Cl. (h) — Applies only to such labourers and domestic servants whose wages do not exceed amount mentioned in cl. (i), i.e. Rupees 400 to Rs. 500 per month — “Wages” is used in same sense as “salary” and as such implies total monthly emoluments.

In analogous statutes dealing with workman which is synonymous with a labourer, and their wages the statutes have invariably fixed a limit. That being the position it seems that in construing the extent of exemption of the wages of a labourer u/s. 60 of the Code a reference to the amount of wages becomes almost imperative as it could never have been the intention of the legislature that the wages irrespective of its amount shall be exempt when, the legislature did not consider it necessary to exempt salary beyond the 1st 400 rupees of any other class of employees. Workman as defined in the several other statutes providing for adequate provision for their welfare and protection did not include persons drawing more than Rs. 500 a month at the most. Therefore, it seems that cl. (h) r/w cl. (i) in the light of similar statutes dealing with the welfare of labourers and workmen postulates only such labourers whose wages do not exceed Rs. 400 to Rs. 500 per month. It seems obvious that the object was to except from the liability to attachment of debts, the case of persons who would be likely to be deprived of their daily means of subsistence by having their earnings attached in the hands of their employers. Therefore, taking the collocation of the word ‘labourer’ with ‘domestic servant’ it is obvious that the reasonable application of the clause is to persons of small means receiving small wages at short intervals. Now, the expressions “wages” and “salary” used in cls. (h) and (i) respectively bear an analogous meaning and it would not be fair and equitable to construe cl. (h) as providing for exemption of the wages of the labourers irrespective of its amount whatsoever. This apart, the expressions “salary” as defined in the Code means total monthly emoluments excluding any allowance declared exempt under cl. (i)

Taking the wider connotation of the term salary, it seems that the amount paid on monthly basis and described as pay and officiating pay etc. even though earned by a person doing manual work, would be salary and not wages which has a restricted connotation. It cannot, therefore, be held that the entire amount of wages of a labourer should be exempt from attachment in execution of a decree for maintenance. The exemption cannot exceed the amount provided in cl. (i), which relates to persons supposed to be better placed than labourers or domestic servants. (Paras 11, 12)

Held, the judgment-debtor husband, who was a laskar, did not come within the spirit of cl. (h) of S. 60 (1) since his wages or monthly remunerations exceeded the amount specified in cl. (i). In the circumstances his wife was entitled to proceed with the execution of the decree for alimony by attachment of his monthly salary. (Paras 11, 14)

Cases Referred: Chronological Paras
AIR 1942 Bom 191 2

Bhaskar Bhattacharya, for Petitioner; Harshit Chakrabarti and Bimal Chakrabarti, for Opposite Party.

B. C. CHAKRABARTI, J:— The petitioner wife obtained an ex parte decree of divorce against the opposite party husband in Matrimonial Suit No. 21 of 1977 of the 8th Court of the learned Additional District Judge, Alipore. Subsequently she filed an application for alimony u/s. 25 (i) of the Hindu Marriage Act. This application however, was contested by the opposite party husband. There was an order in favour of the wife after contested hearing, directing the opposite party husband to pay monthly alimony at the rate of Rs. 200/- from the date of the application. It appears upon a perusal of the order passed in that behalf on January 7, 1978 that an employee from the office of the employer of the opposite party husband gave evidence to the effect that the net income per month of the husband was about Rs. 1,000. The husband claimed that he had to maintain his old parents and minor brothers and sisters. The opposite party husband submitted through his advocate that a monthly alimony at the rate of Rs. 150 would be sufficient. Having however, considered the totality of the evidence the learned Additional District Judge allowed the application for alimony directing the husband to pay at the rate of Rs. 200 per month as already indicated. The husband,

however, admittedly did not pay any amount towards alimony whereupon the wife filed an application for execution, by attachment from the monthly salary of the judgment-debtor husband, the total dues at the date of the filing of the execution petition being Rs. 980.

2. The husband filed an application u/s. 47 r/w S. 60 of the C. P. Code, claiming exemption from attachment on the ground that he was a labourer and in view of the provisions contained in Section 60 (1) (h) of the Code his wages could not be attached. The learned Additional District Judge relying upon the decision in the case of *K. U. Kulkarni v. Ganpat Hiraji*, AIR 1942 Bom 191 held that the husband who was a *laskar* in the employment of the Port Trust, Calcutta was a labourer within the meaning of S. 60 (1) (h) of the Code since he had to do manual work in the performance of his duties and as such the remuneration earned by him was "wages of a labourer". In that view of the matter the learned Additional District Judge held that the husband was a labourer and the wages earned by him were exempt from attachment. The application u/s. 47 was accordingly allowed with the result that the execution case was struck off.

3. The decree holder wife thereupon filed the present revisional application contending that the husband was not a labourer as contemplated by S. 60 (1) (h) of the Code and as such could not claim exemption from attachment. It was further contended that the provision of Section 60 (1) (h) of the Code is ultra vires the Constitution being violative of Article 14 of the Constitution of India.

4. On the application being presented a Rule was issued and a notice of the Rule was also served on the Advocate General, State of West Bengal as well as on the Union of India.

5. At the hearing there was no appearance either on behalf of the Advocate General or the Union of India. The application was contested by the opposite party husband.

6. It is not disputed before us that while the alimony matter was being heard the wife produced a sheet described as "wage slip for the month of Oct. 1975" showing the amount drawn by the opposite party husband. It appears therefrom that the opposite party was drawing Rupees 890.05 which included "Pay, Officiating Pay, Leave Allowance, Dearness Allowance, House Rent, Conveyance Allow-

ance, Compensatory Overtime Allowance etc. After deductions the husband drew a net amount of Rs. 751.59 for that month. It further appears from the order passed on the application for alimony that one G. N. Guha an employee of the Port Trust, Calcutta was examined as witness on behalf of the wife who stated that the gross monthly income of the husband was at least Rs. 1000. Before we come to consider the question whether the opposite party is a labourer and his earnings are "wages of a labourer" within the meaning of S. 60 (1) Cl. (h) it may be mentioned that the husband did not move against the order granting alimony at the rate of Rs. 200 per month. It is also to be remembered that the wage slip for the month of Oct. which was produced at the hearing of the alimony matter was admitted into evidence on admission by the husband. Now of course it has been submitted before us that the monthly remuneration earned by the husband is but a little over Rs. 500. In view of the fact that the husband submitted to the order for alimony and acquiesced to the admission of the wage slip in evidence it is no longer open to him to contend that the remuneration earned by him is not as indicated in the said wage slip.

7. Mr. Bhaskar Bhattacharjee appearing on behalf of the petitioner wife contended that the opposite party husband who draws remuneration of about Rupees 1000 a month cannot by any stretch of imagination be termed as a labourer within the meaning of S. 60 (1) (h) of the Code. He argued further that a clerk in an establishment drawing much less the amount is not entitled to claim the benefit of exemption under that section while a labourer even if the husband is treated as such but drawing many times more the pay of a clerk would be entitled to claim total exemption from attachment of pay. This Mr. Bhattacharjee contends is violative of Art. 14 of the Constitution.

8. Before coming to the question of vires it is necessary to examine whether the husband is really a labourer and if so whether he is entitled to claim exemption u/s. 60 (1) (h) of the Code. S. 60 speaks of properties liable to attachment and sale in execution of a decree. Cl. (h) of the first proviso to sub-sec. (1) of the section lays down that "the wages of labourers and domestic servants, whether payable in money or in kind" shall not be liable to such attachment. Cl. (1) provides for exemption of salary to the extent of the

1st 400 Rupees and two-thirds of the remainder in execution of any decree other than a decree for maintenance. Cl. (ia) provides exemption in respect of one-third of the salary in execution of any decree for maintenance. Now the expressions labourer and wages have not been defined in the Code. The expression salary has been defined to mean the total monthly emoluments, excluding any allowance declared exempt from attachment under the provisions of Cl. (L). Expln. IV to the section says "for the purpose of this proviso wage includes bonus and labourer includes skilled, unskilled or semi-skilled labourer". So what we get from S. 60 in the Code is that though the expression salary has been defined to mean the total monthly emoluments the expression wages has not been so defined. The use of the expression "includes" merely has the effect of enlarging the meaning of the word wages, and since wages has not been defined it should be given the etymological meaning of the word, namely, the remuneration for the services. Assuming that the husband, being a *laskar* is a labourer the question yet remains whether the remuneration earned by him amounts to wages of a labourer as contemplated by S. 60 (1) (h) of the Code. In interpreting the particular Clause courts should not lose sight of the circumstances and conditions prevailing at the time when the provision was enacted. "In the construction of a statute it is of course at all times and under all circumstances permissible to have regard to the state of things existing at the time the statute was passed and to the evil which, as appears from its provision, it was designed to remedy....." (See Craies on Statute Law 6th Edn. page 126). It is significant to note that when this exemption clause was provided in the Code the legislature in its wisdom considered it necessary to give some protection to labourers and domestic servants by exempting attachment of wages earned by them. It is also significant to note that labourers and domestic servants were grouped together in the same category. The concept of the wages of a labourer at the time when the provision was initially enacted in the Code has considerably changed since then. It is not uncommon for a labourer now-a-days to earn much more than any other employee who is not a labourer. This is a situation which was unthought of at the time the provision was made. That this is so would be evident from cl. (i) of S. 60 (1) of the Code with after the amendment in 1976 pro-

vides exemption of the first 400 Rupees of the salary. Initially the exemption from attachment of salary was to the extent of first 100 Rupees. It is thus clear that the legislature while providing for exemption of the wages of a labourer was conscious that the salary earned by any other class of servants was more than the wages of a labourer.

9. This apart we have already indicated that the expression wages has not been defined in the Code. Therefore, in order to ascertain whether the expression is referable to any amount paid to a labourer or not the meaning given to the expression "wages" in similar statutes may be conveniently looked into. It is permissible in considering what construction should be put to the use of an expression in one statute, to refer to statutes in *pari materia* relating to the same persons or things or same class of persons or things. In relation to labourers and their wages there are several other statutes which may be considered as in *pari materia* so that references to those statutes may be helpful in giving a meaningful construction to the term "wages" of labourer as used in S. 60 of the Code. In the Industrial Disputes Act wages have been defined to mean all remuneration capable of being expressed in terms of money which would, if the terms of employment, expressed or implied, were fulfilled, be payable to a workman in respect of his employment, or of work done in such employment and includes such allowance as the workman is for the time being entitled to, the value of any house accommodation or of supply of light, water, medical attendance other amenity or of any service or of any concessional supply of foodgrains or other articles, any travelling concession but does not include any bonus. In the said Act the expression workman has been defined to mean any person employed in any industry to do any skilled, unskilled, manual, supervisory, technical or clerical work for hire or reward etc. But does not include any such person who being employed in a supervisory capacity draws wages exceeding 500 Rupees per month. It may be noted that in describing the remuneration earned by an employee doing supervisory work, the expression wages has been used.

10. In the Payment of Wages Act, 1936 the definition of the expression "wages" is almost similar to the definition as in the I. D. Act. The P. W. Act applies in the first instance to the pay-

ment of wages to persons employed in any factory and to persons employed otherwise than in a factory but in any industrial establishment or in any classes or groups of Industrial establishments. S. 1, sub-sec. (6) however, provides that nothing in the Act shall apply to wages payable in respect of a wage period which, over such wage period, average 400 Rupees a month or more. In the Workmens' Compensation Act, 1923 "wages" has been defined to include any privilege or benefit which is capable of being estimated in money, other than a travelling allowance or the value of any travelling concession or a contribution paid by the employer of a workman towards any pension or Provident Fund or a sum paid to a workman to cover any special expenses entitled on him by the nature of the employment. While defining a workman the statute provided that it does not include a person employed on monthly wages exceeding 500 Rupees.

11. It follows, therefore, that in analogous statutes dealing with workman which is synonymous with a labourer, and their wages the statute has invariably fixed a limit. That being the position we feel that in construing the extent of exemption of the wages of a labourer u/s. 60 of the Code a reference to the amount of wages becomes almost imperative as we have already indicated that it could never have been the intention of the legislature that the wages irrespective of its amount shall be exempt when, the legislature did not consider it necessary to exempt salary beyond the first 400 Rupees of any other class of employees. Workman as defined in the several other statutes providing for adequate provision for their welfare and protection did not include persons drawing more than Rs. 500 a month at the most. Therefore, it seems to us that cls. (h) and (i) read together in the light of similar statutes dealing with the welfare of labourers and workmen postulate only such labourers whose wages do not exceed Rs. 400 to 500 per month.

12. Then again even though the document exhibited on the admission of the husband indicating the emoluments drawn by the husband for the month of Oct., 1975 is described as wage slip the break up of the amount shows payment of pay, officiating pay, house rent allowance, leave allowance, conveyance allowance besides Dearness Allowances. These items are incompatible with wages of a labourer and no particular importance

should be given to the use of the expression wage slip so that the total amount inclusive of pay and other allowances should be exempt from attachment. This being the position we are unable to agree with the learned Additional District Judge that execution by way of attachment is totally prohibited u/s. 60 (1), cl. (h) of the Code. We must construe the word 'labourer' having regard to the subject matter and the intention of the Act. Taking the collocation of the word 'labourer' with "domestic servant" it is obvious that the reasonable application of the clause is to persons of small means—receiving small wages at short intervals. It seems obvious that the object was to except from the liability to attachment of debts, the case of persons who would be likely to be deprived of their daily means of subsistence by having their earnings attached in the hands of their employers. A person in the position of the judgment-debtor husband does not come within the spirit of the cl. (h) of S. 60 (1). The decision in the Bombay case relied on by the learned Additional District Judge arose out of a different context and it may not be looked upon as a safe guide in holding that any amount drawn by a labourer is entitled to exemption. This is more so because this decision was made at a time when cl. (h) of S. 60 (1) read as follows :

"The wages of labourers and domestic servants, whether payable in money or in kind; and salary to the extent of first 100 Rupees and one half of the remainder of such salary." The clause has since been amended and split up into cls. (h) and (i). Since the legislature used the two different expressions, wages and salary though analogous in nature in different parts of the same clause, as it then stood, it was assumed that they were intended to be used in a different sense. Now that the expressions are not used in the same clause but in different clauses and the expressions bear an analogous meaning we do not think it fair and equitable to construe the clause as providing for exemption of the wages of the labourers irrespective of its amount whatsoever. This apart, the expression "salary" as defined in the Code means total monthly emoluments excluding any allowance declared exempt under cl. (L). Taking the wider connotation of the term salary, it seems that the amount paid on monthly basis and described as pay and officiating pay etc. even though earned by a person doing manual work, would be salary and not wages which has a restricted connota-

tion. We are unable to hold therefore, that the entire amount of wages of a labourer should be exempt from attachment in execution of a decree for maintenance. The exemption cannot exceed the amount provided in the other clause of the section namely cl. (i), which relates to persons supposed to be better placed than labourers or domestic servants.

13. Such being our view it is not necessary for us to go into the question whether cl. (h) of S. 60 (1) is violative of Art. 14 of the Constitution.

14. In the result the revisional application succeeds. The impugned order is set aside. The execution case do now proceed in accordance with law. The petitioner shall be entitled to costs—hearing fee being assessed at 3 gold mohurs.

15. Let the order be communicated to the court below forthwith and the records go down at once. Rule is made absolute.

ANIL K. SEN, J.:— I agree.

Revision allowed.

AIR 1982 CALCUTTA 340

SUHAS CHANDRA SEN, J.

Omprakash Patwarika, Petitioner v. Union of India and others, Respondents.

C. R. No. 9100 (W) of 1981, D/- 12-3-1982.

Constitution of India, Arts. 299, 226, 14 — Public contract — Acceptance of tender of contractor at rate higher than offered by petitioner — Selection of higher tender after consideration of analysis — Arbitrariness not established.

In the instant case the Tender Committee asked for analysis of the rates in the tenders invited and was of the view that the rates quoted by the petitioner though lowest were not workable. The tender quoting highest rate was accepted. Held that it could not be said that an arbitrary or capricious view was taken by the Tender Committee as it had refused lowest tender only after scrutiny and consideration of the analysis of rates.

(Para 8)

Cases Referred : Chronological Paras

AIR 1982 Cal 19	7
(1982) 2 Cal HN 480	6
AIR 1979 SC 1628	2

B. C. Dutt and M. K. Basu, for Petitioner; Nani Coomar Chakraborty, Madhusudan Banerji, D. N. Das and P. K. Ghosh, for Respondents.

ORDER:— By a Tender Notice No. 4A 81-82 dt. 4th May, 1981, the Divisional

CZ/DZ/B264/82/TGD/DVT

Rly. Manager, Eastern Rly., invited tenders for execution of new works, works for additions and alterations as also repairs and maintenance works of miscellaneous nature for Zone No. 108 from 1st July 1981 to 30th June, 1982, on the terms and conditions mentioned in the Tender Notice. The notice was issued by the Office of the Divisional Railway Manager, Eastern Railway. The petitioner, Omprakash Patwarika, one Bijoy Sankar Bohra and Santosh Kumar Sharma submitted their tenders in response to the aforesaid notice. The tenders were also submitted on 17th June, 1981, and were opened in the presence of the representatives of the tenderers. It appears that the rates quoted by Omprakash Patwarika, the petitioner herein, were the lowest. Santosh Kumar Sharma's quotations were on the whole the highest of the three tenders that were submitted. By a memo dated 5th Aug. 1981, the Divisional Engineer asked all the three tenderers to submit analysis against items Nos. 1 & 2 (Cement, concrete and brick work) in support of the rates quoted in the tenders. The petitioner and Sarkar (Santosh) Kumar Sharma submitted detailed analysis of their quotations as required by the Divisional Engineer. Bijoy Sankar Bohra, however, did not submit any such analysis. It appears that the tender of Santosh Kumar Sharma who had on the whole quoted the highest rates was accepted.

2. The petitioner, Omprakash Patwarika has challenged the legality and validity of the aforesaid decision of the Railway Authorities to accept the bid of Santosh Kumar Sharma, the Respondent No. 6 herein. It has been contended on behalf of the petitioner that the Railway Authorities were not bound to give work order to the lowest tenderer in all cases, but if the lowest tender is not accepted there must be some reasonable ground for that. Strong reliance was placed upon the judgment of the Supreme Court in the case of Ramana Dayaram Shetty v. International Air Port Authority of India, AIR 1979 SC 1628. It was argued that the Government did not have an unfettered or arbitrary discretion in the matter of accepting tenders. It was argued that the petitioner had successfully submitted tenders quoting the same rates in respect of Zone No. 96, an adjacent zone under the same Division. It was, therefore, submitted that the petitioner had made identical bids in two adjoining zones, one was accepted but the other was rejected as unworkable by the Railway Authorities.

The petitioner submitted that this action of the Railway Authorities was clearly against the principle laid down by the Supreme Court in the aforesaid judgment.

3. It was submitted on behalf of the Railway Authorities that the quotations were on the face of it unreal and could not be accepted having regard to the market price. It was submitted that the analysis of the quotations were invited only for the purpose of being fair to the petitioner and also to the other tenderers.

4. The contention of the petitioner, however, cannot be accepted. The petitioner's allegations in paragraph 18 of the petition that the petitioner submitted a tender in respect of Zone No. 96 under the Divisional Engineer 3, quoting exactly the same rate quoted in Zone No. 108 are factually incorrect. It appears from the tender papers produced by the Railway Authorities at the hearing that the petitioner had quoted much higher figures for Zone 96 where his bid was successful. The petitioner's quotation for Zone 108 was much lower.

5. In view of the aforesaid it cannot be said that the decision of the Railway Authorities not to accept tender of the petitioner on the ground that the rates quoted by the petitioner in respect of Zone No. 108 were unworkable is not on the face of it capricious or arbitrary.

6. Reliance was also placed on behalf of the petitioner in the case of *S. P. Das v. State of West Bengal*, (1980) 2 Cal HN 480. In that case an agreement was entered into for a period of five years by the State of West Bengal. Thereafter, the period of contract was abridged without assigning any reason. There was no allegation that the petitioner was guilty of any defect or breach of any of the terms of the contract. The petitioner was also not given any opportunity of showing cause against the order that was ultimately passed. In these facts *T. K. Basu, J.* held that the Government could not act arbitrarily or capriciously. The facts of the present case, however, are quite different. The Railway Authorities have rejected the tender submitted by the petitioner as unworkable on the ground that the rates quoted by the petitioner were absurdly low.

7. In the case of *Barun Kumar Sinha v. District Magistrate, Murshidabad*, AIR 1982 Cal 19 the petitioner had submitted a tender within the stipulated time for supply of dietary articles to the State-owned Hospitals. The tender of another

contractor, who quoted rates much higher than the rates of the petitioner, was accepted. No reasons were advanced for rejecting the tender quoted by the petitioner. In this case, however, the Divisional Engineer invited the tenderers to submit analysis of the rates quoted by them. It has been stated by the Divisional Engineer in his affidavit-in-opposition "that the petitioner himself worked during the preceding 2 zonal periods at much higher rates than the rate accepted during the current zonal period. So it is abundantly clear that the interest of the Government has been properly looked into. The abnormally low rate quoted by the petitioner in the current zone period by itself smacks of ulterior motive which could not be overlooked in view of the much higher rate at which he worked in the same zone in the past."

8. The tender by the petitioner was not ignored or rejected arbitrarily. It was duly considered and analysis of the rates was invited and only after due consideration of the analysis, the tender submitted by the petitioner was rejected. The petitioner in the writ petition has tried to justify the abnormally low rates quoted by him on the ground that he had stocks of raw materials bought when the market prices were much lower and, therefore, he was in a position to submit the tender quoting such low rates. That the rates quoted were abnormally very low having regard to the prevailing market prices cannot be denied and has not been denied by the petitioner. If the Tender Committee was of the view that the rates quoted by the petitioner were unworkable, it cannot be said that an arbitrary or capricious view has been taken. An analysis of the rates was invited. The petitioner gave an analysis of his rates which was found to be not satisfactory. In my opinion, the allegation of capricious or arbitrary action has not been established in the facts of this case.

9. Another point was made that the work order in this case was issued on a Sunday. It was argued that the said order was back dated and was issued out of ulterior motive and with a view to show special favour to the successful tenderer in this case, the Respondent No. 6. It has been stated in the supplementary affidavit that for urgent work of the Railways, the railway employees also work on Sundays and holidays. In my view, no adverse inference, in the facts of this case, can be drawn against the Railway Authorities only from the

fact that the disputed communication issued on a Sunday.

10. A number of legal points have been argued by the counsel appearing on behalf of the Respondent No. 6. In the facts of this case it is not necessary to go into those questions.

11. In the premises, this Rule is discharged and all interim orders vacated.

12. There will be no order as to costs.

13. The prayer for stay of operation of the order is refused.

Rule discharged.

AIR 1982 CALCUTTA 342

P. K. BANERJEE AND

B. N. MAITRA, JJ.

Jugal Kishore Kundu (deceased by L. R.'s) and others, Appellants v. Narayan Chandra Kundu and another, Respondents.

A. F. O. D. No. 491 of 1975, D/- 2-2-1982.

(A) Civil P. C. (5 of 1908), O. 6, R. 2 — Pleading — New case — Court cannot make a new case, not made out in the pleadings. AIR 1954 SC 758, Rel. on.

(Para 10)

(B) Evidence Act (1 of 1872), S. 32 — Hearsay evidence — Statement that property acquired by karta in the name of benamidar — Deponent admitting it to be his hearsay — Statement not covered by S. 32 (1) to (8) — It would not be admissible being hearsay evidence. (Para 11)

(C) Hindu Law — Dayabhaga — No nucleus to presume that brothers owning any joint property to provide sufficient source to acquire property — Property standing in the name of wife of one of them alleged to be acquired by father in the name of his daughter-in-law during lifetime — Daughter-in-law cannot be said to be benamidar regarding such property and house constructed thereon by her. (Case law discussed). (Para 25)

(D) Evidence Act (1 of 1872), S. 33 — Admission made by a party is decisive on the point. (Para 17)

Cases Referred : Chronological Paras

AIR 1980 SC 727	8
AIR 1979 SC 861	17
AIR 1978 SC 1362 : 1978 All LJ 634	8
AIR 1977 SC 409	24
AIR 1977 SC 1712	24
AIR 1974 SC 117	24
AIR 1974 SC 171	8
AIR 1966 SC 405	24

CZ/CZ/B51/82/VNP/SNV

AIR 1966 SC 1322 : 1966 Cri LJ 960	22
AIR 1960 SC 100 : (1960) 2 SCA 153	17
AIR 1958 SC 255	9
AIR 1954 SC 758	10
AIR 1953 SC 235	9
AIR 1951 Cal 320	7
AIR 1949 FC 88	8
(1941) 45 Cal WN 177	7
AIR 1934 Cal 68 : 37 Cal WN 1174	7
AIR 1927 Cal 776 : 46 Cal LJ 175	7
AIR 1921 Cal 101 : 33 Cal LJ 201	7

M. M. Ghosh and S. C. Roy, for Appellants; B. G. Mitter and Miss Aruna Mukherjee, for Respondents.

B. N. MAITRA, J.:— The plaintiff has alleged that defendant No. 1, Jugal Kishore and defendant No. 2, Bhupendra, are his brothers. Their father, Rasamoy Kundu, lived at Ichhapore in the district of Jessore, which is now in Bangladesh. He was governed by the Dayabhaga school of Hindu law. On the 21st Feb. 1948, he died leaving behind those three sons as his only heirs. His wife had predeceased him. He was very well off, owned many properties and extensive business. He constructed a godown and carried on jute business therein at Langal Bandh Bazar near his native village in the benami of Monorama Kundu, Jugal's wife. In 1946 a riot broke out in Bengal and so Rasamoy wanted to have a house in Calcutta. He sent Jugal to purchase land in Calcutta for that purpose. On the 23rd Dec. 1946, a deed of agreement was thus executed regarding the suit land. On the 16th Jan. 1947, a kobala was executed in respect of that property. Though both the documents stood in his daughter-in-law Monorama's name, she was merely his benamidar. After the purchase, he began to raise building on that land, but the construction was not completed during his lifetime. He and his three sons lived in a joint family. Jugal was the karta. Rasamoy left many properties and business. In 1950, there was a communal riot in East Pakistan. Shortly, thereafter, the plaintiff and Jugal shifted from East Pakistan to the disputed property. Bhupendra was then unmarried and he used to live in East Pakistan. From time to time he would come to Calcutta. The disputed property belonged to the joint family and the three brothers had one-third share each therein. In 1967, they separated in mess, but are still in joint estate. A fire broke out in Langal Bandh Bazar jute godown in 1951 and 1952. A sum of Rupees 130,000.00 was received from the Insurance Company as compensation.

That amount forms part of the joint estate of the brothers. Jugal falsely filed Title Suit No. 340 of 1967 in the First Munsif's Court, Sealdah, for the plaintiff's eviction on the bogus ground that he was a tenant in respect of one room in the disputed house under him and his children. But he lost that case up to the appellate court. Monorama is dead and the pro forma defendants are her heirs. The suit is for partition and for taking accounts also regarding the disputed property.

2. The defendant No. 2 filed a written statement supporting the plaintiff's version.

3. The defendant No. 1 and pro forma defendants Nos. 3 to 6 and 8 and 9 filed a written statement denying the plaintiff's allegations. They allege that Rasamoy separated his three sons and distributed all his assets in 1940 or so. After his death nothing came in the hands of Jugal. There was no existence of any joint family or joint family property. Monorama had considerable money and she acquired the property in question with her own money. Thereafter, she constructed a house on that land with her own money. The godown at Lungal Bandh Bazar belonged to her. Narayan (plaintiff) used to come to the disputed house and live as her guest or licensee. Thereafter, he rented one room from her. As he refused to vacate, the ejectment suit was filed.

4. The learned Subordinate Judge accepted the plaintiff's version and granted a preliminary decree for partition. He also passed a decree for accounts against the defendant No. 1 only regarding the income received from the disputed property. The rest of the prayer for accounts regarding the joint estate was not allowed.

5. Hence this appeal by defendants Nos. 1 and 3 to 8. It has been contended on behalf of the appellants that the moot question is as to who acquired the disputed property and whether Monorama was the real owner or a mere benamidar regarding the property in question. The plaintiff's version cannot be accepted.

6. It has been contended on behalf of the plaintiff-respondent that Monorama was not a woman of substance. It has not been proved that she had sufficient money to acquire the godown at Lungal Bandh Bazar of the disputed property in Calcutta. She died in 1963. A Hindu Joint Family is presumed to be joint in food, estate and worship. That presumption

has not been rebutted. Even if it is assumed that Monorama was the real owner regarding the disputed property, the evidence on the record clearly shows that subsequently that property was thrown into the common stock of the joint family. Jugal said in the Sealdah Court that he had received Rs. 30,000/- and property from his father. Of course, the plaintiff filed some affidavits in the High Court making such damaging statements. Those admissions have no value because under S. 31 of the Evidence Act, an admission is not conclusive. The uncorroborated testimony of DW 2, Jugal Kishore (defendant No. 2), cannot be believed. He failed to establish that Monorama had any source from which the godown at Lungal Bandh Bazar, Jessore, and the disputed property could be acquired.

7. Let the position of law be discussed first. After following a bench case of Gouranga Sundar v. Mohendra Narayan in (1927) 46 Cal LJ 175 : (AIR 1927 Cal 776), it has been stated in the bench case of Hem Chandra v. Motilal in (1933) 37 Cal WN 1174 at p. 1178 : (AIR 1934 Cal 68 at p. 70) that under the Dayabhaga Law, there cannot be a joint family consisting of the father and the son. A son can acquire separate property even if he lives with his father. If the brothers live jointly, one of them cannot claim a share in the acquisition of another unless it is proved that they also had contributed towards its acquisition. A self acquired property becomes joint when it is thrown into the common stock voluntarily with the intention of abandoning all claim over it. After following the case of Pratap v. Sarat, in (1921) 33 Cal LJ 201 : (AIR 1921 Cal 101) presided over by Sir Ashutosh Mukherjee, it has been stated by R. C. Mitter, J., in the case of Surendra Bala v. Bhupendra Kumar in (1941) 45 Cal WN 177 at pages 179 and 180 that a wife or daughter-in-law or son is not coparcener in the joint family under the Dayabhaga system of Hindu Law and hence if the purchase is made in their names, there can be no presumption that the purchase was made for the benefit of the family and the apparent title will prevail. In the case of Akshoy v. Sukumar reported in AIR 1951 Cal 320, K. C. Das Gupta, J., has stated that when a document stands in one's name and another party claims it as a joint property, the onus is on the latter to show that it was a joint acquisition and the joint family had sufficient nucleus. If

such onus is discharged, only then the burden shifts to the other side.

8. In a case of benami, the most important test is the source of the consideration, vide the cases in AIR 1949 FC 88 (92); AIR 1974 SC 171 (J. Poddar v. Bibi Hazra), AIR 1978 SC 1362 (Fatima v. Hasan) and AIR 1980 SC 727 (Bhim Singh v. Kan Singh).

9. It seems that much of the pleadings and the observations made by the learned Subordinate Judge are misconceived because there could not be a joint family amongst the brothers so long as Rasamoy was alive. The most outstanding fact in this case is that the disputed property was acquired when Rasamoy was alive. So long as he was alive, Jugal could not be a karta. No question of blending was pleaded in the written statement. Since it is outside the pleadings, such case cannot be accepted, vide decisions of *Trojen & Co. v. Nagappa* in AIR 1953 SC 235 at p. 240 and of *Venkatramana* in AIR 1958 SC 255.

10. Now it will be our duty to point out that the learned Subordinate Judge has made out a new case. The reason is very simple because in para 6 of the plaint, it has been stated that after making the purchase, Rasamoy began to construct building on the land with his own money, whereas the learned Subordinate Judge has held that the building was constructed with the money of the joint fund of the three brothers. Law on this is well settled because in view of the Supreme Court case of *Sheodhari v. Suraj Prasad* in AIR 1954 SC 758 at p. 760, the court cannot make a new case not made out in the pleadings.

11. Then about the evidence given on behalf of the plaintiff's side. PW 1, Jitendra Nath Kundu, has stated that Rasamoy acquired the godown in Jessore and the Calcutta property in Monorama's benami. Subsequently he says that this is only his hearsay. The learned Advocate appearing on behalf of the respondent has stated that this evidence is relevant under S. 32 of the Evidence Act. This submission cannot be accepted because such statement is not covered by any of the sub-secs. (1) to (3) of that section and hence, such hearsay evidence cannot be accepted. This witness also says that Jugal's father-in-law was not well-off and he used to work in a cloth shop. Subsequently, he is constrained to say that this also is his hearsay.

12. Then about the evidence of PW 2, Gopal Chandra Kundu. He has stated

that the brothers lived jointly and they separated in mess after the suit was filed in the Sealdah Court in 1967. But PW 1, Jitendra Nath Kundu, has stated in his cross-examination that Narayan Babu (plaintiff) has been living in his own house in Banamali Chatterjee Street, Calcutta, from 1360 B. S. This clearly shows that the three brothers were not living in a joint mess, as alleged on behalf of the plaintiff.

13. The evidence of P. W. 3, Shyamapada Dey, an employee of the State Bank of India, is not relevant because it has been pointed out on behalf of the appellant that the Account Book of that bank, Ext. 12, speaks of the entries starting from 1960. So, it has no relevancy about the acquisition of the disputed property.

14. PW 4, Radhaballav Sikdar, has supported the plaintiff, stated that Rasamoy was alive till the completion of the construction work of the house and he died in 1954. There is no manner of doubt that he is not at all a witness of truth because on the 28th Feb. 1948, Rasamoy breathed his last and a plan of that house was sanctioned only in June, 1948, vide Ext. E. He further says in his cross-examination that he does not know about the source of money from which the properties at Jangal Bandh Bazar and Calcutta were acquired. He deposed on behalf of the plaintiff in the Sealdah Court. At last he admits in his cross-examination that he does not know whether Jugal and Narayan lived separately or in a joint mess.

15. PW 5, Narayan Chandra Kundu, being the plaintiff, is an interested witness.

16. DW 1, Bhupendra Nath Kundu, is defendant No. 2 and he filed a written statement supporting the plaintiff's version. He has stated in his evidence that he only heard from his father that the disputed property had been purchased by the former. This is hearsay evidence and should not have been admitted in evidence. He first says that he saw the Account Books in connection with the cost of purchase of the suit land and in the next breath, he denies the same. We did not pin any faith on the evidence given by the PWs.

17. Let us now deal with the alleged admissions made by the plaintiff. A fire broke out in the godown at Jangal Bandh Bazar in Jessore, and this has already been stated. Suit No. 2021 was filed in the Calcutta High Court in 1954, vide Ext. J. The present plaintiff made several admis-

sions in that case. Law in this respect is well settled. It appears from the case of *Narayan v. Gopal* in (1960) 2 SCA 153 : (AIR 1960 SC 100) and of *Avadh Kishore v. Ram Gopal* in AIR 1979 SC 861 that an admission, though not conclusive, is decisive on the point unless it is successfully withdrawn or proved to be erroneous. None of those two elements has been proved because PW 5, Narayan Chandra Kundu, has not been able to show that the admissions made by him in connection with that High Court suit had been withdrawn or the same were erroneous. When he was confronted with the same, he pretended not to recall if he had stated the same. It will appear from his affidavits, Ext. L series, that the properties in Calcutta and at Jangal Bandh Bazar in Jessore belonged to Monorama, she was a woman of substance and she made such purchase with her own money. In that view of the matter, it can be safely stated that the observations made by the learned Subordinate Judge about the existence of the joint family and of a joint family fund are of very little value.

18. The learned Advocate appearing on behalf of the respondent placed reliance on the letters, Exts. 1 (a) and 1 (c) dated 20th April, 1949, and 22nd April, 1949, to show that Jugal had given information about the raising of the house on the disputed land. At all events, these letters do not show that the brothers had any title thereto or contain any statement that it was their joint property. Reliance was also placed on behalf of the respondent on the letters, Ext. 2 series. At any rate, those letters did not create any title in their favour to the property in question.

19. It is thus not necessary to deal with the fact how and who acquired some compensation from the Insurance Company, when fire broke out in the godown at Jangal Bandh Bazar. This is irrelevant for deciding the main question, whether Monorama was the real owner or a mere name-lender.

20. It has been stated on behalf of the respondent that the documents, Ext. 5 series, show that the electric meter in the back portion of the disputed house stands in plaintiff's name and Jugal himself wrote some of the muris, Ext. 13.

21. Now no handwriting expert was examined to show that, in fact, Jugal wrote the same.

22. Title Suit No. 340 of 1967 was filed in the Sealdah Court, vide copy of the

plaint, Ext. 3. The trial court left the question of title to the property open, vide the judgment, Ext. 8. It has been stated that the plaintiff had no cause of action. It will appear from the decision of Wanchoo, J., in the case of *Sheodhan v. D. Kunwar* in AIR 1966 SC 1332 that where the court holds that the suit will fail for want of cause of action, there is no question of any *res judicata*. The decision of the lower court was affirmed in appeal, vide Ext. 9. The appellate court made a damaging statement by stating that though Narayan (present plaintiff) alleged that Monorama was only a benamidar, but the case of benami was not proved.

23. There is another important aspect of the case because Narayan occupied only one room in that house, in which there were ten rooms. If, in fact, he was the owner of 1/3rd share, it would be normally expected that as a co-sharer he would have possession in more than one room. It has already been stated that P. W. 1, Jitendra Nath Kundu, says that from 1360 B. S., Narayan (plaintiff) has been living in his own house in Banamali Chatterjee Street, Calcutta. It appears from those judgments, Exts. 8 & 9, that the single room in which the plaintiff lived in the disputed house, has no separate bath-room or kitchen. That clearly shows that his possession therein was only permissive.

24. It has been stated by the Supreme Court in the case of *Bharat Singh v. Bhagirathi* in AIR 1966 SC 405 at p. 410, AIR 1974 SC 117 at p. 119, AIR 1977 SC 409 (*Union of India v. Moksh Builders*) and *Sitaram v. Ramchandra* in AIR 1977 SC 1712 at p. 1715 that an admission by a party is substantive evidence of the fact admitted therein, if it is clear and unambiguous. It has already been stated that in the affidavits, Ext. L series, Narayan made a clear and unambiguous admission that Monorama was the owner of the disputed property and she acquired it with her own fund. Such admission was made in 1955 and 1960, vide Ext. L series, whereas the suit in the Sealdah Court was commenced only in 1967, vide Ext. 3. Such previous admissions made by the plaintiff regarding the disputed property at a time, when there was no controversy over it, clearly show the hollowness of his case. The learned Subordinate Judge approached the case from a completely wrong angle.

25. Thus, from the totality of the facts, discussed above, it is clear that the bro-

thers did not own any joint property which can be regarded as a nucleus, which provided for a sufficient source for the acquisition of the disputed property or for construction of a new building thereon. We, therefore, reject the contention put forward on behalf of the respondent and find that Monorama was the real owner of the disputed property and she acquired that land and constructed a house thereon with her own money and she was not Rasamoy's benamidar regarding that property. We further held that the plaintiff has no interest therein and his claim for partition and for taking accounts will fail.

26. The appeal is allowed. The judgment and decree appealed against be set aside and the suit dismissed. There will be no order as to costs.

27. In that view of the matter, no order is called for on the application dated 16-5-1980 filed on behalf of the appellant for acceptance of additional evidence.

BANERJEE, J.:— I agree.

Appeal allowed.

AIR 1982 CALCUTTA 346

**M. M. DUTT AND MONOJ KUMAR
MUKHERJEE, JJ.**

Parmeshwar Choudhury and others, Appellants v. State of West Bengal and others, Respondents.

F.M.A.T. No. 2224 of 1981, D/- 8-3-1982.

(A) Calcutta Hackney Carriage Act (I of 1919), Ss. 2 (b) and 70, Second Proviso — Rickshaw pullers granted licences by Municipality under S. 173 of Bengal Municipal Act — Inclusion of area of Municipality within limits of Calcutta by notification under S. 2 (b) — Rickshaw pullers do not acquire right to ply rickshaw in Calcutta City. (Bengal Municipal Act (15 of 1932), S. 173).

Where certain rickshaw pullers claimed a right to ply their rickshaws in Calcutta City on the basis of a notification under S. 2 (b) including the area appertaining to the municipality which granted them licences, their claim would be liable to be rejected when the licences were granted to them under S. 173 of Bengal Municipal Act and not by the officer appointed by the Commissioners of the Municipality to discharge functions of the Registering Officer as laid down in the second proviso to S. 70. Granting of licences under S. 173 and registration of

rickshaws under the provisions of the Hackney Carriage Act are completely different things. (Para 10)

(B) Calcutta Hackney Carriage Act (I of 1919), Ss. 70 and 71 (1) — By-Laws framed under S. 71 (1), By-law 13-A — Registering Authority limiting number of rickshaws to be registered for plying in Calcutta to 6000 — Action not open to challenge.

Considering that the streets of Calcutta are overcrowded and jam-packed, and that the slow-moving vehicles are causing the biggest traffic problem in the metropolis, the limit of 6000 put by the Registering authority to the number of rickshaws to be registered under the provisions of the Act must be deemed to be perfectly justified. (Para 13)

Cases Referred: Chronological Paras
AIR 1955 Cal 417 12

Ranjit Banerjee and Falguni Sarkar, for Appellants; Tapash Roy, S. K. Panja, for C. S. T. C.; D. P. Mazumdar and Miss Sipra Mazumdar, for the State.

M. M. DUTT, J.:— The appellants, who are 117 Rickshaw pullers, have preferred this appeal against the judgment of T. K. Basu, J. dismissing the application of the appellants under Art. 226 of the Constitution of India.

2. The case of the appellants is that, they have been plying their rickshaws within the limits of the South Dum-Dum Municipality under licences granted to them by the said Municipality under Section 173 of the Bengal Municipal Act, 1932. The appellants claim that by a notification issued by the State Government under S. 2 (b) of the Calcutta Hackney-Carriage Act, 1919, hereinafter referred to as the Act, the area appertaining to the South Dum-Dum Municipality has been included in Calcutta as defined in S. 4 (2) of the Act, that is to say, inter alia, the area described in Schedule I to the Calcutta Municipal Act. The contention of the appellants is that in view of the said notification under S. 2 (b) of the Act, the appellants are entitled to ply their rickshaws in the city of Calcutta inasmuch as their rickshaws shall be deemed to have been registered under the Act. Alternatively, the contention of the appellants is that, they have the right to get their rickshaws registered under the provisions of the Act. It is the case of the appellants that they attempted to get their rickshaws registered under the Act through "Rickshaw Malik Samity", but the Registering auth-

ority under the Act refused such registration. The appellants, therefore, filed a writ petition before this Court, *inter alia*, praying for a writ in the nature of *Man-damus* commanding the respondents to issue licences to them under the provisions of the Act. They also challenged the constitutional validity of S. 70A which has been incorporated into the Act by the Calcutta Hackney-carriage (Amendment) Act, 1980. S. 70A, *inter alia*, provides that if any rickshaw, other than a cycle-rickshaw is used as such without having a licence under the Act, the owner of the such rickshaw shall be liable to a fine not exceeding Rs. 100 and in default of payment of fine, to simple imprisonment for a period not exceeding three months.

3. At the hearing of the writ petition before the learned Judge, the appellants challenged the communication dated June 30, 1981 by the Officer-in-charge, Hackney-carriage Branch, Calcutta, made on behalf of the Registering authority Calcutta informing the Secretary of the Rickshaw Malik Samity, Calcutta and 24-Parganas that no new registration of rickshaws could be considered at present. It does not appear that the appellants had advanced any contention before the learned Judge claiming any right to ply their rickshaws in the city of Calcutta in view of the alleged publication of a notification under S. 2 (b) of the Act, and of the grant of licences to them under the provision of S. 173 of the Calcutta Municipal Act. They, however, challenged the constitutional validity of S. 70A of the Act.

4. The learned Judge has observed that if the Executive Government decides as a matter of policy that they will not entertain any new application for licence in respect of any rickshaw in the city of Calcutta, that policy decision cannot be called in question in a court of law. It has been further observed by the learned Judge that judicial notice can be taken of the fact that the streets of Calcutta are over-crowded and jam-packed, and that slow-moving vehicles are causing the biggest traffic problem in the metropolis. The learned Judge, therefore, rejected the first contention of the appellants, that the refusal by the Registering Authority, Calcutta, to register the rickshaws belonging to the appellants was illegal and not justified. The learned Judge also repelled the contention of the appellants that the provision of S. 70A of the Act was illegal and invalid. In that view of the matter, the learned Judge dismissed

the writ petition of the appellants. Hence this appeal.

5. Before we examine the contentions of the appellants, we may refer to some of the provisions of the Act which are relevant for the purpose of this appeal. Under sub-section (3) of S. 1, the Act shall apply in the first instance only to Calcutta. "Calcutta" has been defined in S. 4 (2) of the Act as meaning, *inter alia*, the area described in Schedule I to the Calcutta Municipal Act, 1899; S. 2 of the Act provides as follows:—

"2. The State Government may, by notification,—

(a) extent this Act, or any portion thereof, to any other town or local area; or

(b) exclude from, or include in, Calcutta, or any other town or local area to which this Act is extended under cl. (a), any local area in the vicinity of the same and defined in the notification."

(The two provisos to Section 2 not being relevant for our purpose are omitted.)

Under S. 4 (6), "notification" means a notification published in the Official Gazette.

6. Chapter II of the Act provides for registration of hackney-carriage. Under S. 5, every hackney-carriage in Calcutta shall be annually registered by a Registering Officer, on such date as the Commissioner of Police may direct. S. 6 relates to the duties of the Registering Officer who shall be a Deputy Commissioner of Police specially appointed by the State Government for this purpose. S. 8 which provides for the procedure of registration is as follows:—

"8. (1) Any person who is desirous of registering a hackney-carriage, shall apply to the Registering Officer, stating the class in which he desires that the carriage may be registered, and shall submit the carriage for the inspection of the Registering Officer.

(2) The Registering Officer shall satisfy himself that the municipal tax imposed upon such carriage for the current half-year has been paid, and decide whether the carriage is fit to be registered in the class applied for, and shall register it in that class or refuse to grant the application.

(3) The person in whose name any carriage is registered shall be deemed to be the owner of such carriage for the purpose of this Act."

7. Chapter VII provides for registration of palanquins. Under S. 61 of the

Act, the palanquins shall be registered by the Officer appointed for registering hackney-carriages in the manner provided by Chapter II with respect to the registration of hackney-carriages.

8. Chapter VIII, relates to Rickshaws. S. 70 which is the only section under Chapter VIII of the Act provides as follows:—

"70. All the provisions contained in this Act, relating to palanquins, and the hirers, owners and bearers thereof, shall be applicable, *mutatis mutandis*, and so far as the same may reasonably be applied, to all rickshaws plying for hire in any town or place in which this Act is in force, and to the hirers, owners and bearers of such rickshaws:

Provided that the Registering Officer may cancel, or suspend for such period as he thinks fit, the registration of a rickshaw if in his opinion the type of the rickshaw has been so altered as to render it different from that in respect of which registration was made:

Provided further that in any area included in Calcutta under Clause (b) of S. 2, the functions of the Registering Officer shall be performed by an Officer appointed by the Commissioners of the Municipality comprising such area and the said officer shall forward to the Deputy Commissioner of Police referred to in sub-section (1) of Section 6 all papers relating to registration for record after they have been duly dealt with."

9. The first contention made on behalf of the appellants that as the area comprised in the South Dum-Dum Municipality has been included in Calcutta by a notification published under S. 2 (b) of the Act, and as the rickshaws of the appellants have been registered by the said Municipality, the appellants are entitled to ply their rickshaws in the city of Calcutta by virtue of the provision of S. 70 read with that of S. 61 of the Act. Before the contention can be accepted, two conditions have to be fulfilled, namely, (1) the publication of a notification under S. 2 (b) of the Act and (2) the registration of the rickshaws of the appellants by an officer appointed by the Commissioner of the South Dum-Dum Municipality as provided in the second proviso to S. 70 of the Act. As to the first condition, no copy of the notification has been annexed to the writ petition, nor has the same been produced before us by the appellants. Mr. Tapash Roy, learned Advocate appearing for the State of West Bengal has stated before us that in spite of a thorough search in the Government records, such

a nomination could not be traced out. He submits that no such notification was published under Section 2 (b) of the Act. On the other hand, as evidence of the publication of such a notification Mr. Ranjit Kumar Banerjee, learned Advocate appearing on behalf of the appellants has drawn our attention to the following statement occurring at page 249 of Bejoy Prasad Singh Roy's Bengal Municipal Act:—

"Under Section 2 (b) of the Calcutta Hackney-carriage Act, 1919, the following Municipalities have been included within Calcutta, Bally, Baranagar, Cossipore-Chitpore, Garden Reach, Howrah, Kamarhati, Manicktolla, South Dum-Dum and Tollygunge. These Municipalities under Section 82 (2) of the Hackney-carriage Act, 1919 are entitled to share of the fees and fines realised in Calcutta, in such a proportion as the Local Government may determine."

10. On the strength of the said statement, it is submitted by Mr. Banerjee that we should proceed on the basis that such a notification was published. We are afraid, we cannot do that as submitted by the learned Advocate. It may be that such a notification was published as has been stated by the learned author of the Bengal Municipal Act, but unless the notification is produced before us, it is difficult for us to take it for granted that the notification was published. The absence of the notification is sufficient to repel the contention of the appellants. But, apart from that, there is another difficulty for the appellants. Even if we assume the existence of a notification S. 2 (b) of the Act, the appellants have to fulfil the second condition, namely, their rickshaws have been registered by the officer appointed by the Commissioners of the Municipality to discharge functions of the Registering Officer as laid down in the second proviso to S. 70 of the Act. There is no material on record to show that any such officer has been appointed by the South Dum-Dum Municipality. It is not also the case of the appellants that their rickshaws have been registered by such officer of the Municipality under the provisions of the Act. On the contrary, the case of the appellants is that licences have been granted to them by the South Dum-Dum Municipality under the provision of S. 173 of the Bengal Municipal Act, 1932. Granting of licences under S. 173 and registration of rickshaws under the provisions of the Act are completely different things. On the strength of the licences granted

to the appellants under S. 173 of the Bengal Municipal Act enabling them to ply rickshaws within the limits of the Municipality, the appellants, in our view are not entitled to claim that they have acquired any right to ply rickshaws in the city of Calcutta. The second proviso to S. 70 of the Act is not applicable to the appellants whose rickshaws have not been registered by any officer appointed by the Commissioners of the South Dum-Dum Municipality to discharge the functions of a Registering Officer under the Act. The above contention of the appellants is, therefore, without any basis and is registered.

11. Next we may consider the contention of the appellants that in any event they have the right to get their rickshaws registered under the provisions of the Act. It has been urged on behalf of the appellants that the Officer-in-charge, Hackney-carriage Branch, Calcutta, was not justified in refusing to register the rickshaws of the appellants as claimed on their behalf by the Secretary of the Rickshaw Malik Samity, Calcutta and 24-Parganas. It is apparent from sub-section (2) of S. 8 of the Act, which has been set out above that the Registering Officer has the discretion either to register or refuse the registration of any hackney-carriage. The exercise of such discretion by the Registering Officer cannot normally be challenged unless it is tainted with arbitrariness, bias and mala fide.

12. Under Section 71 (1) of the Act, the State Government has been empowered to make by-laws generally for carrying out the provisions and intentions of the Act; and in particular and without prejudice to the generality of the foregoing power they may make by-laws with regard to certain matters as specified in clauses (a) to (n) of sub-sec. (1) of S. 71. It is unfortunate that a copy of the by-laws framed by the State Government has not been placed before us by either party. Instead, we have been handed over a decision of D. N. Sinha J. (as His Lordship then was) in *Satya Ranjan Roy v. Commissioner of Police, Calcutta*, AIR 1955 Cal 417. In that case, Sinha J. has observed as follows (at page 418):—

"It is by-law No. 13A which grants power to the Registering authority to limit the number of licences if there happens to be too large a number of such vehicles on the road. The registering authority at present finds that 6000 rickshaws (including 168 in Tollygunj) now

plying on the road is about the saturation point, and it is unsafe to grant any more licences."

13. Thus it appears from the said observation that the Registering authority has been conferred with the power to limit the number of licences, and such limit to the number of rickshaws has been fixed as 6000 beyond which the Registering authority is unable to register any more rickshaws. It is also the case of the appellants that 6000 rickshaws are plying in Calcutta which will be evident from the letter dated June 4, 1981 of the Secretary of Rickshaw Malik Samity, Calcutta and 24-Parganas, addressed to the Registering authority, Hackney-carriage Branch, Calcutta Police (Annexure B) to the writ petition, although in that letter it has been submitted that six thousand licenced rickshaws are not sufficient for the thickly populated city of Calcutta. Be that as it may, as the Registering authority by virtue of his power under By-law 13A has limited the registration of the number of rickshaws under the Act to 6000, the Registering authority was perfectly justified in refusing to grant registration of the rickshaws belonging to the appellants. In our view, the limit put by the Registering authority to the number of rickshaws to be registered under the provisions of the Act is perfectly justified, for, as judicially noticed by the learned Judge, the streets of Calcutta are overcrowded and jam-packed, and that the slow-moving vehicles are causing the biggest traffic problem in the metropolis. Therefore, the appellants have no right to claim registration of their rickshaws for the purpose of plying them in the city of Calcutta. The contention of the appellants in this regard fails, and it is overruled.

14. No argument has been advanced before us on behalf of the appellants challenging the constitutional validity of the provision of Section 70A incorporated into the Act by the said Amendment Act of 1980, which has been held to be valid by the learned Judge.

15. For the reasons aforesaid and, in view of the facts and circumstances of the case, we are of the view that there is no merit in the appeal. The appeal is, accordingly, dismissed. There will, however, be no order as to costs.

MONOJ KUMAR MUKHERJEE, J.—
I agree.

Appeal dismissed.

AIR 1982 CALCUTTA 350**DIPAK KUMAR SEN, J.**

Periwal Packing Industries Pvt. Ltd.,
Petitioner v. The Fertilizer and Chemicals Travancore Ltd., Respondent.

Suit No. 998 of 1980, D/- 16-3-1982.

Civil P. C. (5 of 1908), S. 10 — Forum — Choice of forum — Effect.

Where the only dispute between the parties was whether the manufacturer undertaking supply of gunny bags to a purchaser in Kerala was entitled to the benefit of force majeure clause in the agreement for supply, on account of a strike in a particular period in his factory at Calcutta and the clause regarding forum did not state that only the Courts of law in Kerala would have exclusive jurisdiction or that no other court will have jurisdiction to entertain such litigation or that the parties would not be entitled to resort to any other court, it could not be said that Calcutta High Court would not have jurisdiction to entertain the suit between the parties.

ORDER:— Periwal Packing Industries Pvt. Ltd., the plaintiff, instituted this suit on or about the 25th November 1980 against the Fertiliser And Chemicals Travancore Ltd., the defendant, claiming inter alia a decree for Rs. 75,237.37, alternatively, an enquiry into the damages and a decree on the amount ascertained costs and other reliefs.

2. The plaintiff's case is that an agreement was entered into by and between the plaintiff and the defendant on or about the 15th July 1977 whereunder the plaintiff agreed to sell jute bags of specified quality and quantity at agreed rates to the defendant under inter alia the following terms and conditions recorded in the correspondence had between the parties and also in a purchase order issued by the defendant to the plaintiff:

(a) 90% of the value of the goods supplied would be paid through the State Bank of India and the balance 10% would be paid within 30 days after the receipt of the goods at site.

(b) In case the plaintiff defaulted in making delivery failed to explain such default and the defendant did not accept the extension of the delivery period, the defendant would be entitled to deduct from the bills of the plaintiff an amount subject to a maximum of 7½% of the

total value of the order, provided the delay in delivering was not due to any force majeure.

(c) The parties would not be considered to be in default in the performance of their obligations under the contract if the same was prevented or delayed by reason, inter alia, of strikes.

(d) Any litigation arising on account of the said contract would be taken up in a court of law in Kerala.

3. It is not in dispute that the plaintiff has delivered the goods which have been duly accepted by the defendant and that 90% of the payment of the price thereof has been made. It is also not in dispute that the entire supply was not made within the stipulated period and by reason of the delayed delivery the defendant has deducted from the bills of the plaintiff a sum of Rs. 50,326/- by way of penalty and/or liquidated damages.

4. The plaintiff alleges that on account of labour trouble in its factory between April and Nov. 1977, a strike in the plaintiff's factory from December 1977 followed by a clouser of the factory the plaintiff could not supply the goods to the defendant within the time stipulated. The plaintiff contends that under the force majeure clause in the contract the plaintiff is entitled to an extension of time for delivery and the defendant is not entitled to deduct any amount from the plaintiff's bill on account of delay. It is also alleged that the defendant promised to release payment of the amount deducted, on the plaintiff producing a certificate from the office of the Labour Commissioner, West Bengal certifying that the factory of the plaintiff remained closed during the period. Such certificate it is alleged was duly produced by the plaintiff in spite whereof the defendant wrongfully retained the amount deducted.

5. The present application is by the defendant in this suit on a notice dated the 21st August, 1981. The defendant prays for the following orders:

(a) Leave under Clause 12 of the Letters Patent be revoked;

(b) The plaint be taken off the file and/or rejected;

6. The defendant contends that in view of the terms of the written agreement only the courts in Kerala have jurisdiction and this Court has no jurisdiction to try this suit. The defendant alleges that the goods were delivered in Kerala after notification of documents

submitted by the plaintiff through the State Bank at Kerala and as such a substantial part of the plaintiff's cause arose in Kerala. It is alleged further that the defendant has no office in Calcutta all its documents and its witness are in Kerala. In view of the agreed forum and in view of the balance of convenience it is contended that an order should be made in favour of the defendant.

7. One Mohanlal Periwal, a director of the plaintiff has affirmed an affidavit, which has been filed in opposition to this application.

8. It is, inter alia, alleged in this affidavit that the defendant has applied for extension of time to file its written statement in this suit and thus has taken steps in the suit. The clause in the agreement conferring jurisdiction to the Kerala Court it is contended is not a term of the contracts.

9. In the facts and circumstances it appears that the main dispute in the suit will be whether the plaintiff's factory was rendered unproductive on account of a strike at the relevant period and whether on account of the aforesaid the plaintiff is entitled to the benefit of force majeure clause. The evidence on the said issue will necessarily be at Calcutta and not at Kerala. There is no other dispute between the parties.

10. The clause in the agreement provides that litigation under the contract would be taken up in a Court at Kerala. The clause does not indicate that only the Courts of law in Kerala would have exclusive jurisdiction or that no other court will have jurisdiction to entertain such litigation or that the parties would not be entitled to resort to any other court.

11. For the reasons above the defendant is not entitled to succeed in this application.

12. Learned counsel for the plaintiff stated on instructions that the plaintiff has no objection to secure a part of the costs of the defendant in this suit which might be incurred and has suggested that Rs. 5,000 may be kept in deposit with the Advocate on record of the plaintiff to be held free from lien and subject to further orders in the suit. Let the amount be deposited within a fortnight from date.

13. Costs costs in the cause.

14. All parties to act on a signed copy of the minutes of this order on the usual undertaking.

15. On the oral application made on behalf of the defendant the suit will not

appear in the undefended list for a fortnight from date.

Order accordingly.

AIR 1982 CALCUTTA 351

B. C. RAY, J.

Dr. Miss Ruby Sett, Petitioner v. University of Calcutta and others, Respondents.

C. O. 9364 (W) of 1981, D/- 15-3-1982.

(A) Constitution of India, Arts. 14, 15, 226 — Admission to M. D. course by competitive examination — Assessment of marks — High Court cannot go into the merits of answer scripts — Assessment of marks if done arbitrarily or in utter violation of Rules — High Court will interfere.

It is well settled that to assess marks on the answer scripts is exclusively the affair of the examiners appointed by the University and the High Court will not intrude upon as it will not be just and proper for the High Court to say on merits whether the answer scripts were properly assessed or not. But if the assessment of the answer scripts and the giving of marks on such assessment is done arbitrarily, in utter violation of the rules, then certainly High Court will interfere. (Para 4)

In the instant case, the High Court refused to enter into the merits of the case, in view of the fact that the classes of M. D. course had already commenced and almost half of the session was over. (Para 4)

(B) Constitution of India, Arts. 14, 15 — Admission to M. D. Course by competitive examination — Duty of University.

While selecting candidates for highest course of study (M. D. in the instant case) the only idea before the University should be to choose the best students in consideration of their academic achievements not being swayed away by any other influence, consideration and view. This aspect should always be kept in mind and should always weigh with the examiners while assessing the merits of the answers given by the candidates in the written test. (Para 4)

S. Chatterjee R. K. Roy and Alak Banerjee, for Petitioner; N. K. Roy and Smt. S. Parmar, for the University.

ORDER :— The petitioner who appeared in the admission test of M. D. Course in General Medicine under the Univer-

CZ/DZ/B263/82/TGD/VCD

sity of Calcutta which was held on 14-7-81 at the Institute of Post Graduate Medical Education and Research has come up with this application with this grievance that though out of 75 questions she answered 74 questions correctly and though her academic career was all along brilliant and she was entitled to get the 20 marks set apart for good academic career was not properly considered, rather discriminated upon and as such her name was not included in the list of successful candidates for being admitted in the said M. D. Course in Medicine. It has also been stated in this petition that the examiners did not properly value and/or assess the answer scripts of the petitioner vis-a-vis the answer scripts submitted by the other examinees and as a result the petitioner was not selected in the said admission test and her name was not enlisted as one of the successful candidates in order to get admission in the said M. D. Course in Medicine.

2. Mr. Roy, learned Advocate appearing on behalf of the Calcutta University, has filed an affidavit in opposition denying those allegations and stating, inter alia, that in accordance with the rules the answer papers of all the examinees including the petitioner were duly assessed by the examiners and there has been no discrimination in the matter of assessment of the answer papers. It has been submitted that the marks were given on these answers after proper assessment of the same. It has also been submitted by Mr. Roy that in accordance with the rules for the answers which were not correct half marks have been deducted against each of the incorrect answers in accordance with the rules. Referring to the case of the petitioner Mr. Roy submitted that she secured 50 marks for having answered correctly 50 questions and for giving incorrect answers 12 marks were deducted in respect of 24 such incorrect answers. As such she secured only 38 marks and 4 marks were given i.e. 3+1 on assessment of her academic career. In total the petitioner secured only 42 marks and as such she could not secure the qualifying marks for getting her name enlisted in the list of successful candidates.

3. Mr. Chatterjee, however, referring to Annexure A to the affidavit in opposition sworn on behalf of the University submitted in the first place that if the answer scripts of the examinees particularly two of the successful examinees i.e. Shri Apurba Kumar Mukherjee and

Shri Roxy Senior whose names appeared in the list in order of merits as 2 and 1 respectively are produced before this Court it would be apparent from the assessment made that the answers that have been given by these examinees though do not tally with the model answers as referred to in Annexure B to the affidavit in opposition were taken into consideration and marks were given on such answers. It has been next commented upon by Mr. Chatterjee that the academic careers of Shri Roxy Senior and Shri Apurba Kumar Mukherjee are not so brilliant as that of the petitioner, still then about 14 marks have been awarded on this count whereas the petitioner has been given only 4 marks and on this count also the marks were not awarded to the petitioner in consideration of her academic career.

4. The whole question that comes up for consideration in this writ application is whether there has been a fair assessment of marks in accordance with the provisions of the rules laid down in this respect. It is well settled that to assess marks on the answer scripts is exclusively the affair of the examiners appointed by the University and this Court will not intrude upon or it will not be just and proper for this Court to say on merits whether the answer scripts were properly assessed or not. But one thing still remains to be considered by this Court. If the rules for assessment of the answer scripts and the giving of marks on such assessment are done arbitrarily, in utter violation of the rules and also in a manner which smacks of discrimination on the face of it then certainly this Equity Court will interfere and will make appropriate orders so that such arbitrary and discriminatory acts and also acts in contravention of the rules and norms that have been set out by the University by setting them aside and/or by cancelling them and by directing the University by the issue of a mandate to exercise its discretion in accordance with the extant rules and procedure. The allegations that have been made in this case by Mr. Chatterjee that there has not been a proper observance of the rules and procedure for assessment of marks by the University, if correct, certainly this Court will interfere. But in view of the fact that the classes of M. D. Course in Medicine have already commenced since September, 1981, and almost half of the session 1981-82 is over, considering this aspect of the matter it will not be fit and proper

to enter into the merits and if it is found otherwise to interfere in this matter at this stage. But it appears curious to this Court that while ascertaining the merit test apart from the assessment of the answer scripts and giving marks thereon it is really something extraordinary that some candidates have been given marks by several lots in 2 or 3 lots on the ground of the brilliant academic careers whereas others were not given the same. There is no indication how the authorities considered the merits and why one candidate was given marks on assessment of his academic brilliance several times by several lots, not in one lot, this really creates some suspicion in the mind of the Court. It is really expected that those who aspire to sit for the admission test for the highest course in medicine are not students of ordinary intelligence but are students of some greater merit and brilliance so far as their academic careers are concerned. Therefore, in deciding such cases the University should proceed being fully conscious and aware of its duties and responsibilities in this regard and should see that they should not proceed in such a fashion that it will create disappointment or it will unnecessarily debar a brilliant student from getting admission in this highest course. It will be appropos to say in this connection that while selecting candidates for this highest course of study the only idea before the University should be to choose the best students in consideration of their academic achievements not being swayed away by any other influence, considerations and bias. This aspect should always be kept in mind and should always weigh with the examiners while assessing the merits as expressed in the answers given by the students in the written test.

5. With these observations, as I have said already that the session has already started and almost half of the session is already over, I am not inclined at this stage to interfere in this matter. However, if this petitioner appears in the next test for getting herself admitted in the M. D. Course in Medicine or in any other discipline the authorities concerned will consider her answer scripts free from any bias and any prejudice and will consider impartially the merits of the answers to be given by this student and will also weigh the academic brilliance of this petitioner while assessing marks on her academic career.

6. The application is thus disposed of.
1982 Cal./23 VIII G—15

7. Learned Advocates on both sides may take plain copies of this order, as prayed for.

Order accordingly.

AIR 1982 CALCUTTA 353

P. K. BANERJEE AND

B. N. MAITRA, JJ.

Mahabir Saha, Appellant v. Haripada Saha and others, Respondents,

A. F. O. D. No. 622 of 1969, D/- 24-8-1981.

(A) Contract Act (9 of 1872), Ss. 17 and 16 — Evidence Act (1872), Ss. 101-104 — No allegation in plaint that Karta of family got lease deed executed by mother of minor plaintiff by practising fraud or collusion — Certificate that document was read over and explained to her — Necessity.

Plaintiffs did not allege in the plaint that the defendant who was Karta of the joint family got lease deed executed by minor plaintiff's mother by practising fraud or collusion. She appeared before court and gave evidence. She also signed the document on her behalf and on behalf of her minor son. As she is not a parda-nasin or illiterate woman, it is not necessary for the defendant to prove that the contents of the document were read over and explained to her. Omission of giving certificate that the document was read over and explained to her is not material.

(Paras 7, 8)

(B) Registration Act (16 of 1908), S. 17 (1) (c) and (2) (xi) — Mortgage for Rupees 1000 — Endorsement that dues under mortgage were paid — Admissible in evidence and no registration thereof is necessary in view of S. 17 (2) (xi) — As mortgage dues were not extinguished by that endorsement, S. 17 (1) (c) does not apply.

(Para 9)

(C) Evidence Act (1 of 1872), S. 21 — Admission — Value of — It is substantive evidence — When there is admission, it is not necessary to confront the person concerned with his previous statement. AIR 1977 SC 409, AIR 1974 SC 117 and AIR 1966 SC 405, Rel. on.

(Para 11)

Cases Referred: Chronological Paras

AIR 1977 SC 409	11
AIR 1977 SC 1712	11
AIR 1974 SC 117	11
AIR 1966 SC 405	11
AIR 1961 Cal 359	6, 8

BZ/CZ/A756/82/VSS/MYJ—H

AIR 1955 Cal 17

6, 8

(1954) 94 Cal LJ 39

6, 8

AIR 1930 Cal 591: 51 Cal LJ 465

6, 8

(1856) 6 MIA 393 (PC)

6

Rathindra Prasanna Sanyal and Amresh Chandra Bhattacharyya, for Appellant; Ram Mohan Bhattacharjee, Anilnanda Mukherjee and Basanta Kumar Datta, for Respondents.

B. N. MAITRA, J.— The plaintiffs allege that the disputed property originally belonged to one Abdul Sobhan Khan and after his death that property was acquired by many persons. Gopal Chandra Saha was the father of defendant No. 1, Mahabir, and grandfather of plaintiff No. 1. In 1928, Gopal expired leaving Mahabir, Haralal (son) and one Milan Bala, defendant No. 2, who is the widow of his predeceased son, Krishnalal Saha. Haralal died in 1354 B.S. leaving his widow and son (plaintiff No. 1), Haripada Saha, Gopal Chandra was the owner of premises No. 55, Subal Das Road, 35, Nawabgunj Road, 50/1, Subal Das Road and 47, Nawabgunj Das Road within the Dacca Municipality. Since Milan Bala was not an heir of Gopal Chandra, he made provision for her maintenance by making a gift of 2 rooms of his residential house for her and also providing for a sum of Rs. 6 per month for her maintenance. After partition of Bengal the plaintiffs, defendant No. 1 and defendant No. 2 migrated to West Bengal. Defendant No. 1 was the Karta of the Hindu joint family. An arrangement was made with the heirs of Abdul Sowan Khan that an exchange would be made. The valuation of the Dacca property was assessed at Rs. 17,000 and of the Dum Dum property in Calcutta at Rs. 22,000. Powers of Attorney were executed. The plaintiffs and defendant No. 1 executed a power of Attorney in favour of the Muslim co-owners. The latter also executed a power of Attorney in favour of defendant No. 1 because the plaintiff No. 1 was a minor and plaintiff No. 2 an illiterate woman. In September, 1950, the parties delivered possession of the respective properties in terms of the power of Attorney. Then defendant No. 1 realised the rents of the disputed property on his behalf and on behalf of the plaintiffs. Then on the 26th Nov. 1956, a document of lease was executed regarding the disputed property at 23/1/B, Dum Dum Road, Calcutta. Since the plaintiff No. 1 was then a minor and his mother an illiterate pardanasin woman, they had to depend entirely on Mahabir in the matter of execution of the lease.

The said plaintiff and defendant No. 1 had moiety share in the Dacca property and consequently they acquired 1/2 share each in the Calcutta property on the footing of the document of such lease. It appears that taking advantage of the minority of the plaintiff No. 1 and illiteracy of the plaintiff No. 2, Haripada committed fraud and it was recited in the Deed of Lease that the plaintiffs had only 1/3rd share and Mahabir had 2/3rd share therein and sum of Rs. 5000 had been paid by him from his own fund. In fact, Mahabir had no much money. That sum was paid by him from the profits of the joint property. The plaintiffs experienced difficulty and they asked for partition. But Mahabir did not comply with the demand. Hence the suit for partition on the allegation that the plaintiffs had 8 annas share in the property in question.

2. Defendant No. 2 Milan Bala filed a written statement supporting the plaintiff's assertions.

3. Defendant No. 1 filed a written statement denying the plaintiffs' allegations. His case is that after the death of Gopal Chandra, Haralal sold his undivided 1/2 share in the premises No. 50, Subal Das Road to a stranger. Haralal also mortgaged premises No. 55, Subal Das Road for Rs. 1000. Defendant No. 1 paid that debt and obtained the deed of mortgage from the mortgagee. Hence Haralal had the liability to pay this dues. After that arrangement for exchange was made, defendant No. 1 spent more than Rupees 4000 from his personal fund. He also paid Rs. 5000 in cash to the Muslim co-owners when the aforesaid deed of lease was finally executed.

4. The learned Subordinate Judge believed the plaintiffs' version and passed a decree in a preliminary form giving a direction for necessary accounts. This appeal is by the defendant No. 1.

5. It has been contended on behalf of the appellants that the deed of lease, Ext. 2, is binding on the plaintiffs and also on the appellant defendant No. 1. Plaintiff No. 2, mother of plaintiff No. 1, is not an illiterate or pardanasin woman. The permanent deed of lease, Ext. 2, was executed by her with full knowledge of its purport and contents. Both the documents were prepared by a lawyer and the lease in question was read over to plaintiff No. 2. Hence the plaintiffs cannot get any decree for 8 annas share in the property. Their share is 1/3rd and hence the decree should be modified accordingly. Plaintiff No. 1 clearly accepted

the document of lease, Ext. 2, and admitted therein that the plaintiffs had only 1/3rd share and for the remaining 2/3rds share of the property belonged to him.

6. The learned Advocate appearing on behalf of the plaintiff-respondent has referred to the well-known case of Hannuman Persuad in (1856) 6 MIA 393. It has been stated there that the guardian can alienate the minor's share or deal with his interest only for the benefit of the estate or legal necessity. There is no such legal necessity or any element of benefit of the minor plaintiff No. 1 when the deed of lease was executed. Reference has also been made to the cases of Chinta Desya v. Bhalku Das in (1930) 51 Cal LJ 465 : (AIR 1930 Cal 591), Sm. Sonia Parshini v. Sheikh Moula Baksha in AIR 1955 Cal 17 and A. E. G. Carapiet v. A. Y. Derderian in AIR 1961 Cal 359 and Mohini Mohan v. Southern Bank Ltd., reported in (1954) 94 Cal LJ 39. It has been urged that when a person is dealing with a pardanasin illiterate woman, it is for him to show that the contents of the deed were read over and explained to her. It has also been stated that the privilege extended to a pardanasin lady will apply to an illiterate woman, though not pardanasin. Moreover there is no certificate in Ext. 2 that the documents were read over and explained. The omission of giving a certificate that the document was read over and explained to her cannot be lightly treated. If the document is not read over and explained to the plaintiff, defendant No. 1 cannot claim moiety share in the property due to such defects. Defendant No. 1 was the Karta at the relevant time, He had no personal fund when the disputed lease, Ext. 2, was executed.

7. The first question arises, whether the disputed lease, Ext. 2, is binding on the parties. It may be pointed out that there is no averment that the document of lease is not binding on the plaintiffs. The Muslim co-sharers of the Dacca properties have not been made parties to the suit. Plaintiffs did not make appropriate prayer that such document of lease was obtained by practising fraud or collusion.

8. It appears that plaintiff No. 2 is not a pardanasin woman because she appeared before the learned Subordinate Judge and gave evidence. She also signed the document of lease on her behalf and also on behalf of her son and was not an illiterate woman. So the aforesaid cases of Chinta Dasya v. Bhalku Das (AIR 1930 Cal 591) (supra), Sm. Sonia Parshini v. Sheikh Moula Baksha (AIR 1955 Cal 17)

(supra), A. E. G. Carapiet v. A. Y. Derderian (AIR 1961 Cal 359) (supra) and Mohini Mohan v. Southern Bank Ltd. (1954-94 Cal LJ 39) (supra) have no application to the facts of this case. The reason is simple because the plaintiff is not a pardanasin or illiterate woman. This discussion is sufficient for the disposal of the appeal because there is no appropriate prayer in the plaint in this respect.

9. Then about the Dacca properties. It has been pointed out on behalf of the appellant that Haralal executed a mortgage for Rs. 1000 regarding one of the Dacca properties and defendant No. 1 satisfied the dues of the mortgage. According to the provisions of S. 17 (1) (c) of the Indian Registration Act, registration is necessary to extinguish a mortgage for Rs. 1000. But there is an exception, which has been engrafted in cl. (xi) of sub-sec. (2). The endorsement, Ext. A, has been proved in this case to show that the dues of the mortgage were paid. This is admissible in evidence and no registration thereof is necessary in view of cl. (xi) of S. 17 (2) of the Indian Registration Act and cl. (c) of sub-sec. (1) thereof does not apply as the mortgage dues were not extinguished by that endorsement, Ext. A. Moreover, the statement coming from the defendant No. 1 was that the mortgage dues payable by Haralal would be satisfied by defendant No. 1.

10. Then about the next stage of the case. The contract for exchange was arrived at in 1950, but document of lease was executed on 26th November, 1956, vide Ext. 2. Hence title will accrue only on the execution of the document of lease, though in fact they were documents of exchange within the meaning of provision of Section 118 of the Transfer of Property Act. A permanent lease was executed and it appears from the document of lease that the plaintiffs had 1/3rd share and Mahabir was the owner of the remaining 2/3rds share of the property.

11. It is now to be seen whether such admission made by the plaintiff No. 2 has any probative value in the eye of law. Law is that an admission is a substantive piece of evidence. This was stated by the Supreme Court in the case of Bharat Singh v. Mst. Bhagirathi reported in AIR 1966 SC 405 at page 410. It has been stated in that case that an admission is substantive evidence even though the parties are not confronted with such statement, but what weight should be attached to it is a different matter. Of course there is a dissenting note in the judgment of Sita-

ram v. Ram Chandra reported in AIR 1977 SC 1712. That case is distinguishable because in that case a certified copy of a statement of the witness was sought to be used as his admission. In that view of the matter it has been stated in that case that an admission cannot be admitted in evidence unless the previous statements made be first put to him and liberty is given to him to explain the same. It may be pointed out that in that case of Sitaran, the Supreme Court decisions reported in AIR 1977 SC 409 and in AIR 1974 SC 117 at page 119 were not considered. It has been clearly stated in those cases that when there is an admission, it is not necessary to confront the person concerned with his previous statement. This admission has not been proved to be erroneous. In that view of the matter it must be held that the document of lease, Ext. 2, is a genuine document.

12. The last point is what are the shares of the parties regarding the disputed premises. It has been contended on behalf of the respondent that Milan Bala's father-in-law, Gopal Chandra, made provision for her residence in Dacca town by making gift of two rooms to her. This arrangement was upheld by the parties by giving her two rooms, one by the plaintiffs and another by defendant No. 1. The provision is that after her death these rooms would be returned to the donors respectively.

13. This is common ground that there are 10 rooms in the house. Defendant No. 1 acquired six rooms and plaintiffs three rooms and there was another small room. So there is no difficulty in this respect.

14. P.W. 1 Subhasini Saha, plaintiff No. 2, has stated in her evidence that she was present when their deed of lease was executed. P.W. 3, Santosh, has stated that he was present when the documents were executed. The lawyer Rama Ranjan Chakraborty drafted both the documents. He knows that Rs. 5000 was paid in excess by Mahabir for which he got more share. At once a question was put to him why he did not raise any objection. He stated in evidence that that was their family matter and he did not object to the excess share of Mahabir.

15. P.W. 2, Milan Bala, defendant No. 2, stated that Rs. 5000 was paid. The defence is that both the deeds were read over and explained by the lawyer Ranjan Chakraborty. This version has been corroborated by D.W. 2, Biswanath Paul, who says that the parties signed in the documents in their presence.

16. P.W. 1, Suhasini, has stated in her cross-examination that after the execution of the Deed of Lease, Mahabir had been paying 2/3rds share and plaintiffs 1/3rd share towards cess and taxes. They did not raise any objection to the same for the last 10 years. This conclusively shows that the version given by the defendant No. 1 is true and the terms of Ext. 2, Deed of Lease, were accepted by the plaintiffs and they were acted upon. So the question of fraud is ruled out. Had there been any fraud, plaintiff No. 2 would not have accepted possession of only the four rooms and paid Municipal taxes to the extent of 1/3rd share. The defendant No. 2 has stated that plaintiffs had 1/3rd share. Hence the submissions made on behalf of the respondents cannot be accepted. The decree must, therefore, be modified.

17. The appeal is allowed. It is hereby declared that the plaintiffs and the defendant No. 1 have 1/3rd share and 2/3rds share respectively in the disputed property subject to the right of residence of defendant No. 2 with respect to two rooms allotted to her, as well as her right to get Rs. 6 per mensem for her maintenance out of the income of the property for her life. The judgment and decree appealed against be modified accordingly.

18. There will be no order as to costs.

BANERJEE, J.:— I agree.

Appeal allowed.

**AIR 1982 CALCUTTA 356
SPECIAL BENCH**

ANIL KUMAR SEN,

BHABES CHANDRA CHAKRABARTI
AND SUDHINDRA MOHAN GUHA, JJ.

Patrick Herbert Van-Hek, Petitioner v.
Mrs. More Ilma Van-Hek, Respondent.

Divorce Suit No. 5 of 1978, D/- 23-12-1981.

Divorce Act (4 of 1869), Secs. 10, 17 — Reference for acceptance of decree of dissolution passed on ground of desertion and adultery — Evidence in support of adultery — Sufficiency — Charge of adultery failing — Decree cannot be sustained on ground of desertion alone.

Where the case in the application for dissolution on ground of adultery was that the respondent wife had been on very friendly and intimate terms with another person, a seaman, from twelve

FZ/FZ/C411/82/SNV

years before the institution of the suit and the evidence read as if that the respondent deserted the matrimonial home twelve years before filing of suit with the sole object of meeting the said seaman as often as she liked, failure of the petitioner husband not to make the said person co-respondent in the suit contrary to the requirement of law on the ground that he could not collect the name and whereabouts of the person in question, would be unacceptable. Further, recommendation for acceptance by the District Judge, of the decree of dissolution on the ground of desertion and adultery would be unacceptable when the case of the husband was that the respondent had been leading an adulterous life by mixing with the seaman in such manner that his prestige was lowered in the estimation of others and the evidence of the petitioner was that 12 years after the desertion he thought of paying a surprise visit and found out the respondent and the seaman in a compromising position and no person came forward to corroborate the story of the petitioner the evidence of the petitioner would not be sufficient to prove the charge of adultery. Furthermore, in such a case, when the allegation of adultery failed the suit for dissolution of marriage under S. 10 must necessarily fail for desertion simpliciter could not be a ground of dissolution under S. 10. (Paras 6, 7)

B. C. CHAKRABARTI, J.:— This is a reference under S. 17 of the Divorce Act made by the learned Additional District Judge, 7th Court, Alipore after having passed a decree of divorce in Divorce Suit No. 5 of 1978 of his Court. The petitioner instituted the suit in 1977 on an allegation that the petitioner and the respondent both of whom are Indian citizens professing the Christian faith were married in May, 1944. Since after the marriage they were living peacefully and four children were born to them. The children have attained majority and are now living abroad. Sometime in 1965 the respondent wife picked up acquaintance and intimacy with a seaman and became very friendly with him. She started mixing with the said seaman freely and in such a manner that the petitioner felt humiliated and lowered in the estimation of others. His attempts to correct and mend the wife turned futile. On the 25th Dec. 1965 the respondent left the matrimonial home and went away to her mother's place at No. 1 Motisil Street, Calcutta. She has been residing there ever

since and has been leading an adulterous life with the said seaman. It is said that the name and whereabouts of the seaman with whom the respondent is living is not known to the petitioner as the seaman lives away from India in connection with his employment and seldom comes back to India. On these allegations, the petitioner prayed for a decree of divorce under S. 10 of the Divorce Act.

2. The respondent, it appears had entered appearance and filed a written statement denying the allegations but did not eventually contest the claim at the time of hearing. On behalf of the petitioner husband none other than the petitioner has been examined as a witness. He says that he was married with the respondent in 1944; that four children were born unto them; that the respondent was having an affair with a seaman and that she left the matrimonial home in Dec. 1965 to live with her mother at No. 1 Motisil Street, Calcutta, so that she can meet the said seaman as often as she likes. It is also his evidence that his attempts to bring her back failed and he could not make the seaman a party respondent as he could not ascertain his name and whereabouts. He paid a surprise visit on 1-1-1978 when he says he found his wife and the said seaman in a compromising position.

3. On the evidence thus adduced the learned Additional District Judge felt satisfied that the allegations of desertion as far as back in 1965 has been proved and it has further been proved that the respondent is living in adultery with a seaman.

4. The decree so made is now before us upon a reference under S. 17 of the Divorce Act. Notices having been issued from this Court after receipt of the reference, an Advocate appeared for the petitioner although none appears today at the time of hearing. The respondent was duly served.

5. Having considered the case made out in the application for divorce and the evidence on record we are unable to sustain and affirm the decree of dissolution of marriage as passed by the learned Additional District Judge. The case in the application for dissolution is that the respondent has been in very friendly and intimate terms with a particular seaman from the year 1965. The suit was instituted in 1977 i.e. to say nearly 12 years thereafter. The law requires that in the case of a suit for dissolution of marriage

by the petitioner husband on the ground of adultery, it is necessary to make the adulterer a co-respondent. In order to evade making the said person a co-respondent it is said in paragraph 22 of the petition that the name and whereabouts of the said seaman is not known to the petitioner as he lives away from India and seldom comes back. The evidence however, suggests otherwise. It reads as if that the respondent deserted the matrimonial home with the sole object of meeting the said seaman as often as she likes. The suggestion obviously, is that they meet too often and too frequently. If that be so, it is difficult to believe that the petitioner husband could not collect the name and whereabouts of the seaman during the period of 12 years that passed between when he first came to know of the relationship between them and the date of institution of the suit. Therefore, we are not satisfied as to the explanation for not making the seaman a co-respondent in this case.

6. This apart the evidence as it is, appears to us to be insufficient to prove the allegations of adultery. The case is that the respondent has been leading an adulterous life by mixing with a seaman in such manner that his prestige was lowered in the estimation of others. But curiously, not a single other person came forward to corroborate the story of the petitioner. His evidence that merely 12 years after the desertion he thought of paying a surprise visit and found out the respondent and the seaman in a compromising position appears to us unbelievable. We are unable to accept the evidence as sufficient to prove the charge of adultery.

7. If that allegation fails the suit for dissolution of marriage under S. 10 of the Divorce Act must necessarily fail for desertion simpliciter cannot be a ground of dissolution under S. 10 of the Divorce Act. In that view of the matter, we are unable to affirm the decree passed by the Additional District Judge. The decree as passed is set aside and the suit is dismissed. Reference is thus disposed of. There will be no order for costs.

ANIL KUMAR SEN, J.:— I agree.

SUDHINDRA MOHAN GUHA, J.:— I agree.

Order accordingly.

AIR 1982 CALCUTTA 358

DIPAK KUMAR SEN, J.

Narendra Nath Pal Choudhury and another, Plaintiffs v. G. L. Malhotra and others, Defendants.

Suit No. 764 of 1980, D/- 30-11-1981.

Civil P. C. (5 of 1908), O. 6, R. 17 — Application for amendment of plaint seeking to introduce cause of action arising subsequent to filing of suit — Amendments asked for, expected to shorten proceedings and to prevent multiplicity of proceedings — Court, held, can take note of subsequent facts — Amendment allowed. Case law discussed. (Para 7)

Cases Referred : Chronological Paras

AIR 1977 Cal 108	6
AIR 1976 SC 49	6
AIR 1975 SC 1409	6
AIR 1973 SC 171	6
AIR 1970 Raj 77	6

ORDER :— Narendra Nath Pal Choudhury and Biswendra Nath Pal Choudhuri, the plaintiffs, filed this suit against G. L. Malhotra, Bijanendra Nath Pal Choudhuri and Kumar Shankar Pal Choudhuri, the defendants, claiming, inter alia, a decree against the defendant No. 1 for vacant possession of the portion of premises No. 79A, Acharya Jagadish Chandra Bose Road, Calcutta; decree for Rupees 5,000/- as damages against the defendant No. 1; alternatively an enquiry into damages and decree for the amount as may be found due upon such enquiry; a further decree for Rs. 72,549.22 p. against the defendant No. 1 and alternatively decree against the defendant No. 1 for such other sum as may be found fit and proper; decree for mesne profits and future profits at the rate of Rs. 50/- per day on and from the 1st Feb. 1980 till delivery of possession; alternatively, an enquiry into mesne profits and a decree for the sum as may be found due upon such enquiry and other reliefs.

2. The plaintiffs' case is that the said portion of the said premises was demised under a lease in favour of the defendant No. 1 by a registered deed dated the 31st March, 1960 for a period of 21 years on and from April 1960 at an agreed rent of Rs. 350/- per month. The plaintiff alleges further that the defendant No. 1 committed breaches of the covenants and conditions in the said lease, inter alia, as follows :

BZ/CZ/A754/82/VSS/SNY.—H

(a) The defendant No. 1 defaulted in payment of the monthly rent since March 1969. The said default has continued.

(b) The defendant No. 1 has used or permitted the said premises to be used for purposes other than those envisaged in the lease and also has wrongfully installed machinery therein and is carrying on manufacturing activities in the premises.

(c) The defendant No. 1 stored injurious inflammable and combustible materials in the said premises.

(d) The aforesaid wrongful acts of the defendant No. 1 have caused damage to the said premises and constitute a nuisance.

(e) The defendant No. 1 has made structural alterations to the premises by constructing a mezzanine floor without the approval of the plaintiff.

3. By the present application made on a summons dated the 27th July, 1981 the plaintiff seeks to amend the plaint by, incorporating therein the following:—

The term of 21 years under the said lease has expired on the 31st March 1981 by efflux of time and that the defendant No. 1 has failed to deliver up possession of the demised premises on the 1st Apr. 1981 in spite of demands.

4. The defendant No. 1 has affirmed an affidavit on the 28th Aug. 1981 which has been filed in opposition to this application. It is, *inter alia*, alleged in this affidavit that the suit having been filed on the 28th Aug. 1980, the plaintiff is not entitled to effect the amendment as applied and introduce a cause of action which arose on the 1st April 1981. If the amendment is allowed, the cause of action introduced by the amendment would relate back to the date of institution of the suit.

5. Learned counsel for the plaintiff submitted at the hearing that the amendment sought to be incorporated is based on subsequent facts material to this suit and the Court should take notice of the same to do justice to the parties and to shorten the proceedings. Contentions to the contrary were made on behalf of the defendant No. 1.

6. Several decisions were cited at the bar in support of their respective contentions which are as follows :

(a) *Rajeshwar Dayal v. Padam Kumar Kothari* reported in AIR 1970 Raj 77. In this case, a suit for eviction of a tenant was filed on the 24th Jan. 1966 on the

ground of personal necessity and an application was made to amend the plaint on the ground of alleged default in payment of rent on 3rd Apr. 1967. In disallowing the application a single Bench of the Rajasthan High Court held, *inter alia*, that the Court has no power either under S. 153 or under O. 6, R. 17 of the C. P. C. to allow an amendment of the plaint to include a cause of action which was not in existence on the date of institution of the suit.

(b) *M/s. M. Laxmi & Co. v. Dr. Anant R. Deshpande*, reported in AIR 1973 SC 171. This decision was cited for the following observation of the Supreme Court (Para 27) :

"It is true that the Court can take notice of subsequent events. These cases are where the court finds that because of altered circumstances like devolution of interest it is necessary to shorten litigation. Where the original relief has become inappropriate, by subsequent events, the Court can take notice of such changes. If the Court finds that the judgment of the Court cannot be carried into effect because of changes of circumstances the Court takes notice of the same. If the Court finds that the matter is no longer in controversy the Court also takes notice of such event. If the property which is the subject-matter of suit is no longer available the court will take notice of such event. The Court takes notice of subsequent events to shorten litigation, to preserve rights of both the parties and to subserve the ends of justice."

(c) *Pasupuleti Venkateswarlu v. Motor & General Traders*, reported in AIR 1975 SC 1409. This decision was cited for the following observations of the Supreme Court (Para 4) :

"It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the hand-maid and not the mistress of the judicial process. If a fact, arising after the *lis* has come to Court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fair play is violated, with a view to promote substantial justice — subject, of course, to the ab-

sence of other disentitling factors or just circumstances."

"We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognisance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed."

(d) Rameshwar v. Jot Ram, reported in AIR 1976 SC 49, where the Supreme Court observed as follows (Para 8) :

"It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. This is an emphatic statement that the right of a party is determined by the facts as they exist on the date the action is instituted. Granting the presence of such facts, then he is entitled to its enforcement. Later developments cannot defeat his right. The Court's procedural delays cannot deprive him of legal justice or rights crystallised in the initial cause of action.

Courts can, however, take not of subsequent events and mould the relief accordingly, but this can be done only in exceptional circumstances. Rights vested by virtue of a statute cannot be divested by this equitable doctrine."

(e) Ayesha Khatoon v. Durga Sahaya, reported in AIR 1977 Cal 108. In this case the landlord had filed a suit for ejectment of tenants on the ground of forfeiture of a lease. The suit was dismissed by the trial Court and an appeal was preferred by the landlord. Pending appeal the period of lease expired and the appellant applied for amendment of the plaint by claiming relief on the additional ground of expiry of the lease. This application was filed in the appeal. A Division Bench of this Court held that inasmuch as the Courts were entitled to take notice of subsequent facts and grant relief to the parties accordingly, the same principle should be extended for the purpose of amendment of plaints. This was necessary to shorten litigation and for the ends of justice. The Division Bench referred to the decision of the Supreme Court in Pasupuleti Venkateswarlu (supra).

7. In view of the principles laid down by the Supreme Court in the several judgments noted above and also in view of the judgment of the Division Bench of

this Court, which is binding on me, in my view, the plaintiff is entitled to succeed in this application. No doubt the plaintiff is seeking to introduce a cause of action which was not in existence when the suit was filed, but if the Courts are empowered to take note of the subsequent facts there is no reason why the plaintiff should be prohibited from taking advantage of such cognizance by amending his plaint. If the plaintiff is to succeed on his original cause of action and nothing else, as has been urged on behalf of the defendants, then in no case the Court can take note of subsequent facts. The amendments asked for, if allowed, are expected to shorten the proceedings and to prevent multiplicity of proceedings.

8. For the reasons above this application is allowed. There will be an order in terms of prayers (a), (b), (c), (d) and (e) of the petition. The amendments to be incorporated within a fortnight from date on a signed copy of the minutes of this order on which the Department and the parties will act. The defendant will be at liberty to file an additional written statement within three weeks from the service of the amended copy of the plaint. The plaintiffs undertake to draw up, complete and file their order.

9. There will be a stay of operation of this order for one week.

Application allowed.

AIR 1982 CALCUTTA 360 SPECIAL BENCH

ANIL K. SEN,

BHABES CHANDRA CHAKRABARTI
AND SUDHINDRA MOHAN GUHA, JJ.

Brojendra Kumar Ghosh, Petitioner v. Mrs. Arpana Ghosh and another, Respondents.

Divorce Suit No. 70 of 1976, D/- 23-12-1981.

Divorce Act (4 of 1869), S. 10 — Decree of divorce — Grant of — District Judge reaching finding as to absence of collusion and absence of wilful neglect on part of petitioner husband before adultery and adultery on part of respondent wife — Decree of divorce held, was rightly granted.

Where on evidence the District Judge was of the opinion that there was nothing on record to indicate that the peti-

FZ/FZ/C412/82/SNV.

tion for divorce was presented and prosecuted by husband in collusion with either of the respondents and on evidence it was found by the District Judge that the wife, respondent No. 1, was guilty of adultery and it was also found that there was no unreasonable delay in presenting or promoting the petition or the petitioner had deserted and wilfully separated himself from respondent No. 1 before the adultery or that he had been guilty of wilful neglect or by his conduct had condoned the charge of adultery, it was held divorce under S. 10 was rightly granted. (Para 6)

SUDHINDRA MOHAN GUHA, J.:— The instant reference has been made by Sri A. K. Chatterjee, District Judge, Burdwan for confirmation of the decree passed in Matrimonial Suit No. 70 of 1976 under the Indian Divorce Act.

2. An application under Ss. 10 and 34 of the Divorce Act, 1869 was presented by the petitioner, Brojendra Kumar Ghosh for dissolution of marriage of the petitioner with respondent No. 1, Mrs. Arpana Ghosh on the ground that she had been guilty of adultery with the co-respondent No. 2, Sri Dilip Sen and for damages amounting to Rs. 2,000/- against the co-respondent.

3. Both the respondent and co-respondent made their appearance before the court below, but ultimately the suit was not contested by them and as a result the decree was passed ex parte.

4. The petitioner is a Christian by religion and both the parties are domiciled in India for all material times. The petitioner alleged that respondent No. 1 who was married to him had been guilty of adultery with co-respondent since the solemnization of marriage between them. The petitioner, who examined himself in court, stated on oath that there was no ground to suspect that the petitioner had in any manner been accessory to the charge of adultery or that he had condoned the same. On evidence the learned District Judge was of the opinion that there was nothing on record to indicate that the petition for divorce was presented and prosecuted in collusion with either of the respondents. On evidence it was found by the learned District Judge that the wife, respondent No. 1, was guilty of adultery. In the circumstances, a decree declaring the marriage of the petitioner with respondent No. 1 (sic) was passed and pronounced. It was also found that there was no unreasonable

delay in presenting or promoting the petition or the petitioner had deserted and wilfully separated himself from respondent No. 1 before the adultery or that he had been guilty of wilful neglect or by his conduct had condoned the charge of adultery.

5. The learned District Judge also passed a decree for damages of Rupees 1,000/- against co-respondent No. 2.

6. Having gone through the materials on record we are of the opinion that the decree for divorce under S. 10 of the Divorce Act was rightly passed. The decree for a sum of Rs. 1,000/- as damages under S. 34 of the Divorce Act also appears to have been rightly passed. In the circumstances, we confirm the decree and accept the reference.

7. There will be no order as to costs.
ANIL K. SEN, J.:— I agree.

B. C. CHAKRABARTI, J.:— I agree.
Order accordingly.

AIR 1982 CALCUTTA 361

M. M. DUTT, J.

Sm. Parimal Mitra and others, Petitioners v. Paresh Chandra Hazra and others, Opposite Parties.

C. O. No. 3215 of 1981, D/- 6-4-1982.

Civil P. C. (5 of 1908), Ss. 16 (d), 20 (c) — Plaintiff-tenant occupying building situate at Puri in Orissa State — Landlords taking tenant to Calcutta and compelling him to sign agreement collusively surrendering his tenancy right in respect of disputed building — Legality of agreement challenged in City Civil Court, Calcutta — Maintainability.

Where the plaintiff who was tenant of the defendant-landlords occupying building situate at Puri in Orissa State was taken to Calcutta by the landlords and he was compelled to sign some papers which he subsequently came to know was a resolution and an agreement whereby he had purported to surrender his tenancy in respect of the disputed building in favour of the owners and the landlords, the suit filed by the tenant for declaration that the agreement was illegal, collusive and void and not binding on tenant could not be said to be not triable by the City Civil Court, Calcutta for want of jurisdiction as contemplated by S. 16 (d). It was apparent that the principal relief asked for by the plaintiff was for a declaration that the said purported agree-

DZ/DZ/B652/82/SAD/MVJ-H

ment and/or resolution was illegal and void and the plaintiff had not asked for the determination of any right to the disputed building. It was not tenant's prayer that he wanted the court to adjudicate upon his tenancy right in the disputed building, though it was true that if the tenant got a declaration that the said purported agreement or resolution was void, his tenancy right in respect of the disputed building under the landlords would be restored but because of that it could not be said that the suit was one for determination of a right to or interest in immovable property. Further there was no question of obtaining any leave for the purpose of filing suit in the City Civil Court, Calcutta as a part of the cause of action had arisen in Calcutta and in view of Cl. (c) of S. 20 the suit could be filed in that Court. Further in the suit there was an allegation of fraud committed within jurisdiction of City Civil Court, Calcutta and the suit could be said to be maintainable from the point of view of accepted principle of law also that the court within whose jurisdiction fraud was committed would be entitled to entertain a suit founded on fraud. (1874) 21 Suth WR 303; AIR 1950 FC 83 and AIR 1959 Cal 767 (SB) Disting.

(Paras 7, 8., 11)

Cases Referred: Chronological Paras

AIR 1959 Cal 767 (SB)	10
AIR 1950 FC 83	9
(1874) 21 Suth WR 303	8

Ranjit Kumar Banerjee and Alok Kumar Ghosh, for Petitioner; Sudhis Das Gupta and Amal Chakraborty, for Opposite Party.

ORDER:— This application under Section 115 of the Civil P. C. has been filed by the defendants Nos. 1 and 3 to 5, and it is directed against order No. 51 dated July 29, 1981 of the learned Judge, 5th Bench, City Civil Court, Calcutta in Title Suit No. 2317 of 1958 holding that the said Court has jurisdiction to try the suit instituted by the plaintiff opposite party.

2. The plaintiff's case in short is that he was at all material times and still is a tenant under the defendants Nos. 1 and 3 to 5 of the entire building known as Atindra Dham and situate at Gopal Ballav Road, Sea Beach, Puri at a monthly rent of Rs. 300 payable according to the English Calendar month. The defendants Nos. 6 to 9 are the sub-tenants under the plaintiff. On August 31, 1977, the defendant No. 4, one of the landlords of the plaintiff, took him to the Hongkong

House, Calcutta and he was compelled to sign some papers. Subsequently, the plaintiff came to know that he was made to execute a resolution and/or an agreement whereby he had purported to surrender his tenancy in respect of the disputed building in favour of the owners and landlords. Under that agreement, a sum of Rs. 16,000 was payable to the plaintiff by the said defendants as consideration for the surrender. In the suit, the plaintiff has, inter alia, prayed for the following reliefs:

(i) Decree be passed declaring that the purported resolution and/or agreement dated 31st Aug., 1977 at the meeting held at Hongkong House office of the defendant No. 9 is illegal, collusive and void and is not binding upon the plaintiff.

(ii) Declaration that the defendants Nos. 1 and 3 to 5 have committed breach of the purported agreement dated 31st Aug., 1977 held at the office of Bharat Refineries Employees' Co-operative Society at Hongkong House and the plaintiff had right to cancel and has cancelled the said agreement in the alternative.

(iii) Decree declaring that the purported resolution and the purported agreement dated 31st Aug., 1977 has not affected in any way the plaintiff's tenancy right in respect of the premises Atindra Dham at Puri under the defendants Nos. 1 and 3 to 5 * * *

(iv) Permanent injunction restraining the defendants Nos. 1 and 3 to 5 from realising any rent from defendants Nos. 6 to 9, different sub-tenants under the plaintiff in the premises Atindra Dham at Sea Coast Puri and from disturbing plaintiffs possession of the said Atindra Dham in any manner whatsoever.

3. The defendants Nos. 1 and 3 to 5 have been contesting the suit by filing a written statement. It has been admitted by them that the plaintiff was a tenant in respect of the disputed building. But it is alleged that the plaintiff has surrendered his tenancy by the said agreement dated Aug. 31, 1977. It is contended by them that the suit cannot be tried by the City Civil Court, Calcutta for want of jurisdiction as contemplated by S. 16 (d) of the Civil P. C.

4. The learned Judge framed an issue as to jurisdiction and tried the same as a preliminary issue. It has been held by the learned Judge that the suit is not one coming within the purview of S. 16 (d) of the Civil P. C. According to him, there is no question as to the determination of any right to or interest in immovable

property and, as part of the cause-of-action arose within the jurisdiction of the City Civil Court, Calcutta, that court has jurisdiction to entertain and try the suit. Upon the said findings, the learned Judge decided the issue in favour of the plaintiff. Hence this revisional application under S. 115 of the Civil P. C.

5. Section 16 of the Civil P. C. provides as follows:

"Subject to the pecuniary or other limitations prescribed by any law, suits—

(a) for the recovery of the immovable property with or without rent or profits,

(b) for the partition of immovable property,

(c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,

(d) for the determination of any other right to or interest in immovable property,

(e) for compensation for wrong to immovable property,

(f) for the recovery of movable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate."

(The Proviso and Explanation to S. 16 are not relevant for our purpose and are omitted.)

6. It is not disputed on behalf of the defendants that cls. (a) to (c), (e) and (f) of S. 16 have no manner of application to the instant suit. It is, however, contended by Mr. Banerjee, learned Advocate appearing on behalf of the defendants that the suit is one for the determination of a right to or interest in immovable property, that is, the disputed building, and that in view of cl. (d) of S. 16, the suit can only be instituted in Orissa Court within the local limits of whose jurisdiction the building is situate.

7. Now the question is whether the suit is for the determination of any right to or interest in the disputed building. I have already set out above the reliefs claimed by the plaintiff in the suit. It is apparent that the principal relief asked for by the plaintiff is for a declaration that the said purported resolution and/or agreement dated Aug. 31, 1977 is illegal and void and is not binding on the plaintiff. The plaintiff has not asked for the determination of any right to the disputed building. It is not the plaintiff's prayer that he wants the Court to adjudicate

upon his tenancy right in the disputed building. It has been already stated that the defendants have not denied the plaintiff's tenancy right in respect of the said buildings but their case is that the plaintiff has lost his right of tenancy by virtue of the alleged surrender of the same by the impugned agreement dated Aug. 31, 1977. Mr. Banerjee has drawn my attention to prayer (iii) in the plaint whereby the plaintiff has asked for a declaration that the said purported resolution or agreement dated Aug. 31, 1977 has not affected in any way, the plaintiff's tenancy right in respect of the disputed building. This prayer, in my opinion, does not require the Court to decide any right of the plaintiff in the disputed building. The declaration contained in prayer (iii) of the plaint may be said to be a consequential relief. If the Court comes to a finding that the impugned agreement is void, the plaintiff's right of tenancy would continue as before and the declaration as prayed for under that prayer will follow as a matter of course. In considering whether a suit is for determination of any right to or interest in immovable property, the whole of the plaint and the reliefs should be considered. In my opinion, the plaintiff has not sought for any relief which will require the Court to decide any right to or interest in immovable property. It is true that if the plaintiff gets a declaration that the said purported agreement or resolution is void, the plaintiff's tenancy right in respect of the disputed building under the defendants would be restored, but because of that it cannot be said that the suit is one for determination of a right to or interest in immovable property.

8. Mr. Banerjee has placed strong reliance on a Bench decision of this Court in *Hadjee Ismael v. Hadjee Mahomed*, (1874) 21 *Suth WR* 303. In that case, the suit was filed in the Original Side of this Court for setting aside a release alleged to have been executed in Calcutta under fraudulent representations made by the first defendant, and for an account and administration of the estate of a deceased Mahomedan who died intestate in Bombay, where he left movable and immovable property. The plaintiff asked for leave under cl. 11 of the Charter of the High Court of 1865. The leave was granted by the trial Court, but on appeal the order of the trial Court granting leave was set aside and the plaint was directed to be taken off the file, so that the plaintiff might file the plaint in the High Court at Bombay. I do not think that the above

decision is of any assistance to the defendants, for, in that case, the question was whether the cause-of-action arose wholly in Calcutta. Couch, C. J. who delivered the judgment of the Bench observed:

"Here the cause-of-action cannot be said to have arisen wholly in Calcutta... .. The fraudulent representations which led to the execution of the release may have been made and the release may have been executed here; but the cause-of-action in this case consists of more than that Then where did the release take effect? It would, perhaps be a somewhat far-fetched application of the doctrine to hold that the release operated in Calcutta in regard to the plaintiff's share of the movable property. It certainly could not do so in regard to the share in the immovable property, which apparently formed the greater portion of what the plaintiff claimed to be entitled to. That was in Bombay, and that part of the cause-of-action arose there. In such a case as the present, I think the cause-of-action in respect of the immovable property arose in the place where the release took effect, and the suit comes within that part of the clause which provides that the leave of the Court must be obtained."

It is clear from the above observation that though a part of the cause-of-action arose in Calcutta, the greater part arose in Bombay where the property was situated. It was not held that the suit was for land within the meaning of cl. 11 of the Charter. But it was held that greater part of the cause-of-action arose in Bombay where the release took effect. After considering the facts and circumstances, their Lordships took the view that the leave should not be granted. In the instant case, a part of the cause-of-action has arisen in Calcutta. There is no question of obtaining any leave for the purpose of filing the suit in the City Civil Court, Calcutta, for, in view of cl. (c) of S. 20 of the Civil P. C. the suit can be filed in that Court as part of the cause-of-action has arisen in Calcutta.

9. The next decision which has been relied on by the defendants is *Messrs. Moolji Jaitha and Co. v. K. S. & W. Mills Co.*, AIR 1950 FC 83. In that case, the suit was filed in the Original Side of the Bombay High Court. The prayers (a) and (b) of the plaint of that suit were as follows:

"(a) That it may be declared that the said land (particularised in para 8) be-

longed and are the properties of the plaintiff company and the defendants have no beneficial interest therein.

(b) That the defendants may be ordered to execute all such documents and deeds and do such acts as may be necessary for transferring the said lands to the name of the plaintiff."

The majority view that was expressed by Kania C. J., Patanjali Sastri and Fazal Ali, JJ. was that the suit was not a suit for land within cl. 12 of the Letters Patent. It has been observed by Kania C. J. that in order to see whether a suit covered by the expression "suit for land" in cl. 12, it has to be considered whether it is for the purpose of obtaining a direction for possession or a decision on title to land, or the object of the suit is something different but involves the consideration of the question of title to land indirectly. It is observed by Patanjali Sastri J. that the words "suit for land or other immovable property" in cl. 12, besides obviously covering claims for recovery of possession or control of land, are apt to connote also suits which primarily and substantially seek an adjudication upon title to immovable property or determination of any right or interest therein. In this connection, I also like to refer to the observation of B. K. Mukherjea J., although he was in the minority. It has been observed by his Lordship that the words "suit for land" mean a suit for establishing title to land of any interest in the same or for possession or control thereof; and the decree sought for must be intended *proprio vigore* to be enforceable against and binding on the land itself. On the basis of the above interpretation of the expression "suit for land or other immovable property", it cannot be said that the instant suit is a suit for land or other immovable property, even assuming that the said expression is synonymous with the provision of S. 16 (d) of the Civil P. C.

10. In *Probirendra Mohan Tagore v. State of Bihar*, AIR 1959 Cal 767 (SB) the plaintiff instituted the suit in the Original Side of this Court challenging the notification dated Oct. 30, 1952 issued by the Bihar Government under the Bihar Land Reforms Act, 1950. By the said notification, the estate of the plaintiff under the Bengal Settled Estates Act, 1904 in so far as the lands situate in Bihar were concerned, had vested in the State of Bihar. The estate of the plaintiff also included lands situate in Calcutta. It was held that the suit was really a

suit for lands situate in Bihar and this Court had no jurisdiction to entertain the suit. Further, it was held that although the estate of the plaintiff under the Bengal Settled Estates Act, 1904 included properties within Calcutta, no injury or threatened injury to such properties having been alleged in the plaint, no part of the cause-of-action arose within Calcutta. It, therefore, appears that in that case, it was held to be a suit for land situate wholly within the State of Bihar. That case, therefore, is of no help to the defendants.

11. In the instant suit also there is an allegation of fraud. In other words, the suit is founded on fraud and the fraud has been alleged to have been committed within the jurisdiction of City Civil Court, Calcutta. It is now an accepted principle of law that the Court within whose jurisdiction fraud is committed will be entitled to entertain a suit founded on fraud. From that point of view also the City Civil Court had jurisdiction to try the suit.

12. For the reasons aforesaid, this application fails, and it is dismissed. There will, however, be no order as to costs.

Application dismissed.

AIR 1982 CALCUTTA 365

RAMENDRA MOHAN DATTA AND
C. K. BANERJI, JJ.

Union of India and another, Appellants
v. Chinoy Chablani and Co. Respondent.

A.F.O.O. No. 331 of 1976, D/- 19-2-1981.

(A) Contract Act (9 of 1872), S. 230, clause (3) — Contract as to contrary — Presumption under — Principal, a Foreign Company entered into contract with third party without knowledge and consent of agent — Agent acting subsequently for discharge of consignment — Presumption that contract existed by and between agent and third party cannot be raised merely because principal cannot be sued.

The statutory presumption of a contract between the agent and the third party by legal fiction cannot be extended to cover a case where the principal has entered into the contract directly. In cl. (3) the word "principal" has been used in relation to the agent and not otherwise. The expression "though disclosed" have reference to the agent's act. S. 230, clause (3) does

not cover a case where the principal has entered into the contract himself and not through the agent. If the principal would enter into the contract directly with the third party there could not be any question of the principal being required to be disclosed as a principal. In such event, the agent could not possibly come into the picture at all and, as such, the agent could not be made liable by creating a legal fiction whereby a contract would be presumed to exist by and between the agent and the third party. If the agent has not done anything in the formation of the contract he could not be made liable without his knowledge and consent by statutory fiction contained in cl. (3). In such a case, the Legislature could not be said to have exonerated a principal who has himself entered into the contract by foisting his contractual liability on to the agent without his knowledge and consent by means of statutory presumption that a contract existed by and between the agent and the third party simply because the principal contracting party could not be sued. Case law discussed. (Paras 14, 21, 22)

(B) Contract Act (9 of 1872), S. 230 — Contract to contrary — Presumption — Maxim expressio unius exclusio alterius does not apply to clauses 1 to 3 of Section 230. (Maxim — Expressio unius exclusio alterius). (Para 19)

(C) Contract Act (9 of 1872), S. 230, clause (3) — Expression "Principal" — Cannot be sued — Meaning of — Territorial extension of it.

The expression "principal..... cannot be sued" does not bear a restricted meaning so as to confine the question to the territories in India only. The said expression has a wider amplitude and would cover cases where the principal can be sued in a foreign country as well.

(Para 28)

Cases Referred: Chronological Paras

AIR 1975 SC 43	18, 25
AIR 1972 SC 2284	25
AIR 1964 SC 766	25
AIR 1964 SC 1781	25
AIR 1963 SC 550: 1963 (1) Cri LJ 486	25
AIR 1959 SC 422	25
AIR 1959 SC 459	25
AIR 1959 Cal 286: 1959 Cri LJ 582	25
AIR 1955 Assam 86	25
AIR 1953 SC 244: 1953 Cri LJ 1094	23
AIR 1929 Oudh 417	25
(1877) 5 Ch D 605: 36 LT 752: 46 LJ Ch 510, Twycross v. Dreyfus	23
D. K. Sen, for Appellants,	

RAMENDRA MOHAN DATTA, J.:

This is an appeal from the judgment and order of Sabyasachi Mukharji, J. dated March 15, 1976 (reported in AIR 1976 Cal 467). The learned Judge allowed the application and directed the plaint to be taken off the file. The application before him was made praying for such an order, *inter alia*, on the ground, that the plaint did not disclose any cause of action and, alternatively for dismissing the suit on the ground that this Court had no jurisdiction to try or to entertain the suit. The petitioner in the further alternative prayed for stay of the suit.

2. The point involved in this appeal relates to the interpretation of S. 230 (3) of the Contract Act, 1872. The appellant No. 1 and the Food Corporation of India, the appellant No. 2 filed the suit against the respondents who were carrying on business, *inter alia*, as steamer agents of one Black Sea Steamship Company of U.S.S.R. The said Steamship Company was the owner of the vessel "S. S. SUDGA". The plaintiff-appellant No. 2 acted on behalf of the Ministry of Agriculture, Government of India in respect of all importations of fertilizers and food-stuffs. According to the plaintiffs, on October 31, 1973 one Mineral and Metal Trading Corporation of India Ltd. had shipped for and on behalf of the Ministry of Agriculture, Union of India on board the said vessel 81956 bags of Urea and further 820 empty spare bags from the Port of Odessa in U.S.S.R. to be carried to any Port in India. A Bill of Lading was issued by the said Black Sea Steamship Company which agreed to carry the same in accordance with the terms and conditions mentioned in the said contract of carriage.

3. The said vessel had discharged at Visakhapatnam 51933 bags of urea of which certain quantities were cut and torn and certain quantities contained sweepings only from and out of the said consignment. She completed discharge of the goods in the port of Calcutta also to the extent of 28747 bags of which 3201 were cut and torn and further 50 bags contained sweepings only. The same were duly surveyed at both the ports of Visakhapatnam and Calcutta. According to the plaintiff, the loss occurred thereby was due to the negligence and wrongful acts of the carriers and the plaintiffs-appellants claimed a sum of Rs. 73,285 from the respondent who were acting as the Steamer Agents.

4. In paragraph 10 of the plaint, the plaintiffs-appellants have pleaded:

"The said Black Sea Steamship Company appears to be the concern of U.S. S.R. and as such cannot be sued in India. In the circumstances, the defendant or its agents is liable and is sued as such."

5. The above, in short, is the frame of the suit. In short, although the contract was entered into with the said Shipping Company which issued the bill of lading but the said document did not mention anything about the respondent Chinoy Chablani & Co. which acted as the agents in the Calcutta Port for discharging the said consignment from the said vessel as the steamer agents.

6. The defendant-respondent herein contends that the contract of carriage was entered into by and between the appellants and the Black Sea Steamship Co. which issued the bill of lading. The defendant-respondent merely acted as the steamer agent and, accordingly, it could not have been sued in any event. No privity nor any jural relationship was established by and between the plaintiffs-appellants and the defendant-respondent.

7. On behalf of the appellants, it is contended that even though the defendant-respondent did not enter into the contract, still it became liable by reason of the legal fiction created by statute as would appear from the second paragraph of S. 230 of the Contract Act whereby such a contract would be presumed to exist in a case where the principal, though disclosed, could not be sued.

8. To appreciate the argument, it would be convenient to set out S. 230 of the Contract Act which runs as follows:—

"230. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them,

Such a contract shall be presumed to exist in the following cases:—

(1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

(2) Where the agent does not disclose the name of his principal;

(3) Where the principal, though disclosed, cannot be sued."

9. It is further contended that this is a case where the said Shipping Company belonged to the Soviet Government and as such it could not be sued in India. Accordingly, this case would fit in with and

would attract cl. (3) of the second paragraph of S. 230. It is further contended that whether or not such a principal could be sued in view of S. 86 of the Civil P. C. would be a matter to be gone into at the hearing of the suit but there is sufficient pleading in para. 10 of the plaint, as set out above, by virtue whereof the plaint should not be ordered to be taken off the file at such initial stage.

10. The first and the foremost question to be determined in this matter is whether in a case, where the principal has entered into the contract but the agent has not, a contract would be presumed to exist as between the agent and the third party, viz., the appellants herein, so as to make the agent liable by attracting cl. (3) of S. 230. The learned Judge of the Court below has held that in order to make an agent personally liable, the first pre-requisite is that there must be a contract entered into by an agent on behalf of the principal. Indeed, S. 230 of the Contract Act is in respect of cases where the agent has entered into the contract as the contracting party vis-a-vis a third party. The section deals with the agent's rights and liabilities in respect of his acting as such agent. This section does not in any way deal with a contract where the principal has entered into the contract directly with a third party. In such a case the question of agency does not in any way come up for consideration.

11. In general it is an undisputed proposition that only the parties to the contract can be made liable in case of any breach thereof and a contract can be enforced only by and against the parties thereto; but when it comes to the law of agency the position becomes different. Ordinarily the agent can neither personally enforce the contract entered into with third parties nor can he be made liable in respect thereto when he has entered into the contract on behalf of his principal as such agent. It is the principal and the principal alone who, under such circumstances, becomes the main contracting party and as such becomes liable in case of breach and also becomes entitled to sue in his personal name unless the agreement provides to the contrary.

12. Under Section 230, however, the agent under certain circumstances would become personally liable to the third party. Such liabilities have been enumerated in the second para. of the said section on the basis of presumption that such

a contract with the agent existed. The second para. deals with the liabilities of an agent where an agent has entered into the contract and not where the principal has entered into the contract directly with the third party. The second para. does not deal with any case of enforcement of the contract by the third party where the contract has been entered into by him with the principal.

13. Clause (1) of the second para. of the said section creates no difficulty. The language creates no ambiguity. It specifically provides therein that the liability of the agent would only arise under that clause where the contract has been made by the agent. With regard to clauses (2) and (3), however, it is not mentioned so specifically and, the same would require to be construed in relation to the whole of the section to find out their true meaning and import. In respect of clause (2) the language thereof primarily suggests that the agent is a party to the contract with the third party inasmuch as the principal is not disclosed. Accordingly, the question of the principal entering into a contract does not arise at all. The third party in the contract knows the agent to be the principal although the agent is not so acting vis-a-vis his principal. Under such circumstances, the law presumes such an agent to be the principal contracting party and not to be an agent vis-a-vis the third party. Under such circumstances, a contract will be presumed to exist by and between the agent and the third party in which a third party would be entitled to look forward to the agent as a principal contracting party.

14. In my opinion, cl. (3) is directly linked up with cl. (2) of the second para of S. 230. It is a corollary to cl. (2) and the two clauses must be read together in the context of the whole section. Cl. (3) relates to a case where the principal is disclosed in entering into the contract with the third party. The statutory presumption of a contract by legal fiction cannot be extended to cover a case where the principal has entered into the contract directly. In cl. (3) the word "principal" has been used in relation to the agent and not otherwise. The expression "though disclosed" must obviously have reference to the agent's act. The question of disclosure here cannot be an act of the principal if the principal has to be disclosed. He has to be disclosed by an act of the agent.

15. Chapter X of the Contract Act, 1872 containing the group of sections from 182 to 238 deals with agency and the rights and obligations of the principal and of the agent. The group of sections from Ss. 226 to 230 deals with the effect of agency on contracts with third parties. Section 226 provides that contracts entered into through an agent and obligations arising from acts done by the agent are enforceable in the same manner and would have the same legal consequences as if the contracts were made and the acts were done by the principal personally. Thus, it is clear, that a contract entered into through an agent is not enforceable against the agent but only against the principal. Under S. 231 if a person enters into a contract with an agent not knowing that he is an agent, the agent's principal may require the performance of the contract by the other contracting party and the other contracting party also has the same rights as against the principal which he would have had against the agent if the agent had been the principal. But if the principal discloses himself before the contract is completed, the other contracting party has also the right to refuse to fulfil the contract in certain circumstances.

16. Section 230 has two parts. The first part provides that an agent can neither personally enforce nor he is personally bound by contracts entered into by him on behalf of his principal unless there is a contract to the effect that the agent may personally enforce or be bound by such contracts. The second part of the section engrafts an exception to the above rule. It says that although there is no specific contract to the effect that the agent may personally enforce the contracts or be personally bound by them, yet the law will presume the existence of such a contract that the agent may personally enforce the contracts and be bound by them in the three cases mentioned therein. As observed hereinabove, in order to appreciate the scope and effect of the section, the two parts of the section cannot be read disjunctively but have to be read as a whole.

17. In the first case the words "where the contract is made by an agent for the sale or purchase of goods" are merely descriptive of the nature of the contract. The above read in the context of the entire section would read; "a contract to the effect whereby the agent may personally enforce contracts and be personally

bound by them shall be presumed in contracts entered into by the agent on behalf of his principal where the contract is made by the agent for the sale or purchase of goods for a merchant resident abroad." Similarly the second case read in the same manner would read; "a contract to the effect whereby the agent may personally enforce contracts and be personally bound by them shall be presumed in contracts entered into by the agent on behalf of his principal where the agent does not disclose the name of his principal". The third case would accordingly read: "a contract to the effect whereby the agent may personally enforce contracts entered into by him on behalf of his principal and be bound by them shall be presumed where the principal, though disclosed, cannot be sued."

18. It was observed by the Supreme Court in *Umed v. Raj Singh* reported in AIR 1975 SC 43....."but it is equally well settled and authorities abound in support of it — that in order to ascertain the true intention of the legislature the court must not only look at the words used by the legislature, but also have regard to the context and the setting in which they occur."

19. There is no question of any redundancy in the first case in the second part of S. 230 nor the maxim *expressio unius exclusio alterius* has any application in interpreting the three cases in the second part of Sec. 230 or any of them. Neither is there any possibility of two interpretations in the section. It may be pertinent in this context to refer to two other sections of the Contract Act, namely, S. 233 and S. 234. S. 233 provides that in cases where the agent is personally liable the party dealing with the agent may hold either the agent or the principal or both of them, liable. An option is given to the other party to the contract. Under S. 234 where the other party to the contract while entering into the contract with the agent induces the agent to act upon the belief that the principal will be only liable. He cannot afterwards hold the agent liable and again if he induces the principal to act upon the belief that only the agent will be liable he cannot afterwards hold the principal liable.

20. In my opinion, there is both principle and logic in providing for the statutory presumption of contract so as to make the agent and not the principal personally liable in respect of contract

vis-a-vis the third party in respect of the three cases enumerated under the said section. The third party's rights are protected by reason of the difficulties that might be created in respect of contracts which are envisaged thereunder. The third party's rights will not suffer any loss or prejudice if the agent is personally made liable in respect of such cases. The section further provides that if the parties to the contract would so intend they can agree to make the agent personally liable even without recourse to the principal. Likewise, under such circumstances the parties can also confer on him the right to enforce such contract personally in his own name. That will depend on the terms of each contract.

21. In any event, by any stretch of imagination it could not be contended that the said cl. (3) would cover a case where the principal has entered into the contract himself and not through the agent. If the principal would enter into the contract directly with the third party there could not be any question of the principal being required to be disclosed as a principal. In such event, the agent could not possibly come into the picture at all and, as such, the agent could not be made liable by creating a legal fiction whereby a contract would be presumed to exist by and between the agent and the third party. If the agent has not done anything in the formation of the contract it is difficult to see how the agent could be made liable without his knowledge and consent by statutory fiction of such a nature. It is difficult to imagine why the legislature should think of exonerating a principal who has himself entered into the contract by foisting his contractual liability on to the agent without his knowledge and consent by means of statutory presumption that a contract existed by and between the agent and the third party simply because the principal contracting party could not be sued.

22. To my mind, to accept the appellant's contention would be disastrous for the agents who might be otherwise foisted with heavy liabilities without their knowledge and consent. If the argument advanced on behalf of the appellant would be accepted, nobody would think of acting as a handling agent or a shipping agent or for any other purpose inasmuch as he might be saddled with heavy liability at the sweet will of the third party. The legislature would hardly intend to foist such liability on the agent

even though he has not directly, participated in the formation of the contract.

23. In the case of *Twycross v. Dreyfus* reported in (1877) 5 Ch. D. 605 it was held that an agent could not be sued in the absence of a principal. Mr. D. K. Sen, on behalf of the appellant contends that the Indian law in this respect is different from the English common law because under Cl. (3) of S. 230 a legal fiction has been created by Statute so as to make the agent liable in a case when the principal, though disclosed, cannot be sued. The language in S. 230 (3) is nothing but a legal fiction and the Court has to presume liability in the manner as provided therein. The Court has to examine for what purpose the fiction is created and after ascertaining the same, the Court has to assume all facts and consequences which are incidental to the giving effect to such a fiction. Mr. Sen has referred to the Supreme Court decision in the case of *State of Bombay v. Pandurang Vinayak* reported in AIR 1953 SC 244 at page 246. According to Mr. Sen the Statute has gone so far as to provide for his liability even though the agent has not acted personally. He is presumed to have acted, though not acted in fact. The expression "such a contract" in the second paragraph of the section would refer to the opening words herein, viz, "in the absence of a contract to that effect." That contract means a contract whereby the agent has agreed to take upon himself the liability arising out of the contract on behalf of the principal or the principal has agreed that the agent would personally enforce the contract entered into by the agent on behalf of the principal.

24. Mr. Sen has gone even to the extent of contending that by virtue of his position as an agent, wherever he might be, he can be sued by the said party even in a case where he has not been made a party to the contract in any manner entered into by and between the principal and the third party once it is proved that such a principal cannot be sued. It is difficult to appreciate the arguments advanced by Mr. Sen. Such a construction, if made, would require the language of the Statute to be changed altogether by inserting various words into the Statute. Under such circumstances, the first and the second paragraphs could hardly be read in a harmonious manner and the exceptions engrafted in the general principle and the legal fiction and/or the presumption in cl. (3) of

the second paragraph must necessarily give rise to an anomalous position which the legislature could not have intended to provide therein.

25. That being the position, I have no hesitation to hold that the learned Judge of the court below was quite correct in his findings on this point. As observed hereinabove, the contract of carriage was entered into by and between the appellants and the principal, viz., the said Black Sea Steamship Company of U.S.S.R. by issuing the said bill of lading and there is no mention therein of the respondent as the agent or otherwise. Mr. Sen has referred to several decisions but in all such decisions the contracts were entered into by the agent but that is not the case here. Such cases are : B. K. Gupta v. State, AIR 1959 Cal 286; Dharmeswar Kalita v. Union of India, AIR 1955 Assam 86; Durga Prasad Manna Lal v. Cawnpore Flour Mills Co. Ltd., AIR 1929 Oudh 417. Mr. Sen has also referred to several Supreme Court decisions on the point as to how a statute has to be construed under the circumstances. Such decisions are to be found in the cases of N. T. Veluswami Thevar v. Raja Nainar, AIR 1959 SC 422; Shri Ram Ram Narain v. State of Bombay, AIR 1959 SC 459; AIR 1963 SC 550, R. G. Jacob v. Republic of India; AIR 1964 SC 166, Ghanshyamdas v. Regional Assistant Commissioner, Sales Tax; AIR 1964 SC 1781, V. S. Rice & Oil Mills v. State of Andh Pra; AIR 1972 SC 2284, S. Narayanaswami v. G. Punnerselvam; Umed v. Raj Singh, AIR 1975 SC 43; Maxwell on Interpretation of Statutes (12th Edition) 293 to 297; Craies on Statute Law (6th Edn.) 108.

26. In my opinion, the principles enunciated in the said decisions are well-known and it is not here to discuss the same in details.

27. Mr. Sen next contends that under cl. (3) of S. 230 the expression "cannot be sued" should be restricted to mean "cannot be sued in India". It is contended that the principal being in a foreign State could not be sued except with the consent of the Central Government, as provided by S. 86 of the Civil P. C. According to Mr. Sen, whether in a case like this, the consent of the Central Government could be obtained or not could be a relevant matter for consideration at the stage of the trial of the suit herein but such a question cannot be decided at this stage and on the basis thereof the plaint cannot be ordered to be taken off the file

as ordered by the court below. The pleading as set out hereinabove is good enough to cover all possible points that might be raised at the trial of the suit. Mr. Sen has further argued that inasmuch as cl. (3) is restricted to cases in India alone, it is irrelevant for the purpose of the suit to consider whether or not the principal in this case could be sued by the appellants in U.S.S.R.

28. In my opinion, in view of our finding in respect of the first point, it is not necessary to decide this point. In any event, I am of the view that the expression 'principal.....cannot be sued' does not bear a restricted meaning so as to confine the question to the territories in India only. The said expression has a wider amplitude and would cover cases where the principal can be sued in a foreign country as well, as is the case here. There is no pleading to that effect to suggest that the principal here could not be sued even in U.S.S.R. Furthermore, the plaintiffs-appellants herein got the opportunity to state in this application whether or not the Central Government was approached to give its consent or whether such consent could not have been obtained in any event for suing the foreign principal.

29. The result, therefore, is that the appellants cannot succeed and the appeal must be and is hereby dismissed with costs.

C. K. BANERJI, J.:— I agree.

Appeal dismissed.

AIR 1982 CALCUTTA 370

ANIL K. SEN AND

B. C. CHAKRABARTI, JJ.

Sikha Singh, Petitioner v. Dina Chakrabarty and others, Opposite Parties.

C. R. No. 52 of 1982, D/- 5-5-1982.

(A) Civil P. C. (5 of 1908), O. 1, Rr. 3, 10 (2) — Special Marriage Act (1954), S. 27 — Suit for divorce against husband on ground of adultery — Alleged adulteress made a co-respondent — Damages also claimed against her — Alleged adulteress held, was a proper and necessary party — Her name could not be struck off under O. 1, R. 10 (2).

The Rule relating to joinder of the adulterer as a co-respondent proceeds on public policy to prevent collusion. Considered in the light of provision of O. 1, R. 3, C. P. C., the woman with whom the husband was alleged to have committed acts of adultery, held, was right-

FZ/FZ/C409/82/GDR

ly joined in the suit particularly in view of the claim for damages against her. In view of such a claim she was not merely a proper party but a necessary party. As such she could not claim that her name should be struck off under O. 1, R. 10 (2) of the Code. (Paras 27, 28)

(B) Special Marriage Act (43 of 1954), Ss. 27 and 41 — Calcutta H. C. Rules, R. 10 — R. 10 is not ultra vires the rule making power — Wife's suit for divorce on ground of adultery — Woman with whom husband is alleged to have committed acts of adultery can be impleaded as co-respondent in terms of R. 10.

(Para 15)

(C) Special Marriage Act (43 of 1954), S. 41 (2) (a) — Rules framed under, by Calcutta H. C., R. 10 — Suit for divorce on ground of adultery — Impleading "adulterer" as co-respondent — Rule is not referable only to a male adulterer — Masculine gender includes feminine as well. (General Clauses Act (1897), S. 13 (1)). (Para 17)

Cases Referred : Chronological Paras

AIR 1975 Andh Pra 80	25
AIR 1958 SC 886	20
AIR 1954 SC 321 : 1954 Cri LJ 886	21
AIR 1936 All 454 : 1936 All LJ 574	24
(1903) 7 Cal WN 504	26

G. A. Wilson-de Rose, for Petitioner;
Ajoy Roy with S. Dube, for Opposite Parties.

B. C. CHAKRABARTI, J.:— This revisional application at the instance of a co-respondent in a Matrimonial Suit is directed against an order rejecting her prayer for striking out her name from the category of co-respondent.

2. Opposite party No. 1 instituted the suit for a decree of divorce against opposite party No. 2 on the ground of adultery under S. 27 of the Special Marriage Act, 1954. In this suit the wife opposite party No. 1 alleged acts of cruelty and adultery on the part of the husband opposite party No. 2. It is further alleged that the husband committed acts of adultery with the petitioner herein who was made a co-respondent in the suit. The wife also claimed damages against the co-respondent.

3. In this suit, the petitioner co-respondent filed an application under O. 1, R. 10 of the Civil P. C. for striking out her name. It was contended before the court below that there is no provision in the Special Marriage Act permitting joinder of a woman as a co-respondent in a wife's suit for divorce on the ground of adultery and that the Rules framed under the

Act does not contemplate such a procedure and even if it intended to do so, it acted in excess of the powers conferred by the Act.

4. The prayer was resisted by the wife upon a reference to R. 10 of the Rules framed by the High Court. The learned Trial Judge overruled the contention of the petitioner co-respondent and rejected her prayer for striking out her name. Hence the revisional application.

5. Mr. Dey Roze appearing on behalf of the petitioner argued that any Rule providing for impleading a woman as co-respondent is ultra vires the Rule making power of the High Court conferred by S. 41 of the Act, that the power of the High Court in framing rules is limited by the provisions of O. 1, R. 3 of the Code and the provisions of the Indian Divorce Act, that the wife has no legal form of relief available against a woman having or intending to have sexual intercourse with the husband and as such no legal proceedings can be instituted against such a woman. It was further contended that R. 10 as framed by the High Court must be restricted in its application to a male co-respondent when read along with Rr. 18 to 24 of the Rules.

6. This application has been seriously contested by the wife respondent No. 1.

7. In order to appreciate the points involved it would be convenient to bear in mind the relevant provisions of the Special Marriage Act and the Rules framed thereunder.

8. Section 27 (1) (a) of the Act entitles either party to the marriage to present a petition for divorce on the ground that the respondent has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse.

9. Unlike the Indian Divorce Act there is no Special provision that upon such a petition presented by a husband, the petitioner shall be required to make the alleged adulterer a co-respondent unless excused.

Section 41 of the Special Marriage Act, reads as follows:—

"41. Power of High Court to make rules regulating procedure.

(1) The High Court shall, by notification in the official Gazette, make such rules consistent with the provisions contained in this Act and the Code of Civil Procedure, 1908, as it may consider expedient for the purpose of carrying into effect the provisions of Chapter V, VI and VII.

(2) In particular and without prejudice to the generality of the foregoing provision, such rules shall provide for—

(a) the impleading by the petitioner of the adulterer as a co-respondent on a petition for divorce on the ground of adultery, and the circumstances in which the petitioner may be excused from doing so;

(b) the awarding of damages against any such co-respondent;

(c) the intervention in any proceeding under Chapter V or Chapter VI by any person not already a party thereto;

(d) the form and contents of petitions for nullity of marriage or for divorce and the payment of costs incurred by parties to such petitions; and

(e) any other matter for which no provision or no sufficient provision is made in this Act, and for which provision is made in the Indian Divorce Act, 1869."

10. Different High Courts framed different set of rules under the rule making power conferred by this section. Necessarily the rules framed by the different High Courts could not be and are not identical. For the present we are concerned with the rules framed by this High Court.

11. R. 10 lays down that "In every petition for divorce on the ground of adultery the alleged adulterer shall be impleaded as a co-respondent. "The provisions to this rule are unnecessary for our present purpose and need not be referred to.

12. Rr. 17, 18 and 19 relate to a counter claim by the respondent for relief under S. 35 of the Act. R. 20 provides that when the answer of the husband alleges adultery by the petitioner, such answer shall state the name, address and description of the alleged adulterer.

13. R. 24 provides that when a decree for divorce is passed on the ground of adultery, the court may in its discretion award such damages against the co-respondent found guilty of the adultery, as it may think fit and proper.

14. Mr. De Roze in the first place argued that clauses (a), (b), (c) and (d) of Sec. 41 (2) must be read ejusdem generis with clause (e) and consequently the powers of the High Court in framing the rules must be limited by and confined to the provisions of the Indian Divorce Act under which no woman can be impleaded as a co-respondent. To confine the powers of the rule making authority in the manner suggested would

be contrary to the provisions of Sec. 41 (1), which lays down that the rules should be consistent with the provisions of the Special Marriage Act and the Civil P. C. sub-section (2) and the clauses thereunder merely enumerate the subjects regarding which the rules may be framed.

15. This apart, even if the expression "any other matter" referred to in clause (e) is read to mean a matter of the same kind or nature as enumerated in clauses (a) to (d), that also would be of no assistance. Impleading an adulterer as a co-respondent is a matter covered by cl. (a). This is again a matter on which some provision is made in the Indian Divorce Act (vide S. 11) but no sufficient provision is made in the Special Marriage Act. It is not, therefore, incompetent for the High Court to frame rules on such matters. And in fact some of the High Courts have framed rules in this regard in a manner not consistent with the Indian Divorce Act. For example, under the rules framed by the Patna High Court where a wife's petition alleges adultery with a woman named and contains a claim for costs against her, she shall be made a respondent in the cause. Similarly under the rules of the Bombay High Court it is competent for a female to intervene in a wife's petition where the husband is charged with adultery with such named female person. We are unable to agree that such rules are ultra vires being in excess of the powers conferred by S. 41.

16. Then it was contended that the very concept of different High Courts framing different set of rules in respect of a Central Act is opposed to common sense because in that event there would be different set of rules governing the same field within the country. Mr. De Roze therefore suggested that there should be one body authorised to frame rules so that they may be the same every where in the country. This contention too cannot be supported for the simple reason that what should have been the law is not within the sphere of our present enquiry. That apart it is not inconceivable for different High Courts to frame different set of rules under a central statute. In fact Civil P. C. itself authorises different High Courts to frame their own rules in regard to certain matters and the rules thus framed are not always uniform. Nonetheless they are good and binding.

17. Mr. De Roze then argued that R. 10 quoted above refers to an adulterer

and not an adulteress and consequently the rule is referable only to a male adulterer. Here again we are unable to agree with him. According to the accepted rules of interpretation and the provisions of the General Clauses Act, the use of the masculine gender here includes the feminine as well. It is significant to note that the rule begins with the words "in every petition for divorce". The rule therefore, covers both a petition by the husband as also a petition by the wife.

18. Mr. De Roze then pointed out that the construction put by the learned Court below to R. 10 is in direct conflict with the provisions of R. 20. S. 35 of the Act enables a party to the action to make a counter claim, by way of an answer. R. 20 provides that where the answer of the husband alleges adultery by the petitioner, obviously meaning thereby the wife such answer shall state the name, address and description of the alleged adulterer. Since there is no corresponding provision in regard to the answer of the wife containing an allegation of adultery by the petitioner husband, it was argued that in order to give an effective meaning to R. 10, it should be confined to the case of a male adulterer only.

19. Such contention might have been possible but for some other provisions in the Rules. R. 24 empowers the Court to award damages against a co-respondent when a decree for divorce is passed on the ground of adultery. The decree referred to in this rule is not confined to a decree passed on a husband's petition only. It applies to a petition for divorce at the instance of the wife as well. Consequently the combined effect of Rr. 10, 20 and 24 is that in a petition for divorce whether at the instance of the husband or the wife the adulterer if known should be named. While there may be a compulsion in the case of a petition by the husband there is none in the case of a petition by the wife. There is no prohibition either. On the other hand the claim for damages against the present petitioner, as laid in the suit makes it all the more necessary that she should remain on record.

20. The decisions cited by Mr. De Roze in support of his contentions do not appear to be relevant. The case of Razia Begam v. Sahebzadi Anwar Begam, AIR 1958 SC 886 is beside the point. There the appellant asked for a declaration that she was the legally wedded wife of respondent No. 3 and that she was en-

titled to maintenance from him. Respondent No. 3 in his written statement did not dispute that the appellant was married to him. At this stage respondent No. 1 claiming to be the lawful wife of respondent No. 3, and respondent No. 2 claiming to be the son of respondent No. 3 by respondent No. 1 filed an application for being added under O. 1, R. 10 (2) as persons interested. In view of the fact that a suit for a declaration of status of this kind, the parties actually before the Court are not the only persons affected but that it affects the future generation as well, it was held that they could be joined as persons interested. In the present matter before us we are concerned with the question of exclusion of a party as unnecessary and not the contrary.

21. The case of Yusuf Abdul Aziz v. State of Bombay, AIR 1954 SC 321 again is a case which decides a point entirely irrelevant for our purposes. It only lays down that Arts. 14 and 15 of the Constitution read together validates the provisions of S. 497 of the Penal Code which prohibits the woman from being punished as an abettor. Mr. De Roze wanted to argue that since a woman cannot be punished as an abettor in a criminal prosecution for adultery, she ought not to be subjected to answer a similar allegation in a civil action. In fact the whole argument of Mr. De Roze is that an alleged female adulteress is not liable to any action either Civil or Criminal and hence she cannot be made a party to the suit.

22. Whether she can be prosecuted or not as an abettor is provided for in the Penal Code itself. She is not. But that does not by implication mean that no relief can be claimed against her in other forums. The Penal Code exonerates her from entirely different considerations. In framing the law the authors of the Code said "The condition of the woman of this country is, unhappily, very different from that of the women of England and France; they are married while still children; they are often neglected for other wives while still young. They share the attentions of a husband with several rivals. To make laws for punishing the inconstancy of the wife, while the law admits the privilege of the husband to fill his Zennana with woman is a course which we are most reluctant to adopt". The reasoning may not hold good any longer today. Polygamy is gone. The evils which the framers of the law had in their mind

no longer exist and it is time when the question of exemption should be re-appraised.

23. That however, is a different issue altogether. Impleading the petitioner in a wife's suit for divorce cannot be equated with the provisions of the penal code. Therefore, this decision relied on by Mr. De Roze is of no avail.

24. The next case cited, *Sobha Ram v. Tika Ram*, AIR 1936 All 454 lays down that a suit by the husband for damages against a person for enticing away his wife, is competent. Instead of supporting the petitioner it indirectly supports the case of the respondent. This decision holds that a husband has a right to the society of his wife and the infringement of the right by any other person is a tort. Conversely it may perhaps be said that a person — male or female — who infringes the right of the wife to the society of her husband is equally answerable.

25. The case of *Ananda Lakshmi v. Narasimham*, AIR 1975 Andh Pra 80 decides a different point altogether.

26. Finally Mr. De Roze relied on the case of *Ramsay v. Boyle*, (1903) 7 Cal WN 504. In that case the question was whether in a wife's petition for dissolution of her marriage with her husband on the ground of the latter's adultery, the court has jurisdiction to allow the lady with whom such adultery has been alleged to intervene as a party respondent. That was a suit under the Indian Divorce Act which contained special provisions as to who should be made a party and who need not. Their Lordships while holding that though a grievous injustice is done to a person whose conduct is under investigation while he is not able to say a word in his defence, regretted their inability to help the petitioner. That was because of the law as enacted. On principle their Lordships were against the contentions now put forth by Mr. De Roze.

27. There is yet another aspect of the matter from which the matter may be looked into. O. 1, R. 3 of the Code provides that all persons may be joined in one suit as defendants where (a) any rights to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative and (b) if separate suits were brought against such persons any common question of law or fact would arise. Considered in the

light of such provisions it seems that the petitioner was rightly joined in the suit particularly in view of the claim for damages against her. In view of such a claim she is not merely a proper party but a necessary party. A necessary party is one without whom no order can be made effectively while a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final adjudication on the questions involved in decision.

28. The Rule relating to joinder of the adulterer as a co-respondent proceeds on public policy to prevent collusion. In that sense the petitioner is a proper party. In order to facilitate the Court in considering the claim for damages, the petitioner is a necessary party. Therefore in any view of the matter it seems the petitioner cannot claim that her name should be struck off under O. 1, R. 10 (2) of the Code.

29. In the result the revisional application fails and is hereby dismissed.

30. The Rule is discharged.

31. There will be no order for costs.

32. Let the order be communicated to the Court below forthwith.

ANIL K. SEN, J.:— I agree.

Revision dismissed.

AIR 1982 CALCUTTA 374

P. K. BANERJEE AND

B. N. MAITRA, JJ.

Bibhuti Bhusan Mayur, Appellant v. *Bhabesh Bhusan Mayur* and others, Respondents.

F. A. No. 384 of 1964, D/- 4-3-1982.

Succession Act (39 of 1925), S. 263 — Grant of probate — Revocation of — Genuineness of will — Attesting witness stating that will was read over to testator and then he put thumb impression on it — His statement corroborated by another witness — Absence of any suspicious circumstances — Held, will was a genuine document and it was not obtained by practising fraud or undue influence — Probate could not be revoked. Case law discussed. (Paras 14, 15)

Cases Referred: Chronological Paras

AIR 1982 SC 133: (1982) 1 SCC 20	10
AIR 1979 SC 861	9
AIR 1977 SC 409	8
AIR 1977 SC 1712	8
AIR 1974 SC 117	8
(1971) 75 Cal WN 63	4
AIR 1966 SC 405	8

CZ/CZ/B214/82/VNP/LGC—H

AIR 1960 SC 100: (1960) 2 SCA 153 9
 AIR 1957 Cal 631 4
 AIR 1941 Cal 353: 45 Cal WN 44 4
 (1885) ILR 11 Cal 492 4, 8

Bimal K. Banerjee, for Appellant; S. K. Biswas, for Respondents.

B. N. MAITRA, J.:— The petitioner made an application for revocation of the probate. His allegation is that his father, Panchkari, died on the 22nd Oct., 1940, leaving the petitioner as son of his first predeceased wife, opposite party No. 2 Nripanandini as his widow and some children by his second wife. Panchkari inherited the premises No. 8/1, Ghosepara Lane, from his father. He had another house at Mahinath Para Lane and 18 bighas of arable land at Garbhawanipur within the Police Station Amta. From one month before his death he was lying bed-ridden and at last on 22-10-1940 he expired. One week before his father's death the opposite party No. 1 in collusion with opposite party No. 2 took advantage of the bad state of health of his father and with a view to depriving him of the property, obtained Panchkari's thumb-impressions on the alleged fraudulent will said to have been executed on 20-10-1940. Actually that will was obtained by exercising undue influence and Panchkari had no knowledge of its contents. Opposite party No. 1 Bhabesh used to manage Panchkari's affairs. A few days before Panchkari's death, Bhabesh obtained petitioner's signature on a blank piece of paper on the false representation that the same would be used for settlement of some properties. There was no citation of that probate case on him. The land at Garbhawanipur was the petitioner's personal property. On the 26th April, 1957, he first came to know of alleged fraudulent and forged will in course of a domestic quarrel.

2. Opposite party Nos. 1-3 denied the petitioner's allegations. The defence is that the will was duly executed and attested. Panchkari executed the same voluntarily and with full knowledge of its contents. He had testamentary capacity to execute the same. The petitioner put his thumb impression on the will as an attesting witness.

3. The learned Subordinate Judge rejected the petitioner's contention and dismissed the suit with costs. Hence this appeal by the petitioner.

4. The learned Advocate appearing on behalf of the appellant has stated that the learned Subordinate Judge has referred to certified copies, Exts. B and B

(1), and stated that in view of the contents of those documents there would be a presumption of service of citation. In fact, that is not at all a presumption of law. Reference has been made to the case of Promode Kumar Roy v. Sephalika Dutta reported in AIR 1957 Cal 631 to show that the court can go into the question of genuineness of the will. The court has to see whether the will was a genuine document and if the court's conscience has been satisfied. Reference has also been made to the case of (1971) 75 Cal WN 63 at page 66. It has been contended that the suspicious circumstances have not been removed. It is true that by executing the document (Ext. D) the petitioner stated that in fact a probate had been granted, but such statement has no value in the eye of law because, in the case of Brinda Chowdhraim v. Radhica Chowdhraim reported in (1885) ILR 11 Cal 492 at page 494 it has been stated that mere notice or knowledge of the probate proceeding before its grant is not sufficient to refuse the petitioner's application for revocation of the grant. The case reported in (1941) 45 Cal WN 44: (AIR 1941 Cal 353) (Manindra Chandra Roy Chowdhury v. Gopi Ballav Sen) has also been cited. It has been contended that the alleged scribe or attesting witnesses have not been examined. The beneficiaries are also the widow and children of Panchkari's second wife. By executing the alleged will, which was obtained by practising fraud and undue influence, the petitioner has been deprived of a share in the 'ancestral' property. So it is a fit case for revoking the grant of probate and there was no citation on him.

5. The learned Advocate appearing on behalf of the respondents has joined issue and stated that the will was a genuine document and there are no suspicious circumstances.

6. The date of alleged execution of the will is 22-10-1940 and the probate was granted on the 15th July, 1941. The petitioner had knowledge of the grant of the probate as will appear from his own document (Ext. D) executed by him in favour of Rash Behari Bhattacharya, O.P.W. 3, on 29-9-1954, that is, about 13 years after the probate was granted. At once it strikes one's mind, if there is a taint of fraud or collusion, why the petitioner avoided the court and failed to apply for revocation of the probate so long. There is no explanation why after making such statement in 1954 about the grant of probate, he waited till 1959,

when the present case was filed. This unexplained delay is fatal to this case and proves the hollowness of the petitioner's allegations.

7. The learned Subordinate Judge referred to the illustration (a) of Sec. 114 of the Evidence Act and considered the entries in the certified copies, Exts. B and B (1). He was justified in doing so because the petitioner himself stated in the aforesaid document (Ext. D) executed on 29-9-1954 that his father had executed a will and a probate had been granted, vide the para 11 of that document. There is no statement therein that document is vitiated by fraud or collusion or undue influence. So the presumption of service of citation can also be inferred by the court on account of the statement made in the document (Ext. D).

8. Then about the case of *Brinda v. Radhica* (1885 ILR 11 Cal 492) (supra). That case has no application to the facts of the present one because the petitioner had knowledge of the probate after it had been granted by the court. In this case the petitioner himself admitted in the document (Ext. D) about the grant of the probate. There is an admission of the execution of the will and of the grant of the probate in exhibit D. In the Supreme Court Cases reported in AIR 1966 SC 405, AIR 1977 SC 409, AIR 1974 SC 117 at page 119 and in AIR 1977 SC 1712 it has been stated that an admission made by a party is substantive evidence of the fact admitted therein.

9. Let us now consider what the petitioner has stated about the alleged admission in that document (Ext. D). It will appear from the decision of *Hidayatullah, J.*, reported in (1960) 2 SCA 153: (AIR 1960 SC 100) and of *Sarkaria, J.*, reported in AIR 1979 SC 861 that an admission, though not conclusive is decisive on the point unless it is successfully withdrawn or proved to be erroneous. P.W. 1, Bibhuti, is the petitioner. He has admitted in his cross-examination that he sold the property to *Rash Behari Bhattacharya* on the 29th Sept., 1954, and he referred to the will in that kobala. After making the statement he cannot turn round and say at present that his father did not execute the will in question or it was obtained by fraud and undue influence. His admission has not been withdrawn or proved to be erroneous.

10. In the latest case of *Sm. Indu Bala Bose v. Manindra Chandra Bose*, reported in (1982) 1 SCC 20: (AIR 1982 SC 133)

it has been stated that where there are no suspicious circumstances, the fact that the scribe was not called or no evidence was offered as to who called the writer of the will, is of no importance.

11. We generally agree with the observations made by the learned Subordinate Judge and find that there are no suspicious circumstances. Two houses and a land are the subject matter of the disputed will. Petitioner sold one of those houses and the land as well. That shows that the provisions of that will were acted upon.

12. P.W. 1, Bibhuti, says that the will is a forged one. But he is constrained to admit that his thumb-impression appears in the disputed will. There is no manner of doubt that he also is an attesting witness to its execution.

13. P.W. 2, *Nandalal Halder*, says that *Panchakari*, who was seriously ill, lost power of speaking 7 days before his death. But he is a man of straw and his evidence cannot be believed.

14. O.P.W. 1, *Satya Charan Mayur*, is an attesting witness and is a graduate of the University of Calcutta. He says that the will was written by *Tarapada Karati*. It was read over to *Panchkari* by *Santosh Panja*, the executor understood the contents thereof and then he put his thumb impression therein. He is corroborated by O.P.W. 2, *Bhabesh*, who is the opposite party No. 1. We believe their statements.

15. We, therefore, find that the court's conscience has been satisfied. The Will is a genuine document and it was not obtained by practising fraud or undue influence. So the prayer for revoking the grant was rightly refused.

16. The appeal is dismissed. There will be no order as to costs.

BANERJEE, J.— I agree.

Appeal dismissed.

AIR 1982 CALCUTTA 376

SUDHINDRA MOHAN GUHA, J.

In re: *Kalipada Sadhukhan*.

Decided on 18-1-1982.

Partition Act (4 of 1893), S. 4 — Preliminary decree in suit for partition of dwelling house — Sale of undivided interest in suit property in favour of petitioner — Application by opposite party u/s. 4 allowed and Kobala executed in its favour by court — Delivery of possession in favour of opposite party — Held that the opposite party should not be allowed

BZ/CZ/A418/82/CWM

to take delivery of possession of unascertained portion of dwelling house as there was no regular partition. (Para 10)

Cases Referred: Chronological Paras

(1971) 75 Cal WN 195	8
(1961) 65 Cal WN 743	9

Manindra Nath Ghosh, for Petitioner;
Bhupendra Kumar Panda, for Opposite Party.

ORDER:— This application is directed against the order dated 5th December, 1981 passed by Sri D. Pal, Subordinate Judge, 1st Court, Howrah in T. S. No. 17 of 1946 rejecting the petitioner's application under Section 151, C. P. Code.

2. Tulsi Charan Jati filed the above suit for partition of the dwelling house and other lands. The preliminary decree was passed on June 16, 1947. Thereafter on or about 11th April, 1940 Tulsi sold his undivided four annas interest in the suit property to Gostha Behari Sadhukhan, father of the petitioner. On or about June 27, 1959 the opposite party filed an application under Section 4 of the Partition Act for pre-emption of the sale which was allowed. Later on the opposite party was directed to deposit Rupees 9,000 towards valuation of the property to be pre-empted.

3. A kobala was thereafter executed by the Court in favour of the opposite party. The opposite party prayed for delivery of possession with the help of police. The petitioner came up with the application under Section 151, C. P. Code objecting to the prayer of such delivery of possession. That was however rejected.

4. It is contended by Mr. Manindra Nath Ghosh, the learned Advocate for the petitioner that a proceeding under Section 4 of the Partition Act being a suit a final decree has to be drawn up and engrossed in non-judicial stamp before execution.

5. It is further contended that the learned Court below misread the order of the High Court. What their Lordships observed was that no decree need be drawn up in Letters Patent Appeal No. 20 of 1974 which was dismissed and not to mean that no final decree need be passed in the Partition Suit. Mr. Ghosh is perfectly justified in his contention. It was never intended by their Lordships that no final decree need be passed in the suit pending before the Subordinate Judge.

6. Mr. Bhupendra Kumar Panda, the learned Advocate for the opposite party argues that the petitioner without moving

the superior Court against the order granting police help has come up with an application under Section 151, C. P. Code on some vague allegations. It is also contended by Mr. Panda that no question of making final decree arises, because the opposite party was allowed pre-emption in respect of undivided 4 annas share in possession of the petitioner. According to him the opposite party has his ancestral share in the dwelling house and to this 4 annas undivided share of the petitioner has been added and it is only after delivery of possession of the undivided 4 annas share that the Commissioner for partition can make partition and grant separate allotment to members of the Jati family and after that only the question of drawing up final decree would come in.

7. Under Section 44 of the Transfer of Property Act the purchaser of the share of a dwelling house was not entitled to joint possession or other common or part enjoyment of the house. But the purchaser in this case was successful in taking possession of the undivided 4 annas share in the dwelling house. So on an application under S. 4 of the Partition Act in Court directed the sale of 1/4th share of the petitioner in favour of the opposite party and in fact, a sale deed was executed by the Court in favour of the opposite party.

8. In *Surendra Nath Achar v. Ram Chandra Hazra*, reported in (1971) 75 Cal WN 195 it is held that the proper stage for making the application under S. 4 of the Partition Act would be when application for final decree for partition by appointment of a Commissioner to effect partition by metes and bounds has been made. If an application under Sec. 4 of Partition Act is made proper direction to the Commissioner should be that after allotments have been fixed the lot to which plaintiff will be entitled need have to be valued for exercise of the rights by defendants under S. 4 of the Partition Act. In this case there has already been a transfer of the petitioner's share in favour of the opposite party by the Court. Now the question is whether he can take delivery of possession before the final decree.

9. Unless there is a final decree and an allotment in favour of the petitioner, the petitioner cannot become the sole and exclusive owner of the portion transferred to him — so unless there is an allotment in favour of the petitioner, he continues to be the joint owner and in

joint possession of the entire dwelling house. Accordingly, on such allotment the petitioner loses all interest in other plots. Thereafter the opposite party — pre-emptor can step into the shoes of the petitioner, and not before that. Exactly similar was the observation in the case of *Gour Chandra Ghosh v. Prasanna Das*, reported in (1961) 65 Cal WN 743. Their Lordships at page 746 of the report observe as follows:—

"The parties, therefore, when they make an actual division by taking possession by metes and bounds according to the allotments, mentioned in the sale decree (Ext. 13), effect in law, a partition on those terms, amicably and without writing, and this will be an effective partition in law as between them conferring title to the respective allotments."

10. Thus in this view of the matter the opposite party by virtue of pre-emption cannot take delivery of unascertained portion of the dwelling house, as there was no regular partition. So, in agreement with *Mr. Ghosh I* would hold that the opposite party should not be allowed to take delivery of possession of the unascertained portion of the dwelling house in 4 annas share by police help.

11. The application is allowed without costs. The impugned order is set aside.

Application allowed.

AIR 1982 CALCUTTA 378

ANIL K. SEN AND

B. C. CHAKRABARTI, JJ.

Anehakana Sur and others, Petitioners
v. Abani Bhusan Sur and others, Respondents.

C. O. 3954 of 1981, D/- 24-2-1982.

Succession Act (39 of 1925), S. 214 (1) (b) — Civil P. C. (1908), S. 47 — Suit for recovery of profits misappropriated by Receiver — Suit decreed ex parte — Death of decree-holder and judgment-debtor — Execution filed by successors-in-interest of decree-holder — Amount claimed is not debt — Succession certificate is not necessary in execution proceeding.

A person appointed as Receiver in respect of a "Jalkar" in a Partition suit was found to have misappropriated the profits arising out of the "Jalkar". One of the parties to the partition filed a suit against the Receiver for recovery of the amount misappropriated. The suit was decreed ex parte. Both the decree-holder

and the judgment-debtor died thereafter. The successors-in-interest of the decree-holder filed execution for realization of the decretal dues. The successors-in-interest of the judgment-debtor filed an objection under S. 47 of C. P. C., contending that in view of S. 214 of the Succession Act, execution could not proceed except on production of the succession certificate.

Held, that the claim in the suit was apparently not a claim for a liquidated sum. To all intents and purposes it was a suit for accounts. An action claiming an account is not an action for recovery of debt and is not covered by S. 214 of Succession Act. In order to sustain proceeding in execution by heirs of deceased decree-holder, therefore, a succession certificate is not necessary, irrespective of whether the decree has been put into execution before or after death of the decree-holder. Case law discussed.

(Paras 5, 9, 10, 12)

In order to attract bar of S. 214 (1) (b) of Succession Act the application must be for execution of a decree or order for payment of debt. A decree for payment of a debt presupposes a debt existing before the passing of the decree. A judgment-debt created by the decree itself is outside the purview of S. 214 (1) (b).

(Para 13)

Cases Referred : Chronological Paras

AIR 1964 Cal 42	13
(1909) 13 Cal WN 966 : 10 Cal LJ 180 7	
(1908) 12 Cal WN 145 : 7 Cal LJ 658 6	
(1905) ILR 32 Cal 418	8
(1899) ILR 22 Mad 139	5
(1899) ILR 22 Mad 144 (Notes)	8

Rabindra Nath Mitra and Debasis Mitra, for Petitioners; Manmohan Mukherjee, for Respondents.

B. C. CHAKRABARTI, J.:— This revisional application at the instance of the judgment-debtors raises a short question whether the Decree-holder opposite parties are entitled to proceed in execution of a decree obtained by their predecessor-in-interest without production of a Succession Certificate.

2. The judgment-debtors (hereinafter called the petitioners) raised an objection that the execution case was not maintainable. This objection under S. 47 of Civil P. C. was registered as Misc. Case No. 6 of 1980 of the 7th Court of the learned Subordinate Judge at Alipore and the learned Subordinate Judge has, by his order dated Aug. 31, 1981 overruled the contention. Hence the revisional application.

3. The application has been heard on notice to and upon contest by the opposite parties,

4. The controversy arose under the following circumstances and there is no dispute as to the facts leading to the controversy. The predecessor-in-interest of the opposite parties instituted a suit for recovery of damages being M. S. 10 of 1966. The principal allegation in the suit was that Dilip Kumar Sur, the predecessor-in-interest of the petitioners was appointed receiver in respect of a Jalkar in a Partition suit between the predecessors of the parties and that while acting as such Receiver the said Dilip Kumar Sur, Receiver misappropriated the profits arising out of the Jalkar which he was bound to refund. On such allegation Amiya Kumar Sur, predecessor-in-interest of the opposite parties instituted M. S. 10 of 1966 for realisation of a sum of Rs. 36,498.45. The suit was decreed ex parte on 14-3-1967, in favour of Amiya Kumar Sur. The decree-holder Amiya Kumar Sur died on Nov. 30, 1975 whereupon the opposite parties filed a money execution for realisation of the decretal dues, against the present petitioner, Dilip Kumar Sur having died on 21-5-1968. The petitioners filed an objection under S. 47 of the Code contending inter alia, that in view of the provisions of S. 214 of the Succession Act the execution could not be proceeded with except on production of a succession certificate. The learned Subordinate Judge has rejected the objection by the order impugned.

5. There is no dispute that the claim in the Money suit was a claim for recovery of damages in the hands of a Receiver who was alleged to have misappropriated the profits while in possession as Receiver. Apparently it was not a claim for a liquidated sum. To all intents and purposes it was a suit for accounts. Question is whether such a claim is a 'debt' within the meaning of S. 214 of the Succession Act. An action claiming an account is not an action for recovery of debt. Debt implies a present obligation to pay a liquidated sum of money. A claim for an unliquidated sum can hardly be called a 'debt' (see *Sabju v. Noordin*, (1899) ILR 22 Mad 139).

6. Mr. Mitter appearing on behalf of the petitioners referred to the case of *Sahadev v. Sk. Sakhawat*, (1908) 12 Cal WN 145 in support of his contention that production of a succession certificate is necessary. The facts of this case were entirely different. There, after a preli-

minary decree had been made in a mortgage suit, the mortgagee died and his sons were substituted on the record and an order absolute was made in their favour. The proceeds of the sale of the mortgaged property being insufficient, they applied for a personal decree for the balance. It was held that until the applicants obtained a certificate under the Succession Certificate Act no such decree could be made in their favour. Such a view was taken because there could be no doubt that there was a 'debt' and the whole debt accrued due on the date fixed for repayment in the bond. Even though the creditor was bound to seek a particular remedy in the first instance for the satisfaction of his claim but nevertheless the debt was all the while in existence and in full vigour. The right of realisation as against the debtors personally did not give a separate and independent cause of action, the debt being one debt only. This decision therefore cannot assist the petitioners in contending that claim for unliquidated damages is a debt.

7. The next case relied on, *Bancharam v. Adya Nath*, (1909) 13 Cal WN 966 is similarly clearly distinguishable on facts. It was held in this case that in the case of a debt existing in the life of a creditor which did not become payable until after his death, his heirs cannot obtain a decree without the production of a certificate. The distinguishing feature of the case is the existence of a debt in the life of the creditor.

8. In the case of *Bisseswar v. Durgadas*, (1905) ILR 32 Cal 418 it was held that a suit for accounts is not a suit for the recovery of a debt within the meaning of S. 4 of the Succession Certificate Act and that it was an abuse of language to call such a liability as debt (see also *Penta Reddi v. Anki Reddi*, (1899) ILR 22 Mad 144 (Notes)).

9. Hence it is apparent on the authorities cited that the claim in the money suit was not a claim for the recovery of a debt.

10. Mr. Mitter however, next contended that the petitioners being the heirs of the judgment-debtor under decree obtained in the Money Suit, the opposite parties, who are the heirs of the judgment creditor, since deceased, would be required to obtain a Succession Certificate before realising the debt. He conceded that the position might have been different had the execution case been initiated during the lifetime of Dilip Ku-

mar Sur and Amiya Kumar Sur and the petitioners were substituted on the record of the execution case. To us it seems that the fact that the decree has been put into execution after their death does not improve matters for the petitioners.

11. That this is so would be clear upon a reading of S. 214 of the Succession Act. It provides that no court shall (a) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof, or (b) proceed, upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt, except on proof of one of the five kinds of representative title enumerated in the section.

12. The use of the expressions "such a debtor and his debt" in cl. (b) referred to hereinbefore make it abundantly clear that the 'debt' referred to cl. (b) is referable to a "debt" as in cl. (a). In other words, unless the original claim in the suit which was the foundation for the decree was a 'debt', cl. (b) would not be attracted. And we have already indicated that the original claim for damages on accounting could not come within the meaning of 'debt'. Consequently, in order to sustain a proceeding in execution by the heirs of the deceased decree-holder, a succession certificate would not be necessary.

13. Mr. Mitter finally referred to the case of Tarak Dasi v. Batta Krishna Roy reported in AIR 1964 Cal 42. This decision instead of supporting the case of the petitioners goes very much against them. It supports the view we have taken by holding that in order to attract the bar of S. 214 (1) (b) the application must be for execution of a decree or order for payment of a debt. A decree for payment of a debt presupposes a debt existing before the passing of the decree. A judgment debt created by the decree itself is outside the purview of S. 214 (1) (b). Although the decree that was sought to be executed there was one for costs, the principle why S. 214 (1) (b) would not operate as a bar has been clearly explained and we concur with the view so taken.

14. Such being the position, there is nothing to interfere with the order impugned in this revisional application. The application is accordingly dismissed.

15. There will be no order for costs.

16. Let the order be communicated to the court below forthwith.

ANIL K. SEN, J.:— I agree.

Revision application dismissed.

AIR 1982 CALCUTTA 380

M. N. ROY, J.

Krishna Narayan Das and others, Petitioners v. Additional District Magistrate etc. and others, Respondents.

Civil Rule No. 4256 (W) of 1977, D/- 9-7-1981.

(A) West Bengal Land (Requisition and Acquisition) Act (2 of 1948), Sec. 3 — Order under S. 3 — Giving of prior notice and hearing to person affected, not contemplated — Remedy of aggrieved party is to complain to authority concerned after service of order under S. 3 (2). (Para 11)

(B) West Bengal Land (Requisition and Acquisition) Act (2 of 1948), Sec. 3 (1) — Public purpose — What constitutes public purpose — Requisition order — Issuance of rolled up order without scoring out irrelevant purposes — Order not sustainable. (Land Acquisition Act (1894), S. 6).

It is true that it is impossible to define precisely the expression 'public purpose'. All the facts and circumstances of a case will have to be clearly examined in order to determine whether a public purpose has been established. Prima facie, Government is the best judge as to whether a requisition was for a public purpose, but they are not the sole judge. The Courts will have jurisdiction and it will be their duty to determine the matter, whenever a question or any dispute on that aspect is brought up or canvassed. In deciding such question or any fact, on a challenge to requisition order being thrown, the Court will thus have to see also whether opinion was formed duly and bona fide. In fact, the provisions of the Act, do also contemplate such formation of opinion. The public purpose involved behind or in a requisition proceeding, will also have to be proved, if the act or action, as taken, is required to be sustained or supported.

(Paras 11, 13)

The purposes of a requisition order would be that by reading the same or going through the same one should be in a position to follow and ascertain whether the requisition was ordered for purposes of drainage, irrigation, road

construction or transport. The absence of striking out a purpose or purposes not required or unnecessary and issuance of a rolled up requisition order, as in the instant case, would establish a case of non-application of mind of the authorities concerned, apart from vagueness. The requisitioning authority should file an affidavit explaining purposes for which requisition was made and how mind was applied. No such affidavit having been filed in the instant case the order of requisition was quashed. (1966) 70 Cal WN 503, Rel. on. (Paras 11, 15)

(C) West Bengal Land (Requisition and Acquisition) Act (2 of 1948), S. 3 (1) and Preamble — Requisition of land which was a tank used for pisciculture — Validity. (Land Acquisition Act (1894), Ss. 4 and 6).

The land requisitioned was a tank which was used for rearing fish and pisciculture. The defence of Special Land Acquisition Collector was that as the bed of the tank was dried up or was drying up, it was temporarily leased out to a third party for augmenting source of revenue. It was unauthorised under the Act. There was no compliance with the preamble of the Act which provides for requisition and speedy acquisition of land. As the definition of 'land' in S. 3 (a) of the Land Acquisition Act does not include fishery, the said Act cannot be invoked by State Government for requisition of the land in question. When the requisition in question was not admittedly for the purpose of a fishery or for letting out the same for that purpose, the lease of the fishery was highly improper, irregular, unauthorised and mala fide. Requisition order in respect of such land had to be quashed. (Paras 13, 14, 15)

Cases Referred : Chronological Paras

AIR 1980 Cal 13	13
(1980) 84 Cal WN 661 : (1980) 2 Cal LJ 19	11
AIR 1974 Cal 99 : 77 Cal WN 157	14
(1974) 78 Cal WN 397	11
(1966) 70 Cal WN 503	11

Samarendra Kumar Dutta and Sujit Kumar Laik, for Petitioners; Debaprasad Mukherjee, for Respondents.

ORDER :— The petitioners, who have claimed to be the owners of the lands (hereinafter referred to as the said lands), as involved in the order of requisition (hereinafter referred to as the said order), under S. 3 (1) of the West Bengal Land (Requisition and Acquisition) Act, 1948 (hereinafter referred to as the said Act), obtained this Rule on 9th Aug.

1977. At the time of the issue of the Rule, no interim order was granted, but liberty was given, to ask for appropriate interim order, on notice to the other side and although such prayer for interim order was made, the same was not entertained. The respective particulars of the petitioners, whereby they entered into and possessed their shares in the said lands and so also the names of their respective vendors have been duly disclosed in the petition.

2. It has also been stated that the purchase of petitioner No. 3, Sri Binapani Dasi from her vendor was in respect of a tank measuring more or less .93 acre in Plot No. 40 and the bank of the tank along with garden measuring more or less .36 acre in Plot No. 36/1492. That apart, one Banka Behari Rajak, father of petitioner No. 4, Sm. Jyotsna Dasi and that also of the petitioner No. 2 Kamal Krishna Rajak, possessed the said tank as a lessee. It has in short been stated and claimed that after the purchase as aforesaid, the petitioners have been occupying the said tank, bank of the same and the garden and have reared fish. It has been stated, further that the tank in question, has been used and utilised for pisciculture or fishing and so also the bank of the same, for operations attached to the same. The petitioners have stated that the tank would be about .93 acre and the bank of the same would be about 1.20 acres, thus the total area of the tank and the bank of the same would come to about 2.13 acres. It has been stated by the petitioners that the tank in question was not used for purposes other than what has been mentioned above and more particularly for domestic and irrigation purposes and the tank in question was not adjoining to any homestead. The petitioners categorically claimed that the tank in question would be a fishery in terms of the definition in S. 2 (3) of the West Bengal Fisheries (Requisition and Acquisition) Act 1965 (hereinafter referred to as the said 1965 Act), which defines "Fishery", as any land whereon water is confined naturally or artificially whether periodically or throughout the year for pisciculture or for fishing and includes a 'tank' 'fishery' as defined in the Explanation to cl. (e) of sub-sec. (1) of S. 6 of the West Bengal Estates Acquisition Act, 1953, as also the fish in such fishery or 'tank-fishery', but does not include a tank not exceeding one acre in area adjoining a homestead and used for purposes of irrigation or domestic purposes :

3. It was the case of the petitioners that on or about 12th Jan. 1977, they received notices signed by the respondent authorities concerned as issued under S. 3 (1) of the said Act, intimating the purpose of the requisition, to be for maintaining supplies and services essential to the life of the community, viz. for providing proper facilities for transport/communication/irrigation/drainage, for acquisition for stock yard offices and godowns (PWD) Roads Department at Suri, in the District of Birbhum. It has been alleged by the petitioners that such requisition was not bona fide and in fact the same was made in a mala fide way, manner and intention or at the machination of Shri S. K. Mondal, Executive Engineer, PWD Roads, Respondent No. 4, who had the idea and intention to enjoy the fish as grown by the petitioners. In fact, it has been alleged, at least on two given dates, the said Respondent No. 4, caught fish by engaging his men from the tank of Shri Banku Behari Rajak, for which General diary entries have been lodged. That apart, it was claimed by the said Banku Behari Rajak, that there was fish worth about Rs. 8,000/- to Rs. 10,000/- in the tank.

4. It was alleged by the petitioners that in or about the month of June 1977, they came to learn from the office of the Executive Engineer concerned, that the lease of the said tank was granted to one Dharendra Dhibar, Respondent No. 6, for three years and on hearing such, necessary demand for justice was made.

5. It was claimed and contended by the petitioners that the said Act, was neither attracted nor applicable in the case of the said tank, as the same was a tank fishery within the meaning of the said 1965 Act and as such, apart from other infirmities, the requisition as challenged, was made in colourable exercise of power of the Respondent No. 4, Executive Engineer. The petitioners, in view of the admitted fact of letting out the tank fishery to Respondent No. 6, after requisitioning the same for the purposes as mentioned above, claimed the same to be mala fide too. Such charge of mala fide nature was sought to be established, as there were other lands lying and available for the purpose and according to the petitioner even though these lands were much more and better suited for the purpose and object of the requisition, they were not touched and on the other hand, the said tank has been sought to be requisitioned by the auth-

orities concerned at the instance of the Respondent No. 4, Executive Engineer and that too for the purposes of a private individual like the said Respondent No. 6.

6. Shri Priya Lal Aich, Special Land Acquisition Collector, Suri, Respondent No. 2 (hereinafter referred to as the said deponent), had initially filed on affidavit-in-opposition dated 28th Jan. 1978, for his behalf and on behalf of Respondent Nos. 1, 4 and 5, claiming himself to be acquainted with the facts, as he was looking after the case. There has been no affidavit filed by the Executive Engineer, Respondent No. 4 and for that, Mr. Dutt, appearing in support of the Rule, made serious comments. In fact, he commented, that the allegations of mala fide, as duly made against that Respondent or his conduct have not been duly controverted.

7. The said deponent has stated that the petitioners received the notices of requisition on 11th and 12th Jan. 1977 and the fact of rearing fish in the said tank, was not known to the respondents. He has also stated that the instant requisition was not made at the instance of the Respondent No. 4, Executive Engineer or that the said officer had the idea or intention to enjoy the fish of the tank as alleged. In fact, it has been stated that when possession of the said tank was taken on 15th Jan. 1977, there was no fish in the tank. The said deponent has of course admitted that the tank in question was leased out to Respondent No. 6, for a period of three years. He has denied the allegation that the fish of the tank was caught by the Respondent No. 4 or by his men and at his instance. The said deponent has also claimed that the said Act was applicable in this case and the same was duly applied. The said affidavit-in-opposition was replied to by the petitioners by their affidavit-in-reply dated 8th March 1978 and in this affidavit, they have not pleaded any new fact.

8. There was another supplementary-affidavit dated 7th April 1978, filed by the answering Respondents, which was allowed to be filed by the order dated 12th May 1978 and in the circumstances as mentioned therein. In this affidavit, the said deponent has stated that the requisition in question was pure and simple for public purpose and the plot number of the concerned tank under requisition, would be 36 and not 40 as alleged. He has stated further that the Birbhum Highway Division Office was start-

ed in September, 1972 and prior thereto, there was one sub-divisional office at Suri (Tilpara), under the control of the Executive Engineer, Burdwan High way Division. There was no Divisional P. W. (Roads) Departments' Office in the district of Birbhum and such division was created by splitting up of works of construction of Roads of Birbhum District separately from those of Burdwan District and in the process of developing such Divisional Office into a full-fledged one, it was necessary that some lands adjoining and contiguous, be requisitioned for the sake of convenience and that place was most suited for properly guarding the costly materials and was also suitable for the office site.

9. It has also been stated that the requisition in question was also absolutely necessary for storing and stocking for measurement of road construction materials and also for construction of godowns and offices required for road building purposes, apart from erecting building for offices and for proper development of the District Office as mentioned above. The said deponent has further stated that since the bed of the tank became very much shallow and filled up in many places and the ultimate object and aim was to fill-up the tank and to construct in near future, structure for godowns and offices for the safety and preservation of road building materials, so after taking possession on 15th Jan. 1977, a lease to the Respondent No. 6 was granted on 23rd June, 1977, as he was the highest bidder, at Rs. 600/-, for three years, subject to the right of termination with notice. This settlement, according to the said deponent, was done in accordance with PWD Code and also the general convention of the Department and for public purpose, apart from earning extra revenue for the time being. In their reply dated 30th May 1978, to the said supplementary affidavit, the petitioners have denied all the material allegations and claimed that the purposes as disclosed now, were neither bona fide nor genuine or proper. It has also been claimed that the said deponent has made untrue statements, when he has stated about the settlement of the tank to the Respondent No. 6 being the highest bidder, as there was no tender or auction at all.

10. The total land would be .93 and 2.13 acres i.e. 3.06 acres and the notice under the said Act was received by the petitioners. Those lands have also been claimed to have been purchased by the

petitioners. In the pleadings and the facts as mentioned hereinbefore, Mr. Dutt, appearing in support of the Rule contended firstly, that the requisition in question, was beyond the scope and purview of the said Act and in any event, S. 3 of the said Act, which is to the following effect:—

3. (1) If in the opinion of the (State) Government or any person authorised in this behalf by the (State) Government it is necessary so to do for maintaining supplies and services essential to the life of the community or for providing proper facilities for transport, communication, irrigation or drainage, the (State) Government or the person so authorised, as the case may be, may, by order in writing, requisition any land and may make such further orders as appear to it or to him to be necessary or expedient in connection with the requisitioning :

Provided that no land used for the purpose of religious worship shall be requisitioned under this section.

(2) An order under sub-section (1) shall be served in the prescribed manner on the owner of the land and where the order relates to land in occupation (of an occupier, not being the owner of the land, also on such occupier).

(3) If any person fails to comply with an order made under sub-sec. (1), the Collector or any person authorised by him in writing in this behalf shall execute the order in such manner as he considers expedient and may,—

(a) if he is a Magistrate, enforce the delivery of possession of the land in respect of which the order has been made to himself, or

(b) if he is not a Magistrate, apply to a Magistrate or, in Calcutta as defined in clause (11) of Section 5 of the Calcutta Municipal Act, 1951, to the Commissioner of Police, and such Magistrate or Commissioner, as the case may be, shall enforce the delivery of possession of such land to him,

had or has no application in the facts of the Case. Mr. Dutt secondly contended that the impugned order of requisition or the proceedings relating thereto, was absolutely null and void, bad and unauthorised, apart from being illegal and irregular, as there was abject non application of mind and the order in question was as vague as the same could be. He, thirdly, submitted that since the requisition of fishery, if at all, was governed and guided by the provisions of the said 1965 Act, so the action for requisition of the tank fishery as

taken under the said Act was unauthorised, improper and without jurisdiction and fourthly, it was contended by Mr. Dutta that there was no public purpose involved in the instant requisition and the entire action was taken or resorted to in colourable use and exercise of power, authority and jurisdiction. That apart, Mr. Dutta claimed the process of requisition in this case, to be a mala fide one.

11. In support of his first and second submissions as mentioned above, Mr. Dutt referred to the preamble of the said Act and so also to the provisions of Section 3 of the same. The said Act was enacted, for making provisions for the requisition and speedy acquisition of land, which, in terms of Section 2 (b1) has the same meaning as in the Land Acquisition Act, 1894, for certain purposes viz. for the purposes of maintaining supplies and services essential to the life of the community and for providing proper facilities for transport, communication, irrigation and drainage and S. 3 of the same lays down, how and in what manner the power of requisition, is to be exercised. The preamble of the said Act and S. 3 of the same as mentioned above, do specify the different purposes, for which the provisions of the said Act, can be put into action or shelter under the same can be taken in a given case of requisition, and the said Act or the provisions of the same or the machineries under the same cannot be employed, for requisitions other than those as mentioned or contemplated under the said Act or specified therein. In any event, the public purpose involved behind or in a requisition proceeding under the said Act, will also have to be proved, if the act or action, as taken, is required to be sustained or supported. In terms of the determinations in the case of Narendra Nath Tripathy v. State of West Bengal, (1974) 78 Cal WN 397, it has been observed that the said Act is intended to provide for the requisition and speedy acquisition of land for certain purposes, inter alia of maintaining supplies and services essential to the life of the community for providing proper facilities for transport, communication, irrigation or drainage. A perusal of the relevant provisions of the Act indicates that there is no express provision for a hearing before an order of requisition is made. The application of the principle of natural justice also appears to be excluded by necessary implication and if a contemplated requisition in public interest is on a vast scale affecting innum-

erable persons it may not be possible nor practicable to afford any opportunity for hearing before requisition except at the cost of frustrating the scheme which is the basis of requisition. In such cases there will be no scope for affording any opportunity of hearing before requisition which by reason of attending circumstances will oust the application of the principles of natural justice. The views as expressed in the above case, on notice and principles of natural justice, have, in fact been followed in the case of Sushila Debi Fomra v. State of West Bengal, (1980) 84 Cal WN 661 and in that case, it has also been observed that the said Act does not contemplate the giving of notice to and hearing the person affected before making an order under Section 3 of the Act. Such a provision is not implicit in the Act. The only remedy available to the aggrieved person is that he is at liberty to make a representation to the authority concerned after the order is served under Section 3 (2). On the submissions as aforesaid or in support of them, Mr. Dutt, made a further reference to the order of requisition, wherein all the purposes were kept and maintained and were not scored through. That, according to him, was enough to establish the allegations of non-application of mind and vagueness or to establish the invalidity or irregularity of the concerned order. The affidavit filed by the respondents has not appropriately answered the effect of the allegations categorically made for non-striking out the eventualities not required by the requisition in question. The purposes of a requisition order would be that by reading the same or going through the same, one should be in a position to follow and understand or ascertain, in terms of the determinations in the case of Pramatho Nath Mukherjee v. State of West Bengal, (1966) 70 Cal WN 503, whether the requisition was ordered for the purpose of drainage, irrigation, road construction or transport. The absence of such striking out the interest, purposes or the purposes not required or unnecessary and the issuance of a rolled up requisition order would establish a case of non-application of mind of the authorities concerned, apart from vagueness. The above being the position, it was expected that the requisitioning authority should have filed an affidavit, at least explaining the purposes, for which the requisition was made and how mind was applied. Unfortunately, there is no such affidavit filed and the defence as put forward, which have been

mentioned hereinbefore, and were referred to by Mr. Mukherjee, were not very convincing.

12. Since it was claimed and established by Mr. Mukherjee that the lands as requisitioned in their entirety, were not fishery, but such fishery formed a part of the lands as requisitioned, the third submissions of Mr. Dutt, as referred to hereinbefore, would not be available in their entirety, in respect of or against the requisition and the same in my view, would thus be available only in respect of the part or portion of the requisition order, covering the fishery and that too for the reasons as mentioned hereinafter.

13. If the object of the requisition was for construction of office buildings or such buildings as mentioned in the affidavits, then the submissions of Mr. Dutt and more particularly on his fourth submission that there was no public purpose involved behind the requisition in question, cannot be accepted. It is true that it is impossible to define precisely the expression 'public purpose'. All the facts and circumstances of a case will have to be clearly examined in order to determine whether a public purpose has been established. Prima facie, the Government is the best judge as to whether a requisition was for a public purpose, but they are not the sole Judge. The Courts will have jurisdiction and it will, in my view, be their duty to determine the matter whenever a question or any dispute on that aspect is brought up or canvassed. In deciding such question or any fact, on a challenge to the requisition order being thrown, the Court will thus have to see also whether opinion was formed duly and bona fide. In fact, the provisions of the said Act, do also contemplate such formation of opinion. The defence of the answering respondents in the instant case was that, as the bed of the tank was dried up or was drying up, so the same was temporarily leased out to the respondent No. 6, as he was the highest bidder for augmenting the source of revenue. This, in my view, would not certainly establish a public purpose, rather demolish such purpose, if the same was the real basis of the requisition. In fact, so far the tank or the lands covering the same, that was the only defence. Such defence, in my opinion, was not bona fide and the defence as taken, supports the fifth submissions of Mr. Dutt on mala fide. When the requisition in question was not admittedly for the pur-

pose of a fishery or for letting out the same for that purpose, the lease of the fishery as given to the respondent No. 6 of a portion of the requisitioned lands, was highly improper, irregular and unauthorised. Such lease as granted, has expired, even then, I have no other alternative but to hold as aforesaid, as the said subsequent leasing out to the Respondent No. 6, was not bona fide. While on this aspect, it should be noted that Mr. Dutt referred to the determinations in the case of Sailendra Nath Roy v. State of West Bengal, AIR 1980 Cal 13. In that case, lands were sought to be acquired for the purpose of providing facilities for transport and widening of road and in the alternative, for maintenance of supplies and services essential to the life of community and the settlement of those lands were made in respect of small traders, displaced as a result of some other acquisition. It has been observed that such settlement cannot be said to be connected with or incidental to the facilities for transport and widening of road and in the alternative for maintenance of supplies and services essential to the community.

14. A fishery, in the light of the Bench determinations in the case of Pasupati Roy v. State of West Bengal, (1973) 77 Cal WN 157: (AIR 1974 Cal 99), does not come within the purview of the Land Acquisition Act, 1894 as the definition of land in that Act does not include fishery as such in that view of the matter it cannot be said that the said Act could be invoked by the State Government for the purpose of requisition of all the lands as involved in this case. At least a portion of the lands as requisitioned or a part thereof, was a tank, which was used for rearing fish and pisciculture, which fact was also established from the action of the respondents, in leasing out the said part or portion to the respondent No. 6 for such purposes and that fact or act or action would thus establish that requisition of the lands, in so far as they related to the lands covering the tank, which was used or after requisition intended to be used for the purposes as aforesaid through the respondent No. 6, was inappropriate and unauthorised under the said Act. Apart from the above, if a part or portion of the land, as in this case, was leased out to a third person for augmentation the source of revenue, which was the case of the answering Respondents, then, there was in my view, no compliance with the preamble of the

said Act, which provides for the requisition and speedy acquisition of land.

15. For what has been indicated above, the requisition so far the lands covering the tank concerned, which was used for the purposes as mentioned above, was bad, void and irregular, apart from being without jurisdiction, unauthorised and mala fide and the order of requisition in respect of the other lands suffered from the necessary infirmities of non-application of mind as the order in question was a roiled up one and the irrelevant purposes have not been scored through or struck off.

16. So the Rule succeeds and the same is made absolute for the reasons as mentioned above. There will be no order as to costs.

17. This order will not prejudice the Respondents now, to proceed in the matter of requisitioning the lands in accordance with law, if they so intend or are so advised.

Rule made absolute.

AIR 1982 CALCUTTA 386

ANIL K. SEN AND

B. C. CHAKRABARTI, JJ.

M/s. West Bengal Decorating Co., Petitioner v. M/s. Damodar Das Daga, Opposite Party.

C. O. No. 3790 of 1981, D/- 10-3-1982.

(A) Civil P. C. (1908), O. 37, R. 3 — Summary procedure — Procedure for appearance of defendant — Suit for recovery of price of goods sold and delivered — Leave to defend filed beyond time — Condonation of delay, (Limitation Act (36 of 1963), S. 5).

Where a suit for recovery of price of goods sold and delivered was held to be within the purview of O. 37, C.P.C. and was permitted to be continued under the summary procedure the delay in filing the application for leave to defend was condoned since the order was passed before the summons was served on the defendant, and the defendant was under the impression that the order was passed by the Judge in his administrative capacity and while entering appearance the defendant had challenged the jurisdiction of the court. (Para 8)

(B) Civil P. C. (5 of 1908), O. 37, R. 1 — Applicability — Suit for recovery of price of goods sold and delivered — It does not come within meaning of O. 37. (Sale of Goods Act (3 of 1930), S. 55).

CZ/DZ/B212/82/SMA/MVJ

A suit for recovery of price of goods sold and delivered which is not founded on a written contract cannot be said to arise on an enactment. Therefore, such a suit does not come within the meaning of O. 37, AIR 1963 Cal 9, Disting. (Para 16)

A cause of action does not arise under or on an enactment unless it arises out of and depends on the enactment, so that the plaintiff must show both in stating and in proving his case that his right to recover stands on the enactment. The claim of the nature as made in the instant suit cannot be said to arise on an enactment. It arises from the contract of sale and the breach thereof. It is apparent upon a reading of S. 55 of Sale of Goods Act that the claim, for the price of the goods really arises from the terms of the contract of sale. It would be unreasonable to hold that because the Act enables the seller to sue the buyer for the price, the claim must be held to arise on the enactment. (Para 14)

Cases Referred: Chronological Paras
AIR 1963 Cal 9 15, 16

S. N. Sanyal, for Petitioner; G. S. Tandon and V. N. Bajpayee, for Opposite Party.

B. C. CHAKRABARTI, J.:— These two revisional applications, both at the instance of the defendant of Com. Suit No. 510 of 1979 of the City Civil Court, are directed against two Orders dated Jan. 11, 1980 and September 23, 1981.

2. The plaintiff opposite party instituted the above suit for recovery of price of goods sold and delivered together with interest, under O. 37, C.P.C. The learned Registrar of that court being not certain whether such a suit could be instituted under O. 37, placed the matter before the Bench for orders. The court by its order dated January 11, 1980, held that the unpaid price of goods sold is in the nature of a 'debt' and the liability arises out of an enactment, viz, the Sale of Goods Act. Hence, in view of the amended provisions of O. 37 it was held that the suit came within the purview of that order.

3. Thereafter the summary procedure for suits under O. 37 was adopted and the summons having been served, the defendant petitioner entered appearance and filed an application under sub-rule (5), R. 3, O. 37 praying for leave to defend the suit unconditionally. The defendant claimed in the said application that the plaintiff's claim was fictitious and that the defendant had a substantial defence to put forth. It was also claimed that such a suit could not come within

the meaning of O. 37 of the Code. This application for leave to defend was filed beyond time and the defendant also explained the reason for the delay and prayed for condonation of the same.

4. By the order dated Sept. 23, 1981 the learned Judge, held "the cause shown by the defendant for the delay in filing the application for leave is considered sufficient. Permission should therefore be granted to the defendant to defend the suit on furnishing security to the extent of Rs. 11,500."

5. On such findings the learned Judge allowed the defendant's application and granted leave to defend the suit on condition of furnishing cash security of Rs. 11,500 which represented the total claim in the suit.

6. Being aggrieved the defendant filed a revisional application challenging the propriety and correctness of the Order. Subsequently a separate application was filed challenging the order dated January 11, 1980 by which order the suit was found to be governed by the provisions of Order 37 of the Code. This second application was obviously filed beyond time and was accompanied by an application under Section 5 of the Limitation Act.

7. All the applications have been heard together on notice to and upon contest by the plaintiff opposite party.

8. In the application under Section 5 of the Limitation Act, it has been pleaded that the order dated January 11, 1980 was passed before the summons was served on the defendant, that the defendant was under the impression that the order was passed by the learned Judge in his administrative capacity and that while entering appearance the defendant had challenged the jurisdiction of the court, in passing the order permitting the suit to continue under the summary procedure. Having heard the learned Advocates, we are inclined to condone the delay in challenging the first order in the peculiar circumstances of the case.

9. The delay being condoned we are now concerned with the more important question namely whether such a suit really comes within the meaning of O. 37. The contention of the petitioner is that it does not while Mr. Tandon in opposing the applications contends that in view of the amended provisions of the Code, the suit falls well within the class of suits contemplated by Order 37.

10. Before coming to consider this aspect of the matter, we may at once point out that the second order dated September

23, 1981 suffers from an apparent infirmity in so far as the learned Judge does not appear to have at all considered whether or not the defendant had succeeded in making out a substantial defence at all. But this however is a question which we may be required to consider if at all it is found that the suit comes within the meaning of Order 37.

11. Admittedly the suit could not come under the provisions of Order 37 as it stood prior to amendment. By the amendment, the scope of Order 37 has been enlarged and extended to include the specified classes of suits enumerated in the amended provisions.

12. Sub-rule (2) of Rule 1 of Order 37 as it now stands reads as follows:

"(2) Subject to the provisions of sub-rule (1), the Order applies to the following classes of suits, namely,—

(a) Suits upon bills of exchange, hundies and promissory notes;

(b) Suits in which the plaintiff seeks only to recover a debt or a liquidated demand in money payable by the defendant, with or without interest, arising—

(i) on a written contract; or

(ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty;

13. It is obvious that clause (a) has no application. In invoking clause (b) sub-clause (i) also has to be excluded because it is nobody's case that the claim is founded on a written contract. Therefore the suit may be held to come under Order 37 only if it can be shown that the plaintiff is seeking to recover, by the suit, a debt or a liquidated demand in money arising on an enactment.

14. By referring to Section 55 of the Sale of Goods Act, Mr. Tandon contends that the claim arises under the provisions of the said Act. In fact that was the finding of the learned Judge when he passed the first order impugned before us. Section 55 (1) of the said Act provides as follows "where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods". It is apparent upon a reading of the section aforesaid that the claim for the price of the goods really arises from the terms of the contract of sale. It would be unreasonable to hold that because the Act enables the

seller to sue the buyer for the price, the claim must be held to arise on the enactment. That it is not so is apparent on the language of the section itself. A cause of action does not arise under or on an enactment unless it arises out of and depends on the enactment, so that the plaintiff must show both in stating and in proving his case that his right to recover stands on the enactment. In our view the claim of the nature as made in this suit cannot be said to arise on an enactment. It arises from the contract of sale and the breach thereof.

15. Mr. Tandon drew our attention to a somewhat analogous provision contained in Chapter XIII A of the Rules of the High Court at Calcutta in its Original Side and argued upon a reference to the case of *Mitra Mukherjee & Co. v. Ajit Kumar*, AIR 1963 Cal 9, that a suit for recovery of price of goods sold and delivered really falls within the category of a summary suit contemplated by Chapter XIII A of the Rules.

Rule 1 of Chapter XIII A reads as follows:—

"1. The provisions of this Chapter shall not be applicable save to suits.—

(A) in which the plaintiff seeks to recover a debt or liquidated demand in money payable by the defendant with or without interest arising—

(i) on a contract express or implied; or
(ii) on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

..... "..... "..... "..... "....."

16. In spite of the seemingly similar words used in the Rule aforementioned and the provisions of Order 37 of the Code, there is a world of difference in so far as cl. (i) is concerned. Clause (i) of Order 37 relates to a suit arising on a written contract whereas cl. (i) of R. 1 of Chapter XIII A relates to a suit arising on a contract express or implied. The case of *Mitra Mukherjee & Co.* (supra) has to be read in the context of this difference. This apart, that case, though arising out of a claim for recovery of price of goods sold and delivered, and brought under Chapter XIII A of the High Court Rules (Original Side), considered the question of appealability of an order directing furnishing of security to the extent of the claim in the suit. It holds that such an order is appealable and if on appeal such an order is set aside, the decree that was drawn up pursuant to the non-compliance with the order, will automatically disappear. The

decision did not consider under which particular clause of Rule 1, the suit was categorised as a summary suit. The trial proceeded on the footing that it was a summary suit. It is likely and that seems to be more plausible, that it was so held because the claim rested on a contract of sale which was implicit on the transaction itself. Since Chapter XIII A also relates to suits arising on a contract express or implied, it may be that such a suit was found to be governed by Chapter XIII A, of the Rules. But there is no such provision in Order 37 of the Code. Suits arising on an implied contract are outside its scope. It will bear repetition that in the suit before us the plaintiff does not appear to have founded his claim on a written contract. An implied contract is outside the perview of Order 37. We have found already that the claim of the plaintiff cannot be said to arise on an enactment. Therefore it is difficult to see how such a suit could come within the meaning of Order 37.

17. Such being our view, the order dated January 11, 1980 can hardly be sustained. If that order fails, and fail it must, the subsequent order dated September 23, 1981 must necessarily fail.

18. In the result the revisional applications succeed. Both the impugned orders are hereby set aside. The suit should now proceed under the ordinary procedure. Since the defendant has already entered appearance, although in response to a summons issued under Order 37, it will not be necessary to serve him afresh. The defendant may now be directed to file his defence, if any, straightway.

19. The applications are thus disposed of.

20. There will be no order for costs.

21. The order be communicated to the court below forthwith.

ANIL K. SEN, J.:— I agree.

Revision allowed.

AIR 1982 CALCUTTA 388

M. M. DUTT AND

MONOJ KUMAR MUKHERJEE, JJ.

M/s. United Investment Corpn. and another, Appellants v. Corporation of India, Respondent.

Appeal from Original Order No. 193 of 1977 (Matter No. 539 of 1975), D/- 2-2-1982.

Calcutta Municipal Act (33 of 1951), S. 5 (53) — 'Owner' — Building construct-

DZ/EZ/B670/82/HR/RSK

ed by lessee and let out for first time by him to tenants — Held, lessee realising rents from its sub-lessees was 'Owner' of building in terms of S. 5 (53) and assessing authority determining annual value of building was entitled to take into account such rents realised by lessee. AIR 1970 SC 1417, Disting. Decision of D. K. Sen in Original Order No. 193 of 1977, Affirmed. (Para 10)

Cases Referred : Chronological Paras
AIR 1970 SC 1417 8, 10

N. R. Chatterjee with Miss Muku Chatterjee, for Appellants; P. K. Ghose, for Respondent.

M. M. DUTT, J.:— The appellants M/s. United Investment Corporation a partnership firm and its partner Smt. Bandana Suraiya have, in this appeal, challenged the propriety of the order of D. K. Sen, J., whereby the learned Judge discharged the Rule Nisi issued on the application of the appellants under Article 226 of the Constitution.

2. By an indenture of lease dt. July 16, 1962 Mehta Suraiya (P) Ltd., granted a lease of a piece of land measuring 10 cottahs 2 chittacks 28 sq. ft. comprised in premises No. 14/1B, Ezra Street, Calcutta to the appellant firm for a period of 33 years. It is provided in the lease that the rent for the first three years would be Rs. 700/- per month and thereafter, for the remaining thirty years the rent would be at the rate of Rs. 2,500/- per month. Under the lease, the lessee was to use the demised premises for the construction of a building thereon for office and/or residential purposes according to the map or plan duly signed by the parties and for letting out the same. It was enjoined that the lessee was to erect and complete the building within a period of three years from the date of the lease. Cl. (n) of para 1 of the lease provides that the lessee shall deliver up his full possession of the demised premises and the messuages and buildings to be erected thereon at the expiration or sooner determination of the lease. Cl. (d) of para 3 of the lease is a renewal clause under which the lessee would be entitled to have the lease renewed for a further term of 33 years and on the expiry of the said term for another term of 33 years by serving before the expiry of each term three months' notice on the lessor. The rate of rent, however, would remain the same, namely, Rs. 2,500/- per month. Cl. (e) of para 1 of the lease provides as follows:

"To bear pay and discharge all such Government and Municipal rates and

taxes and/or assessments which are now imposed or charged or may hereafter be imposed or charged by the Municipality or competent authority on the demised premises and the messuages and buildings to be erected thereon whether payable by the owner or occupier and also to bear and pay all other outgoings and demands whatsoever now imposed or charged or hereafter to be imposed or charged for or in respect of the demised premises and the messuages and buildings to be erected thereon as aforesaid"

3. It thus appears that the lessee was to pay both shares of the municipal taxes in respect of the building that would be constructed by it upon the demised land. Indeed the lessee, that is, the appellant firm has since constructed a building and let out the same. The appellant firm has been realising rents from the sub-tenants.

4. From time to time, the annual value of the building was assessed by the Calcutta Corporation. In 1966-67 the annual value that was assessed by the Calcutta Corporation was Rs. 5,30,874/-. The appellants preferred an appeal before the Presidency Small Cause Court, Calcutta and, on such appeal, the annual value was reduced to Rs. 5,06,874/-. Thereafter, the appellant did not prefer any further appeal to this Court. In other words, the said valuation which was to take effect from the third quarter of 1966-67 became final. In the writ petition, however, the appellants have challenged the said valuation as determined by the Presidency Small Cause Court, Calcutta.

5. Thereafter, in 1968-69 there was a general revaluation and a notice u/s. 180 of the Calcutta Municipal Act 1961 was served upon the appellant firm.

6. By the said notice it was proposed to increase the annual value of the said premises to Rs. 7,07,726/- with effect from 4th quarter 1968-69. The appellants preferred an objection against the enhancement of valuation. Upon such objection, the Special Officer of the Calcutta Corporation reduced the annual value to Rs. 5,30,469 with effect from 4th quarter 1968-69. The appellants have also challenged this valuation of the premises.

7. It was contended on behalf of the appellants before the learned Trial Judge at the hearing of the writ petition that the appellant firm was illegally treated as the owner of the said premises No. 14/1B, Ezra Street, Calcutta, for the purpose of assessment of annual value of the

premises. In other words, the contention of the appellants was that the Calcutta Corporation was not entitled to take into consideration the rents realised by the appellant firm from its sub-lessees treating it as the owner of the said premises comprising the building which was erected by it at its own costs. The learned Judge, after considering the facts and circumstances of the case and the submissions made on behalf of either party, overruled the said contention and, as stated already, discharged the Rule Nisi. Hence this appeal.

8. The principal point that is involved in this appeal is whether the appellant firm can be treated as the owner of the building being premises No. 14/1B, Ejra Street, Calcutta. Mr. N. R. Chatterjee, learned counsel, appearing on behalf of the appellants submits that the appellant firm being a lessee cannot be treated as the owner of the building and the rents realised by the appellant firm cannot be taken into consideration for the assessment of the annual value of the building. In support of his contention much reliance has been placed by the learned counsel on the decision of the Supreme Court in the case of Corporation of Calcutta v. Life Insurance Corporation of India, AIR 1970 SC 1417. In that case, the Supreme Court observed that in determining the assessment of the annual value the assessing authority was not concerned with the rent which the tenant might receive from his sub-tenant and that it was the gross rent which the owner might realise by letting the land or building under a bargain uninfluenced by "extraneous considerations" which determined the annual value.

9. On the other hand, it has been contended by Mr. Ghosh, learned counsel appearing on behalf of the Corporation of Calcutta that the appellant firm can be treated as the owner in view of S. 5 (53) of the Calcutta Municipal Act, 1951. S. 5 (53) of the Act defines the term "owner" as follows:—

(53) "Owner" includes the person for the time being receiving the rent of any land or building or of any part of any land or building, whether on his own account or as agent or trustee for any person or society or for any religious or charitable purpose, or as a receiver or who would so receive such rent if the land, building or part thereof were let to a tenant.

10. Admittedly, the appellant firm has been realising rents from its sub-lessees

of the building in question. The firm, therefore, comes within the definition of the term "owner". It is true that in the decision of the Supreme Court in the case of the Corporation of Calcutta v. Life Insurance Corporation of India, (AIR 1970 SC 1417) (supra) it has been laid down that the rent which the owner may realise by letting the land or building can only be taken into consideration for the purpose of assessment of the annual value and not the rent realised by the tenant from its sub-tenant. In that case, the tenants M/s. Firpo Ltd., did not construct the building in question. The building was constructed by the landlord. Admittedly, the landlord was the owner of the building. The building was not, for the first time, let out by the tenants M/s. Firpo Ltd., to their sub-tenant, but it was let out by the landlord to M/s. Firpo Ltd. In the instant case, however, the building in question was admittedly constructed by the appellant firm and the firm for the first time let out the same after it was constructed. In the circumstances, the above decision of the Supreme Court is distinguishable on facts from the instant case where, the building has been constructed by the lessee and the lessee lets out the building for the first time to its tenants. The assessing authority will, therefore, be entitled to take into consideration the rents realised by the lessee from its sub-lessees. In that sense, the lessee may be treated as the owner of the premises in view of S. 5 (53) of the Calcutta Municipal Act.

11. We do not think that any writ petition is maintainable for quashing the annual value of the premises that was ultimately fixed by the Presidency Small Cause Court, Calcutta on an appeal preferred by the appellants to that court. A further appeal lay to this Court against the order of the Presidency Small Cause Court, Calcutta fixing the annual value of the building in question. As stated already, no appeal was preferred by the appellants to this Court. In the circumstances, that order became final. So far as the assessment of annual value of the building which was to take effect from the 4th quarter of 1968-69 is concerned, we are of the view that the assessment has been done in accordance with law treating the appellant firm as the owner of the building in question. No other point has been urged in this appeal.

12. For the reasons aforesaid, this appeal is dismissed. In view of the facts

and circumstances of this case, there will be no order as to costs.

13. Mr. Chatterjee prays for a certificate for appeal to the Supreme Court under Art. 134A of the Constitution. In our opinion, no substantial question of law of general importance is involved in this appeal. The oral prayer for a certificate is disallowed.

MONOJ KUMAR MUKHERJEE, J.:—

agree.

Appeal dismissed.

AIR 1982 CALCUTTA 391

**ANIL K. SEN AND
B. C. CHAKRABARTI, JJ.**

Smt. Hironmoyee Debi and others, Appellants v. Somendra Chandra Nandy and others, Respondents.

L. P. A. No. 53 of 1972, D/- 5-3-1982.*

(A) W. B. Premises Tenancy Act (12 of 1956), Ss. 13 (2), 16 (2) — Protection to sub-tenants against eviction — Availability — Sub-tenant giving notice under S. 16 (2) is only entitled to protection — Requirement of notice cannot be dispensed with.

Under S. 13 (2) the Legislature had made it incumbent for the sub-tenants to give notice of their sub-tenancies in order to be entitled to claim protection thereunder. As such no court can dispense with fulfilment of such a statutory requirement by taking the view that since the landlords were aware of the sub-tenancy it is immaterial whether a notice under sub-sec. (2) of S. 16 had been given or not. To apprise the landlord of such sub-tenancy is not the only object behind the provision in S. 16. The more important object behind the provision is to render the issue of subletting whether pre-Act or post-Act uncontroversial so that none can set up a frivolous claim of subletting when he has not given any notice nor can a landlord who has been served with such a notice wrongfully deny the subletting. (Para 7)

Thus where in the eviction suit the sub-tenant who had occupied the suit premises before the commencement of the Act and that too with the knowledge of the landlord was refused protection under S. 13 (2), as he failed to issue notice under S. 16 (2) the refusal was

*Against judgment and decree passed by S. K. Dutta, J., reported in AIR 1971 Cal 425.

proper. AIR 1971 Cal 425, Affirmed.

(Para 7)

(B) W. B. Premises Tenancy Act (12 of 1956), S. 40 — W. B. Premises Rent Control (Temporary Provisions) Act (17 of 1950), Ss. 13 (2), 12 (1) (c) — Saving clause — Effect of — Right of sub-tenant under S. 13 (2) to be deemed to be tenant directly under the landlord is not saved by S. 40 of Act 12 of 1956, AIR 1957 Cal 257 (SB), Foll.; AIR 1980 Cal 131, Not followed in view of AIR 1957 Cal 257 (SB). AIR 1971 Cal 425, Affirmed.

(Para 10)

Cases Referred : Chronological Paras
AIR 1980 Cal 131 : (1980) 1 Cal LJ 197

8, 10

(1974) C. R. No. 1992 of 1974 (Cal),
Samad Mistri v. Md. Omed

10

AIR 1957 Cal 257 : 61 Cal WN 263 (SB) 9

Amarendra Nath Basu, for Appellants;
Amarendra Narayan Bagchi and Tarak
Nath Roy, for Respondents.

ANIL K. SEN, J.:— This is an appeal under cl. 15 of the Letters Patent and is directed against the judgment and decree dated March 15, 1971 (reported in AIR 1971 Cal 425), passed by our learned brother S. K. Dutta, J., thereby dismissing an appeal from appellate decree No. 218 of 1964 preferred by defendants Nos. 3 and 4 in a suit for eviction. The said defendants are the appellants now before us. The short point which arises for our consideration in this appeal is as to whether the said defendants who have been found to be in occupation of different parts of the suit premises as sub-tenants since before the West Bengal Premises Tenancy Act, 1956 but who had not given any notice of such sub-tenancy under S. 16 (2) of the said Act, would be entitled to protection against eviction.

2. The respondents Nos. 1 and 2 before us (hereinafter referred to as the plaintiffs) instituted Title Suit No. 251 of 1957 for eviction against their tenant, the respondent No. 3 before us (hereinafter referred to as the defendant No. 1) on two fold grounds of default and wrongful subletting. In this suit the present appellants defendants Nos. 3 and 4 (hereinafter referred to as the said defendants) were made parties as they claimed to be sub-tenants in respect of the suit premises though they had not given any notice of their sub-tenancy under S. 16 (2) of the said Act.

3. In the suit two sets of written statements were filed — one on behalf of the defendant No. 1 and the other on behalf of the said defendants. The defence of the defendant No. 1 was struck off under

the provision of S. 17 (3) of the said Act and the suit was contested by the said defendants. They claimed themselves to be sub-tenants — the sub-tenancy in their favour being created by the erst-while tenant since before 1956 with the consent and knowledge of the plaintiffs and, as such, they are entitled to protection against eviction.

4. The two courts below concurrently found that the said defendants came to occupy the suit premises as sub-tenants since before the West Bengal Premises Tenancy Act, 1956, and that again to the knowledge of the plaintiffs and their employees. But as the said courts further found that these defendants had failed to comply with the mandatory provision of S. 16 (2) of the said Act, they were not entitled to any protection against eviction under the provision of S. 13 (2) of the said Act, which protects only such sub-tenants as had given notice of their sub-tenancies under the provision of S. 16 of the said Act. The two courts thus concurrently decreed the plaintiffs' suit against all the defendants including the said defendants and they preferred the above second appeal to this court. Our learned brother concurred with the view expressed by the two courts below and dismissed the second appeal. The said defendants, however, obtained leave under cl. 15 of the Letters Patent and on the basis thereof the present appeal has been preferred by them. The material issues of fact being concluded by the concurrent findings of the courts below, the only point for our consideration now is as to whether under the law the said defendants can claim any protection against eviction by virtue of their position as sub-tenants under the defendant No. 1.

5. Mr. Bose appearing in support of this appeal has raised two points. In the first place it has been contended that the objects of a notice under S. 16 (2) of the Act being one to apprise the landlord of the existence of the sub-tenancy that was otherwise fulfilled upon the findings of the courts below that the plaintiffs had due knowledge of the existence of such sub-tenancy since before the 1956 Act. Hence, according to Mr. Bose irrespective of whether a notice under S. 16 (2) of the Act was served on the landlord or not, the said defendants are entitled to protection under S. 13 (2) of the said Act. Alternatively, it has been contended by Mr. Bose that in view of the amended provision of S. 40 of the said Act, the said defendants are entitled to protection

against eviction under the provision of S. 13 (2) of the W. B. Premises Rent Control Act, 1950 (hereinafter referred to as the Act of 1950). Both the points thus raised by Mr. Bose have been strongly contested by Mr. Bagchi appearing on behalf of the plaintiffs/respondents.

6. So far as the first point raised by Mr. Bose is concerned, S. 13 (1) of the said Act, in cl. (a) contemplates that a tenant is liable to be evicted where he transfers, assigns or sublets in whole or in part the leasehold premises without the previous consent in writing of the landlord. Section 13 (2), however, provides as follows :

"(2) Sub-tenants, if any, referred to in S. 16 who have given notice of their sub-tenancies to the landlord under the provision of that Section shall be made parties to any suit or proceedings for the recovery of possession of the premises by the landlord :

Provided that except in cases covered by cl. (f) or cl. (g) of sub-sec. (1), no decree or order for ejectment shall be passed against any such sub-tenant unless any of the grounds mentioned in cls. (b) to (e) and (h) apply to him."

7. On the terms of sub-sec. (2) of Section 13 as aforesaid, the legislature had made it incumbent for the sub-tenants to give notice of their sub-tenancies in order to be entitled to claim protection thereunder. In our view, no court can dispense with fulfilment of such a statutory requirement by taking the view that since the landlords were aware of the sub-tenancy it is immaterial whether a notice under sub-section (2) of Section 16 of the Act had been given or not. To apprise the landlord of such sub-tenancy is not the only object behind the provision in Section 16. Had it been so sub-sec. (1) of S. 16 would not have provided that even where a subletting is made with the consent of the landlord in writing after the Act, such a sub-tenant also is to give notice of such subletting in the manner prescribed. The more important object behind the provision is to render the issue of subletting whether pre-Act or post-Act uncontroversial so that none can set up a frivolous claim of subletting when he has not given any notice nor can a landlord who has been served with such a notice wrongfully deny the subletting. In cases of pre-Act subletting sub-s. (3) again goes on to provide that where such subletting is without any consent in writing of the landlord and the landlord denies to have given any oral consent

the Controller shall on an application made to him in this behalf either by the landlord or the sub-tenant within two months from the date of receipt of the notice by the landlord or the issue of the notice by the sub-tenant as the case may be by order declare that the tenant's interest in so much of the premises as has been sublet shall cease and that the sub-tenant shall become a tenant directly under the landlord. Thus in cases of pre-Act subletting where there is no consent of the landlord in writing, the statute made a further provision for determination of any dispute regarding such sub-tenancy being with or without the consent of the landlord by the Controller and the landlord's right to dispute the sub-tenancy under sub-sec. (3) is dependent upon service of the notice on him. The object of S. 16, on the whole was to provide a scheme and a machinery to render it certain as to who are the sub-tenants that would be entitled to relief under the other provision of the Act, namely, S. 13 (2) thereof. Such being the legal position, in our view, our learned brother S. K. Dutta, J., and so also the courts below were right in their views that in the absence of any notice given under S. 16 (2) of the said Act, the pre-Act sub-tenants like the said defendants are not entitled to the protection under S. 13 (2) of the said Act. The first point raised by Mr. Bose, therefore, must fail and is overruled.

8. We now proceed to consider the second point raised by Mr. Bose. According to Mr. Bose, unlike S. 14 of the present Act, there was no statutory bar to sub-letting under the provisions of the Act of 1950 by a tenant of the first degree. Section 13 (2) of that Act further provided that "where any premises or any part thereof have been or has been sublet by a tenant of the first degree.....if the tenancy of such tenant is lawfully determined otherwise than by virtue of a decree in a suit obtained by the landlord by reason of any of the grounds specified in cl. (h) of the proviso to sub-sec. (1) of S. 12, the sub-lessee shall be deemed to be a tenant in respect of such premises or part, as the case may be, holding directly under the landlord of the tenant whose tenancy has been determined, on terms and conditions on which the sub-lessee would have held under the tenant if the tenancy of the latter had not been so determined." According to Mr. Bose this provision of the Act of 1950 confers a right upon a sub-tenant like the said defendants to be

deemed to be a tenant directly under the landlord in the event there is a decree for eviction against the original tenant as in the present case not based on a ground contemplated by cl. (h) to the proviso to sub-sec. (1) of S. 12 of the Act of 1950. Mr. Bose contends that such a right has been saved by the amended provision of S. 40 of the said Act of 1956. Reliance is placed upon sub-sec. (2) of S. 40 which reads as follows :

"Notwithstanding the repeal of the said Act (a) any proceeding pending on 31st day of March 1956 may be continued, or

(b) any proceeding or remedy in respect of any right, privilege, obligation, liability, penalty, forfeiture or punishment under the said Act and relating to the period before such repeal may be instituted or enforced as if the said Act had been in force and had not been repealed or had not expired."

According to Mr. Bose when the said defendants had a right under the Act of 1950, to be deemed to be tenants directly under the landlords on lawful determination of the tenancy in favour of defendant No. 1 otherwise than by virtue of a decree for eviction obtained by reason of the grounds specified in cl. (h) to the proviso of S. 12 (1) of the 1950 Act, the necessary proceeding or the remedy provided in the said Act is saved by cl. (b) of sub-sec. (2) of S. 40 of the said Act of 1956. Reliance is placed by Mr. Bose on a Bench decision of this court in the case of *Ram Khilan Das v. Smt. Radharani Dasi* (1980) 1 Cal LJ 197 : (AIR 1980 Cal 131).

9. On a careful review of the legal position we are, however, unable to accept the above contention raised by Mr. Bose. Since the Act repealed was itself a temporary statute the legislature instead of relying upon the usual saving clause as contained in S. 4 of the Bengal General Clauses Act, incorporated a special saving clause in sub-sec. (2) of Section 40 of the said Act. It was pointed out by the Special Bench of this Court in the case of *Tarak Chandra Banerji v. Ratan Ghosal*, 61 Cal WN 263 : (AIR 1957 Cal 257) that the object of introducing such a saving clause is to save pending proceedings and authorise new institutions for the enforcement of rights and liabilities accrued under the Act of 1950 notwithstanding the repeal or the expiry of that Act. Section 40 (2) (b), therefore, intended to keep alive such of the provisions of the Act of 1950 as provided for

proceedings or remedies in respect of any right, privilege, obligation, liability, penalty, forfeiture or punishment which accrued or were incurred under the Act of 1950 for the limited purpose of enforcing such rights, privileges, obligations etc. This is clear on the language of the clause itself when it refers to "any right, privilege, obligation, liability, penalty, forfeiture or punishment under the said Act and relating to the period before such repeal". On the facts of the present case, we fail to appreciate what right had accrued in favour of the appellants under the Act of 1950 and before its repeal and what are the provisions thereof which the appellants can avail of for enforcement of any such accrued right. It may be that under the provisions of the proviso to Ss. 12 (1) (c) and 13 (2) of the Act of 1950 a sub-tenant under a tenant of the first degree would become a tenant directly under the superior landlord when the tenancy in favour of the tenant of the first degree is lawfully determined otherwise than by virtue of a decree in a suit obtained by the landlord by reason of any of the grounds specified in cl. (h) of the proviso to sub-sec. (1) of S. 12. But such a right did not accrue in favour of or vest in the sub-tenant on the sub-letting itself but was contingent upon a lawful determination of the tenancy in favour of the tenant of the first degree and obviously having regard to the other provisions of the Act of 1950. Undisputedly in the present case the tenancy in favour of the appellants landlord, that is the tenant of the first degree (as contemplated by the Act of 1950) was not so determined when the Act of 1950 was in force. It was determined only by a decree obtained by the landlord under the provisions of the new Act, viz., the said Act of 1956, long after the repeal of the Act of 1950. In that view, it cannot be said that any right under the proviso to S. 12 (1) (c) or S. 13 (2) of the 1950 Act did at all accrue in favour of the appellants on the date that Act was repealed so that the provisions of S. 40 (2) of the said Act could be invoked for initiating any proceeding for enforcement of such a right.

10. Strong reliance is placed by Mr. Bose on a Bench decision of this court in the case of Ram Khilan Das v. Radha Rani Dasi (AIR 1980 Cal 131) (supra) which no doubt lends some support to the contention of Mr. Bose. We have carefully read the said decision more than once but with due respect to the

learned Judges it appears to us that they have not given any independent reason of their own when they held, "The sub-tenancy in question did not cease and rights and obligations of sub-tenants under S. 12 (1) (c) and S. 13 (2) of the 1950 Act remained unimpaired", but appears to have held as such approving the decision of a learned single Judge on the point at issue rendered in the case of Samad Mistri v. Md. Omed, (unreported judgment in C. R. No. 1992 of 1974). In the case before the learned single Judge the point at issue, however, was not the same. In Samad's case the decree for eviction against the tenant of the first degree was one passed in terms of the provisions of the Act of 1950 which was held to be applicable to such a suit. The determination of the tenancy in favour of the tenant of the first degree having been made under the provisions of the Act of 1950, it was held by the learned single Judge that the right under S. 13 (2) of the Act of 1950 vested in the sub-tenant. The fact that in the said case the tenancy in favour of the tenant of the first degree was lawfully determined under the provisions of the Act of 1950, is a point of important difference which was unfortunately overlooked by the learned Judges deciding the case of Ram Khilan Das when they thought that the point raised before them was the same as was raised before the learned single Judge. Though normally we would have been bound by the Bench decision as in the case of Ram Khilan Das, we do not feel ourselves so bound because the said decision is based upon non-consideration of the Special Bench decision referred to hereinbefore which according to us clearly explains the effect and implication of S. 40 (2) of the said Act and which we prefer to follow in deciding the point.

11. In the result, both the points raised by Mr. Bose in support of this appeal fail, the appeal fails and is dismissed. There will be no order as to costs.

B. C. CHAKRABARTI, J.:— I agree.
Appeal dismissed.

AIR 1982 CALCUTTA 394

MRS. JYOTIRMOYEE NAG, J.

Suresh Kumar Rungta, Petitioner v.
Mahadeo Prasad Agarwala, Respondent,
Civil Order No. 2958 of 1981, D/- 15-1-1982.

West Bengal Premises Tenancy Act (12 of 1956), S. 34 — Essential services — Contractual tenant relegated to position

DZ/EZ/B452/82/HR/RSK

of statutory tenant by notice to quit — Does not lose right to enjoyment of electricity and water supply which are essential services available to all tenants until eviction from premises — Tenant may apply for restoration of services where landlord has discontinued same.

True, a statutory tenant cannot be put in the same position as that of a contractual tenant but nevertheless, as soon as the tenancy of a contractual tenant is determined by notice to quit and a suit is instituted against him and he is relegated to the position of a statutory tenant he does not lose the right to enjoyment of electricity and water supply which are the essential services available to all tenants. Until a tenant is evicted from the suit premises he is entitled to enjoy the same and if the landlord discontinues with these services he may apply for restoration by making a proper application before the court: AIR 1980 Cal 108, AIR 1965 SC 414, AIR 1968 SC 471 and AIR 1977 Cal 318, Refd. (Para 1)

Cases Referred: Chronological Paras

AIR 1980 Cal 108

AIR 1977 Cal 318

AIR 1968 SC 471

AIR 1965 SC 414

Saktinath Mukherjee and Tarun Chatterjee, for Petitioner; S. P. Roy Chowdhury and Jagadish Kumar Gupta, for Respondent.

ORDER:— This application is in respect of an order being order No. 9 dt. 27th August, 1981 passed by the learned Munsif, First Court at Sealdah in Title Suit No. 290 of 1981. The opposite party Mahadeo Prasad Agarwala landlord of 30/5, Kankurgachi Road, C.I.T. Scheme No. VII, P.S. Fulbagan, Calcutta instituted a title suit No. 290 of 1981 against the applicant, petitioner in the first court of the learned Munsif in respect of the suit property for eviction on several grounds, namely, default, subletting etc. In the suit the applicant petitioner filed an application u/s. 151 of the Code of Civil Procedure for restoration of his electricity which was enjoyed from the metre of one Shri Newrang Rai Fatehpuria and he claimed that he enjoyed electricity exclusively from that metre (consumer No. being 47088040106) since the inception of his tenancy. The petitioner applicant alleged that his supply had been cut off by the landlord opposite party on 4th August, 1981 at 4 p.m. and hence the application u/s. 151, C.P.C. for restoration. An objection was raised by the opposite party (to) this application

on the ground that the consumer number which is quoted above does not belong to the tenant and in fact although the tenant had a right to enjoy electricity as a tenant and that as the metre stood in the name of another tenant the same cannot be restored without offending the provision of the Calcutta Electricity Act. The learned Munsif dismissed the application of the applicant observing that the petitioner applicant had been enjoying electricity in the suit premises illegally. The court cannot place the seal of legality upon such illegal use by allowing the petition u/s. 151, C.P.C. The learned Munsif observed that the defendant had a right to get electricity supplied at the suit premises at his own cost by submitting a proper application before the Calcutta Electricity Supply Corporation. Against this order of the learned Munsif the petitioner applicant has come up in revision. On behalf of the petitioner it is submitted that the order is illegal and rejection of the application u/s. 151, C.P.C. of the applicant petitioner is illegal and not justified in law. Mr. Mukherjee appearing for the applicant submits that a tenant had been enjoying electricity in the suit premises from the said metre as the same had been allotted to the tenant by the landlord himself and that this has been enjoyed for a considerable period without any hindrance and, therefore, it did not lie in the mouth of the landlord to say that the tenant was enjoying electricity illegally and hence the supply had been stopped and cannot be restored. Moreover, it has been argued by Mr. Mukherjee that enjoyment of electricity forms part of the tenancy and disconnection of the electric supply gives a right to the tenant to pray for restoration not only under the general law but also under the West Bengal Premises Tenancy Act. The applicant petitioner is a statutory tenant inasmuch as a suit is going on against him for eviction after, his tenancy had been determined by a legal notice to quit. Nevertheless so long as he is not evicted from the suit premises he has a right to enjoy all the amenities which he had enjoyed as a tenant. It has been argued further by Mr. Mukherjee that the enjoyment of the electricity by the tenant applicant is not merely for a temporary period but forms a part and parcel of his tenancy rights and, therefore, until evicted from the suit premises, he is entitled to pray for restoration of the same. Accordingly, the learned Munsif should have allowed the application u/s. 151, C.P.C. by giving an order for

restoration of electric supply from the metre from which he was getting his electricity so long, instead of directing him to take a separate metre in his own name directly from the Calcutta Electric Supply Corporation. Mr. Roy Chowdhury appearing for the opposite party has strenuously argued that the order of the learned Munsif in rejecting the application u/s. 151 is valid and that the applicant petitioner can make an application for getting electricity from the Corporation directly without taking the consent of the landlord instead of insisting upon restoration of the same from the old metre which was in the name of an ex-tenant. Further, Mr. Roy Chowdhury argued that the provisions of S. 34 or any other section of the West Bengal Premises Tenancy Act providing for amenities to a tenant are not available to a statutory tenant. He can only claim protection from eviction from the suit premises so long as a decree has not been passed against him by a competent court. In this connection, Mr. Roy Chowdhury has referred to two cases of this Court and also a decision of the Supreme Court. The cases referred to by him are reported in AIR 1977 Cal 318 and AIR 1980 Cal 108. The former is by M. M. Dutt, J. and the latter is by G. N. Ray, J. It may be pointed out that so far as the judgment of G. N. Ray, J. is concerned, his Lordship's attention has not been drawn to the earlier decision reported in AIR 1977 Cal 318. In that case M. M. Dutt, J. held that when an application for restoration of electric supply is made by a tenant under O. 39, Rr. 1 and 2, C.P.C. his application should not be rejected on the ground that a special remedy is provided u/s. 34 of the West Bengal Premises Tenancy Act and there cannot be any curtailment of any general right by S. 34 of the West Bengal Premises Tenancy Act. That application was rejected on the ground that it was not maintainable in view of the provision of S. 34 of the West Bengal Premises Tenancy Act. This was held to be illegal and accordingly set aside. Mr. Roy Chowdhury has conceded that even if the general law is available to the statutory tenant under O. 39, Rr. 1 and 2, in any event no such application was made before the learned Munsif and the relief u/s. 151, C.P.C. cannot be availed of under the circumstances. Now referring to the decision reported in AIR 1980 Cal 108. His Lordship has elaborately dealt with the rights of a statutory tenant and Mr. Roy Chowdhury placed reliance upon this decision particularly the

observation made in the said judgment that a statutory tenant does not enjoy the same position as that of a contractual tenant. The Legislature does not intend that the statutory tenant will be treated at par with a contractual tenant under the West Bengal Premises Tenancy Act. Accordingly, after the determination of tenancy, the statutory tenant cannot make an application u/s. 8 of the West Bengal Premises Tenancy Act for determination of fair rent by the Rent Controller. In this decision however the question of enjoyment of amenities such as meter and electricity by a statutory tenant did not come up for discussion. Furthermore one of the considerations which weighed (with) his Lordship in holding and very rightly too that a statutory tenant cannot be equated with the contractual tenant is that the defence of that tenant was struck out u/s. 17 (3) of the West Bengal Premises Tenancy Act. However, his Lordship for the general proposition relied upon several decisions of the Supreme Court which are reported in AIR 1965 SC 414 and also AIR 1968 SC 471. On a consideration of the arguments of Mr. Roy Chowdhury, I am in agreement with him that a statutory tenant cannot be put in the same position as that of a contractual tenant but nevertheless, I have not come across a decision wherein it has been held that as soon as the tenancy of a contractual tenant is determined by notice to quit and a suit is instituted against him and he is relegated to the position of a statutory tenant he ceases to have any right to the enjoyment of electricity and water supply which are the essential services available to all tenants. Until a tenant is evicted from the suit premises he is entitled to enjoy the same and if the landlord discontinues with these services he may apply for restoration by making a proper application before the court. In this case, as pointed out by Mr. Mukherjee, he made an application for restoration for supply of electricity from the metre from which he was enjoying but when it was brought to the notice of court that that metre was in the name of a person who was an ex-tenant, the learned Munsif refused to restore connection in respect of that metre but he gave leave to the tenant applicant to make an independent application for getting a separate metre from the Calcutta Electric Supply Corporation and it is stated before me that his application has been granted by the Calcutta Electric Supply Corporation. But inasmuch as the main metre board is

within the control of the landlord and in view of his previous experience of obstruction by the landlord, the tenant is apprehensive that unless he is given some sort of protection he will not be able to instal a new metre in the suit premises. In view of this and for the end of justice, I think I may add a direction upon the landlord not to interfere or obstruct the installation of the new metre by the Calcutta Electric Supply Corporation to the premises of the tenant. I, specifically put a question to Mr. Roy Chowdhury to be answered by him on behalf of his client who has been attending Court all along whether he has any objection to the installation of a new metre for the tenant. Mr. Roy Chowdhury said that there has been no obstruction by his client previously and there should be no apprehension of any obstruction in the future but he did not specifically undertake on behalf of his client to place no obstruction at the time the new metre (is) to be set up by the Calcutta Electric Supply Corporation. In such a state of affairs, I think that it is necessary to give a direction that the landlord will not put any obstruction to the setting up of the new metre by the Calcutta Electric Supply Corporation and that those who will come from the Electric Supply Corporation will be given access to the metre board. Until the Calcutta Electric Supply Corporation sets up a new metre for the tenant, the landlord may give temporary connection from the old metre from which electricity was so long enjoyed by the tenant if by doing so there is no contravention of any provision of the Act. This arrangement will stand until a new metre is installed. With this observation I dispose of the application upholding the orders passed by the learned Munsiff.

2. Let two plain copies of the order, countersigned by the Assistant Registrar (Court), be given to the learned advocates for both sides, as prayed for.

Revision allowed.

AIR 1982 CALCUTTA 397

AMITABHA DUTTA, J.

Phanindra Nath Dey, Appellant v. Bholanath Banerjee, Respondent.

S. A. No. 1084 of 1978, D/- 2-7-1982.

(A) Evidence Act (1 of 1872), S. 154 — Hostile witness — Cross examination — Inconsistent and contradictory state-

ments are not the only ground for permitting such examination.

The Court has discretion to permit examination of a witness under Section 154 of the Evidence Act when it is satisfied from the manner in which the witness gives evidence that he is not desirous of telling the truth and that it is necessary to give such permission to elicit the truth. Inconsistent or contradictory statements of the witness are not the only ground for permitting examination under Section 154 of the Act. AIR 1977 SC 170 and AIR 1976 SC 294, Relied on. (Para 8)

(B) Evidence Act (1 of 1872), S. 73 — Service by Post — Postal peon denying that he has made any endorsement that notice was refused — Signature of peon on envelope and on his deposition in Court compared — Comparison justified. (Paras 6, 9)

(C) Civil P. C. (5 of 1908), Sec. 100 — Second appeal — Finding of fact based on mere inadequacy or insufficiency or improper assessment of evidence — Cannot be interfered by reappraisal of evidence. (Para 10)

Cases Referred: Chronological Paras
AIR 1977 SC 170: 1977 Cri LJ 173 6, 8
AIR 1976 SC 294: 1976 Cri LJ 295 8
AIR 1976 SC 2032: 1976 Cri LJ 1568 10
AIR 1975 Cal 98 10
AIR 1974 SC 1059 10

Inderjit Mondal, for Appellant; Samarendra Banerjee, for Respondent.

JUDGMENT:— This is an appeal by the defendant from the decision of the learned Additional Subordinate Judge, Bankura affirming the decision of the learned Munsif, 1st Court, Bankura in Title Suit No. 92 of 1974 for ejectment of a premises tenant, arrears of rent and compensation.

2. The plaintiff brought the suit on 9-9-1974 alleging that the defendant was a monthly tenant in the suit premises comprising a drawing room and eastern portion of a covered verandah of the plaintiff's building in holding No. 315A of Lohar Moholla of Bankura Municipality at a monthly rent of Rs. 25/- per month payable according to Bengali Calendar month; that the defendant defaulted in payment of rent since Chaitra, 1377 B. S.; that the plaintiff reasonably requires the suit premises for his own occupation as owner; and that a valid notice of ejectment was served on the defendant by registered post on behalf

of the plaintiff which the defendant refused to receive, terminating his tenancy on the expiry of Sraban, 1381 B. S.

3. The defendant filed a written statement denying the alleged grounds of ejectment and the service of the notice to quit.

4. The defence of the defendant against delivery of possession was struck out under Section 17 (3) of the West Bengal Premises Tenancy Act, 1956 (hereinafter called the Act) by the trial Court's order No. 31 dated 12-7-1976 as the defendant's deposits of rent with the Rent Controller were admittedly invalid deposits and the defendant did not comply with Section 17 (1) of the Act or raise any dispute under Section 17 (2) of the Act. Thereafter, the defendant contested the suit only on the point of service of the notice of ejectment, the validity of which was not challenged. The defendant denied on oath the tender and refusal to accept the notice to quit sent by registered post on behalf of the plaintiff. The plaintiff examined the postal peon who was permitted to be cross-examined by the plaintiff under Section 154 of the Evidence Act. The plaintiff also examined another witness (P.W. 5) who testified to the tender of the notice by the postal peon to the defendant and the latter's refusal to accept it.

5. Both the Courts below have concurrently found on a consideration of the evidence and circumstances of the case that the notice of ejectment was duly served on the defendant as he refused to accept it when tendered to him on 6-7-1974. The trial Court has decreed the suit for ejectment on the ground of default in payment of rent under Section 13 (1) (i) of the Act with a finding that the ground of reasonable requirement of the plaintiff for his own occupation has not been proved. His claim of the arrears of rent and compensation has also been decreed. The decision of the Court of first instance has been affirmed by the first appellate Court which has rejected the cross-objection of the plaintiff respondent, challenging the trial Court's finding on the point of the plaintiff's reasonable requirement of the suit premises for his own occupation.

6. It has been submitted on behalf of the appellant before this Court that the trial Court followed a wrong procedure

in permitting the plaintiff to cross-examine P.W. 2 the postal peon although the witness did not make any inconsistent or contradictory statements in his evidence and the defendant objected to his examination under Section 154 of the Evidence Act. In this connection reliance has been placed on the decision in the case of Rabindra Kr. Dey v. State of Orissa, reported in AIR 1977 SC 170. It is further submitted that P.W. 5 being a chance witness of the alleged tender and refusal of the notice, no reliance could be placed on his evidence without corroboration from a credible source. The next submission on behalf of the appellant is that the trial Court has erred in comparing the signature below, the purported endorsements of refusal on the registered envelope with the signature of the postal peon below his deposition in Court. Lastly, it is submitted that as there can be no presumption of service in view of the defendant's denial on oath of tender and refusal of the notice and the postal peon's positive evidence that the endorsement of refusal is not his, the Courts below have erred in holding that registered envelope containing the notice of ejectment had been served on the defendant. The learned Advocate for the respondent has sought to repel those contentions.

7. In this case, there is evidence that the notice of ejectment was sent by registered post prepaid to the correct address of the defendant, namely, the grocery shop of the defendant by the side of a shop named Bikash Radio at Lalbazar (Bankura Town) which according to D.W. 1 the defendant was his address. P.W. 2 is the postal peon who got the registered letter from the Post Office for service on the defendant. He was cited by the defendant but was examined by the plaintiff. He has said that the defendant was known to him, although the defendant in his evidence has denied that fact. There are several endorsements on the registered envelope (Ext. 1/1). One of them is a penned through endorsement in Bengali signifying that the owner of the shop was not there and it is dated 5-7-74. P.W. 2 has admitted that he made the said endorsement. There are also endorsements reading as "Absent" dated 5-7-74 and "Refused" dated 6-7-74. PW 2 has denied that he made or signed any such endorsement. At that stage, the Court

permitted cross-examination of P. W. 2 by the plaintiff under Section 154 of the Evidence Act. In cross-examination P. W. 2 was not in a position to deny or affirm that he dealt with the registered envelope on 6-7-74. He has admitted that he went to the defendant's shop on 5-7-74 for the first time. He has further admitted that according to the rules a registered letter is to be kept by the postal peon for seven days in case the addressee is not found, apparently for further attempt at service before its return to the Post Office for being sent back to the sender. But P. W. 2 has said that he returned the registered envelope on 5-7-74 to the Post Office. That is not the probable conduct of a senior postal peon who was going to retire two years later. The plaintiff called for the records of the Post Office relating to the service of the registered letter in question but they were not available as the records were destroyed under the rules. P. W. 5 is a resident of the locality of the defendant's shop. He has deposed to the effect that on 6-7-74 he visited the shop of the defendant as he used to have business transactions with the defendant and that he saw P. W. 2 tendering a registered envelope to the defendant who refused to accept it. The learned Munsif has considered the evidence of P. Ws. 2 and 5. He has compared the signature below the endorsement of refusal on the registered envelope with the signature of P. W. 2 the postal peon, below his deposition and found that the signature below the endorsement is of P. W. 2. He has come to the conclusion that the postal peon has tried to suppress the truth and help the defendant. Relying on the evidence of P. W. 5, the learned Munsif has found that the registered envelope containing the notice of ejectment was tendered to the defendant and the defendant refused to accept it and so it was duly served on the defendant. The Court of appeal below has concurred in the finding of the learned Munsif considering the evidence as a whole and relying on the evidence of PW 5. He has taken into account the improbability of P. W. 2's returning the registered envelope to the Post Office on 5-7-74 as the defendant was not present in his shop without further attempt to serve it on him in the face of the rules requiring him to keep it for seven days for such attempts.

8. In my view, the submission made on behalf of the appellant that the trial Court erred in permitting examination of P. W. 2 under S. 154 of the Evidence Act is not acceptable. Both the decision in the case of Rabindra Nath Dey v. State of Orissa, reported in AIR 1977 SC 170 relied on by the appellant and the decision in the case of Sat Paul v. Delhi Administration, reported in AIR 1976 SC 294 cited on behalf of the respondent support the proposition that the Court has discretion to permit examination of a witness under S. 154 of the Evidence Act when it is satisfied from the manner in which the witness gives evidence that he is not desirous of telling the truth and that it is necessary to give such permission to elicit the truth. Inconsistent or contradictory statements of the witness are not the only ground for permitting examination under S. 154 of the Act. It has been held that the Evidence Act leaves the matter entirely to the discretion of the Court and such discretion is unqualified and unfettered to be exercised liberally for extracting the truth.

9. Regarding the objection taken to the comparison of hand writing by the learned Munsif, in my view, the Court is competent to compare the disputed writing with the admitted writing under S. 73 of the Evidence Act in order to appreciate properly, the evidence produced to prove the service of notice.

10. I cannot accept the appellant's contention that P. W. 5 being a chance witness is unworthy of credit if his testimony is not corroborated by other reliable evidence. It appears that the courts below have not regarded P. W. 5 as a chance witness. There is nothing to show that he was a friend of the plaintiff or he had animus against the defendant. The evidence of a chance witness is not necessarily incredible. It requires cautious approach and scrutiny when he is a partisan witness (vide Bahal Singh v. State of Haryana, AIR 1976 SC 2032, para 10). The court of appeal below has not committed any error of law in relying on the evidence of P. W. 5 in the context of other evidence and circumstances of the case. In view of such evidence, the courts of fact have not accepted the defendant's testimony denying refusal of the registered notice. This Court cannot reassess the value of the evidence and interfere with the finding

of fact on reappraisal of the evidence in Second Appeal (P. B. Desai v. C. M. Patel, AIR 1974 SC 1059, para 6). The finding of fact based on mere inadequacy or insufficiency or improper assessment of evidence does not involve an error of law so as to leave the question open to interference in Second Appeal (Harnath v. Dhanoo Devi AIR 1975 Cal 98).

11. In the result, I hold that there is no sufficient ground to interfere with the concurrent finding of the courts below that the notice of ejectment was duly served on the defendant. No other point has been raised on behalf of the appellant.

12. The respondent has filed a cross-objection challenging the concurrent finding of the two courts that the plaintiff has failed to prove reasonable requirement of the suit premises for his own occupation. The learned Advocate for the respondent has not pressed the cross-objection.

13. The appeal is therefore, dismissed. The cross-objection is also dismissed as it is not pressed. The defendant is allowed time till the last day of Aswin, 1389 B. S. to vacate the suit premises.

14. No order is made as to costs.

Appeal dismissed.

AIR 1982 CALCUTTA 400

G. N. RAY, J.

M/s. Serajuddin & Co., Petitioner v. Union of India and others, Respondents.

C. R. No. 2348 (W) of 1979, D/- 21-4-1982.

Mines and Minerals (Regulation and Development) Act (67 of 1957), Ss. 8, 30 — Mineral Concession Rules (1960), R. 22 — Application for renewal of lease — Deemed rejection thereof as not considered within stipulated period — Revision — Central Govt. allowing revision remanding application for renewal to be decided on merits — Renewal granted by State Govt. and matter put for approval before Central Govt. — Order refusing to grant approval — Validity.

An application for renewal of a mining lease was filed before the State Govt. The application was deemed to have been rejected as it was not considered within the stipulated period under R. 22 of the Rules. The petitioner company filed re-

vision before the Central Govt. The revision was allowed and the case was remanded to the State Govt. with a direction to decide the application for renewal on merits. Afterwards, the State Govt. granted the renewal and put the matter before the Central Govt. for its approval. The Central Govt. refused to grant approval on the ground that the area covered by the mining lease in favour of the petitioner company, was required for public sector exploitation.

Held, that the refusal by the Central Govt. to grant approval to the renewal of lease was not invalid. Simply because by allowing the revision, the State Govt. was directed to consider the case of the petitioner company on merits, it cannot be said that by necessary implication, the Central Govt. agreed to accord approval if the State Govt. was inclined to grant a renewal. Initially the State Govt. did not express any view and did not reject the application for renewal made by the petitioner company on merits but such rejection was only a deemed rejection because of non-consideration of the said application within the stipulated time. The Central Govt. intended to have the views of the State Govt. on merits of the case and for the said purpose directed the State Govt. to consider the case of the petitioner company on merits. The Central Govt. had certainly the right to grant or refuse approval after getting the views of the State Govt. (Paras 6, 7)

The power of the Central Govt. under the Act and the Rules is very wide and the same is not fettered by the desire and or the decision of the State Govt. (Para 7)

Also, it cannot be said that if the State Govt. has followed the guidelines as referred to in S. 8 of the Act and has not taken into consideration any extraneous matter and thereafter comes to any decision either in favour or against the grant of a lease, the Central Government is to accept such decision as a matter of course. The Central Govt. for proper reasons, may not accept the decision of the State Govt. although such decision was taken on proper consideration of the relevant facts after following the guidelines. There is no manner of doubt that the decision of the State Govt. cannot be lightly brushed aside by the Central Govt. and it is reasonably expected that such decision of the State Govt. which is the owner of the Mines, must have an anxious consideration by the Central Govt. for a harmonious relation of the States and the Centre. If, however, the Central

Govt. does not agree with the decision of the State Govt. and overrides its decision for a valid reason, it cannot be said that the Central Govt. has over-stepped its limit. (Para 7)

In the instant case, the Central Govt. has refused to grant approval on the ground that the area in question should be better utilised by the public sector undertaking, and it cannot be said that such consideration is not amenable to any reason. Whether such exploitation by a public sector undertaking will be more useful in the greater interest of the country or not, is not to be considered by the Court and the Court should not embark upon the uncharted ocean of public policy. (Para 7)

Cases Referred: Chronological Paras

AIR 1976 SC 1435	5
AIR 1976 SC 2591	4
AIR 1939 SC 655	3
(1969) 3 SCR 165: (1970) 2 SCJ 125	6
AIR 1968 SC 718	3

R. C. Deb, Balai Chandra Roy, for Petitioner; Dipankar Gupta, Mrs. L. Mukherjee (for No. 2) and G. L. Sanghi, S. Mudaliar and A. K. Dey (for No. 6), for Respondents; Bhaskar Gupta, Samar Banerjee and S. K. Kundu, for Union of India.

ORDER :— This writ petition is directed against refusal by the Government of India to accord approval for the renewal of a Mining Lease of the petitioner Company by the Government of Orissa under the provisions of Mines and Minerals (Regulation and Development) Act, 1957 read with the Mineral Concession Rules, 1960. It appears that sometime in the year 1944, the petitioner applied to the then Raja of Keonjhar Estate for grant of a Mining Lease in respect of Mangane Ore over an area of about 3329.40 acres in several mouzas in Champua Sub-Division of the said Estate. On 29th Dec. 1947, the Raja of Keonjhar granted a Mining Lease for the Manganese Ore to the petitioner for a period of 10 years commencing from 1st Nov. 1946 with an option of renewal for a further term of 15 years. On 8th June, 1949, the Government of Orissa annulled the said Mining Lease. On 14th July, 1949, the Government, however, allowed the petitioner to continue mining operations in the said area on payment of rates and royalties in accordance with the terms and conditions of the said Mining Lease and promised to grant a new Lease to the petitioner in accordance with the policy to

be laid down by the Government of India for leasing out Mines. It, however, appears that subsequently by an order dt. 3rd July, 1951, the State Government of Orissa withdrew and cancelled the said order. The petitioner company however submitted to the State Government of Orissa its terms and conditions of compromise and to settle the dispute mutually. On 12th June, 1952, the State Government of Orissa intimated its acceptance of the said terms and conditions of the Mining Lease and the said terms and conditions were also reduced and embodied into a written agreement known as Subsidiary Agreement. In Dec. 22, 1952, the said Subsidiary Agreement was executed and registered at Keonjhar and under the terms of the said Agreement, the petitioner company surrendered about 830 acres out of the demised area of 3329.40 acres and the petitioner company became lessee for the balanced area viz. 2499.40 acres for a term of 20 years with effect from November 1, 1946 with a stipulation that the State Government would grant and the petitioner company would take a renewed lease for a further period of 20 years. As the period of lease was not consistent with the existing law the Controller of Mining Lease for India directed that the petitioner's Mining Lease should be for a period of 20 years from 1st Nov. 1946 and the renewal of the said lease could be regulated according to the law and rule in force at the time of such renewal. On 28th Oct. 1965, the petitioner company made an application for first renewal for 20 years from 1st Nov. 1966 under the provisions of R. 22 (2) of the Mineral Concession Rules, 1960. As within the stipulated period such application of the petitioner company, was not considered by the State Government, it was deemed under the provisions of the said Mineral Concession Rules that the said application of the petitioner had been rejected by the State Government of Orissa. The petitioner company thereafter made an application for revision before the Central Government under the said Mineral Concession Rules, 1960 against the deemed rejection of the application of the petitioner for renewal of the said lease by the Government of Orissa. It appears that the said revision application was allowed by the Central Government and by an order dated 26th June, 1968, the Central Government passed an order remanding the petitioner company's application for renewal to the State Government of Orissa directing

the State Government to consider the petitioner company's application for renewal on merits and to pass suitable orders thereon at an early date. It appears that after consideration of the case of the petitioner company on merits for renewal of the said lease, the Government of Orissa by its Memo dated 1st October, 1969 informed the Central Government that the State Government of Orissa had decided to grant renewal of the said Mining Lease for Manganese Ores to the petitioner company and the State Government sought for approval for such renewal of the Mining Lease by the Central Government. It also appears that on 27th March, 1973 the petitioner company submitted a petition to the Central Government through the State Government under R. 63 of the Mineral Concession Rules, 1960 requesting the Central Government to consider the merits of the petitioner company's case for grant of renewal of the said Mining Lease and to accord necessary approval and/or sanction for the same. On 26th Oct. 1973 the State Government passed an order rejecting the application of the petitioner company for renewal of the said lease on the ground that the Central Government had advised the State Government to reject the said application for renewal as the area in question was required for public sector exploitation. The petitioner company thereafter challenged the said order of rejection of the petitioner's application for renewal of lease under Art. 226 of the Constitution in this Court and a Rule being Civil Rule No. 3608 (W) of 1973 was issued by this Court on the said application under Article 226. It appears that the said Rule was made absolute by this Court and the impugned order dated 26th Oct. 1973 passed by the State Government of Orissa and also the order passed by the Central Government refusing to grant approval were quashed by this Court. It was directed by this Court in the said order that the Central Government should hear the petitioner within two months from the date of the order after giving notice of hearing to the petitioner and in the mean time, parties would maintain status quo. It appears that on 10th Sept. 1977 the petitioner company made a representation to the Central Government *inter alia* explaining the background of the application of renewal of the said Mining Lease and the petitioner company also requested that pursuant to the order passed by this Court a suitable date might be fixed for giving the petitioner a

personal hearing. But the petitioner contends that the Central Government, however, failed to comply with the direction of this Court and did not give the petitioner any hearing within the specified date. It also appears that in the representation, the petitioner company also pointed out that when the State Government of Orissa, on consideration of the merits of the application, intended to grant the first renewal of lease for 20 years it was not open to the Central Government to deny any approval which it had granted by necessary implications at an early stage. In Nov. 1977, the petitioner company was given a hearing before the Joint Secretary, Department of Mines, Central Government and by a communication dated 26th March, 1979 the Central Government regretted its inability to accord approval for the renewal of the said lease as the area was required for development in the public sector. The petitioner company thereafter again moved this Court under Art. 226 of the Constitution of India against the said decision of the Central Government refusing to grant approval to the renewal of the said Mining Lease as desired by the Orissa Government and the instant Rule has been issued by this Court.

2. It appears that during the pendency of the Rule, the Manganese Ore (India) Limited, a public sector undertaking, made an application for addition of party and by an order dated 22nd Aug. 1979, the said Manganese Ore (India) Limited (hereinafter referred to as MOIL) was added as a party respondent to the Rule.

3. Mr. Deb being ably assisted by Mr. Balai Chandra Roy appearing for the petitioner company contends that against the deemed refusal by the Government of Orissa to consider the application of the petitioner company for renewal of the said Lease in accordance with the provisions of the Act and the Mineral Concession Rules, 1960, the petitioner company made an application for revision before the Central Government and the Central Government allowed the said application for revision and directed the State Government of Orissa to consider the application for renewal made by the petitioner company on merits. Mr. Deb submits that it is, therefore, quite evident that the Central Government had no objection of its own against the grant of renewal of the said lease in favour of the petitioner company and it only gave a green signal to the State Government of Orissa to consider the case of the peti-

tioner company on merits and to take a decision as to whether or not the State Government of Orissa was inclined to grant the renewal of the lease as prayed for. Mr. Deb submits that the State Government of Orissa thereafter considered the case of the petitioner company on merits and decided to grant renewal of the said lease subject to accord of formal approval by the Central Government in accordance with the provisions of Mines and Minerals (Regulation and Development) Act, 1957 read with Mineral Concession Rules, 1960. Mr. Deb submits that in the facts of this case, the accord of approval by the Central Government was only a formality under the said Act and the Rules and in the backdrop of events there was no scope for the Central Government to refuse approval when the State Government had agreed to grant the renewal. Mr. Deb contends that in the facts of the case it must be held that by directing the Government of Orissa to consider the case of the petitioner on merits against an earlier order of deemed rejection by the State Government, the Central Government, by necessary implication, made it quite clear that subject to the willingness of the State Government to grant renewal, the Central Government had the required approval for the renewal of the said Mining Lease. Mr. Deb submits that in the circumstances, the Central Government was not entitled to hold back its approval on any ground whatsoever at a later stage. Mr. Deb also submits that under R. 58 of the Mineral Concession Rules, a reservation for public sector undertaking or for Government Company can be made after giving notification in the official gazette for the said purpose. Such power is also circumscribed by R. 49 of the Mineral Concession Rules, 1960. This R. 58 of the Mineral Concession Rules has, however, come by amendment and at the relevant time when the Central Government refused to accord approval on the ground of reservation of the area for public sector exploitation the said R. 58 was not in force. Mr. Deb also contends that under Sec. 17 of the Mines and Minerals (Regulation and Development) Act, the Central Government after consultation with the State Government may undertake prospecting or mining operation in any area not already held under any lease or prospecting licence, and if the Central Government proposes to do such prospective and mining operation it shall, by notification in the official gazette, specify the bound-

aries and/or areas of operation. In the instant case, no such notification has been made and as such there cannot be any reservation for any public sector exploitation. Mr. Deb also submits that the petitioner company has been carrying out mining operations for a pretty long time and there has not been any complaint whatsoever against the petitioner company for such mining operations and the Government of Orissa has also expressed its satisfaction for the manner in which the petitioner company has been working out the mining operations. The petitioner company has also paid rates and royalties to the State Government regularly and the Orissa Government has also expressed its willingness to grant renewal of Mining Lease in favour of the petitioner company. Mr. Deb has also pointed out that previously other areas were made available to MOIL for exploitation of the Manganese Ores but MOIL failed to utilise such offer and the Orissa Government is not, therefore, interested in getting the area in question exploited by MOIL. It is also contended by the learned counsel for the petitioner company that the Manganese Ores are principally consumed by the public sector undertakings including the Steel Authority of India and the export of Manganese Ores are also controlled by the Central Government in various ways. It is also contended by the learned counsel for the petitioner that there is no allegation against the petitioner company that the petitioner company is not carrying out the Mining operations scientifically or effectively thereby causing losses of the material resources of the country. In the circumstances, the refusal by the Central Government is absolutely arbitrary and without any valid reason and for extraneous reasons not authorised under the Act and the Rules. Mr. Deb has also submitted that this Court in exercise of powers in the writ jurisdiction can direct the Central Government to grant approval of lease and it is no longer necessary to direct the Central Government to consider afresh the petitioner's application for renewal. In support of the contention that in appropriate case this court can straightway direct the Central Govt. to accord approval for renewal of Mining Lease, Mr. Deb has referred to the decisions of the Supreme Court made in the case of *P. Bhooma Reddy v. State of Mysore* reported in AIR 1969 SC 655 and *Union of India v. M/s. Anglo Afghan Agencies* reported in AIR 1968 SC 718.

4. Mr. Dipankar Gupta, the learned counsel appearing for the Government of Orissa, has also contended that against the deemed refusal by the State Government of Orissa the petitioner company made an application for revision and the Central Government allowed the said revision application of the petitioner company and directed the State Government to dispose of the petitioner company's application on merits and when on such consideration of merits, the State Govt. was inclined to grant renewal it was not open to the Central Govt. to refuse permission to grant such renewal of lease. Mr. Gupta contends that the Supreme Court in the case of *Amritlal Nathubhai v. Union Govt. of India* reported in AIR 1976 SC 2591 has clearly held that the State Government being the owner of Mines has inherent right to exploit the Mines within its territory and for the said purpose the State Government can reserve any land. Mr. Gupta submits that apart from the fact that the State Government is the owner of the Mines and Minerals lying within the boundary of the State, the State Government has also primary interest to see that the Mining Lease and/or renewal of the same is given to a proper party. The State Government has direct interest in the dead-rent, royalty, sales tax relating to the transactions of the Minerals and the State Government has also share in the income-tax realisation from the operators of mines. It has also a direct interest in the proper development of Mines and Minerals in the State as such development will open a venue of employment of the residents of the State. The State Government has also a secondary interest in the general prosperity of the country and earning of foreign exchange by export of Minerals. Mr. Gupta submits that omnibus reservation for exploitation by public sector undertaking and/or Government Undertakings cannot be made by the Central Government. Under S. 8 of the Mines and Minerals (Regulation and Development) Act, several guidelines have been laid down for the purpose of granting lease by the State Government. He submits that it cannot be contended that although the power of the State Government to grant a mining lease is controlled or circumscribed by the guidelines, the power of the Central Government to refuse approval or to accord approval is unfettered. Mr. Gupta submits that the only reasonable interpretation of S. 8 will be that in exercising its power to accord or to refuse approval, the Cen-

tral Government will only ensure that the State Government has followed the guidelines in basing its decision and no extraneous consideration has been made by the State Government. Mr. Gupta submits that where the State Government has followed the guidelines and has not contravened any provision of the Act and the Rules and has not also taken into consideration of any extraneous matter and has come to a decision either in favour or against the grant or renewal of a mining lease, then there will be no occasion for the Central Government to interfere with the decision of the State Government. As in the instant case, the State Government has not taken into consideration any extraneous matter and on consideration of the merits of the case as directed by the Central Government earlier, has agreed to grant renewal, there was no occasion for the Central Government to refuse approval of the same.

5. Mr. Bhaskar Gupta, the learned counsel appearing for the Union of India, has drawn the attention of this court to the directive principles as embodied in Art. 39 of the Constitution. He submits that under Art. 39 (b) the ownership and control of the material resources of the community will be so distributed that the common good is best served. Art. 39 (c) provides that the operation of the economic system should be done in a way that it does not result in the concentration of wealth and means of production detrimental to the common interest. Mr. Gupta contends that under Entry 23 of List II of the Seventh Schedule to the Constitution, regulation of mines and mineral development can be made by the State Legislature subject to the provisions of List I and under Entry 54 of List I of the Seventh Schedule, regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest, is to be made by the Parliament. Under S. 2 of the Mines and Minerals (Regulation and Development) Act, such declaration has been made by the Parliament. Mr. Gupta has placed various sections of the Mines and Minerals (Regulation and Development) Act for the purpose of showing that it was the clear intention of the Parliament to have ultimate control of the Central Government over the Mines and Minerals in different States. He refers to the provisions of S. 4A of the said Act and contends that in the matter of termination

of Mining Lease, the opinion of the Central Government is final and it has only been provided for that before forming the opinion, the Central Government will consult with the State Government. It also appears from S. 5 of the said Act that even in the matter of prospecting licence, the approval of the Central Government is necessary. The proviso to Section 6 (1) also lays down that if the Central Government is of the opinion that in the interest of development of mineral it is necessary so to do, the Central Government may for reasons recorded in writing, permit any person to acquire one or more prospecting licence. S. 7 deals with the prospecting licences and S. 8 deals with the mining lease and both the provisions are similar. Even in the matter of prospecting licence, it appears from the proviso to S. 7 (2) that no renewal of prospecting licence can be made except with the approval of the Central Government. Similarly in the matter of grant of mining lease, a similar proviso has been added to S. 8 (2) of the Act. Mr. Gupta also draws the attention of the Court to sub-sec. (3) of S. 8 and submits that the Central Government may authorise renewal if in the interest of mineral development such renewal is necessary. Under S. 13, power has been given to the Central Government to make rules in respect of mines and minerals. Under S. 17, the Central Government has been given special power to undertake prospective and mining operations in certain land. S. 18 (1) lays down that it will be the duty of the Central Government to take such steps as may be necessary for the conservation and development of minerals in India. Sub-sec. (3) of S. 18 provides that all rules made under the said Section shall be binding on the State Government. S. 13 gives the power to the Central Government to refuse any order which has been passed by the State Government under the said Act and S. 31 empowers the Central Government to relax the provisions of the Act and the Rules in special cases if in its opinion, the Central Government holds that in the interest of mineral development it is necessary to relax the provisions of the rules. The Central Government has also the right to grant or renewal of lease on terms and conditions different from the terms and conditions laid down in the Rules made under S. 13 of the Act. Mr. Gupta, therefore, submits that if the scheme of the Act is scrutinised, it will be quite evident that the Parliament has intended that the Central Government

will have the absolute right or control over the mines and minerals in the country. The power of the Central Government under the Act is very wide and the same is not fettered by the desire or decision of the State Government. Mr. Gupta contends that under R. 54 of the Mineral Concession Rules, the Central Government acts as a revisional tribunal against any order passed by the State Government. The order of the Central Government in exercise of power of revision therefore leaves no discretion to the State Government either to refuse or to grant the mining lease to an applicant. In this connection, Mr. Gupta refers to the decision of the Supreme Court made in the case of Dharam Chand Jain v. State of Bihar reported in AIR 1976 SC 1433. Mr. Gupta submits that if the power of revision or control can be passed by the Central Government after the order is passed by the State Government it will not be amenable to any reason that similar power cannot be exercised by the Central Government before any order is passed by the State Government. Mr. Gupta submits that if in its wisdom, the Central Government feels that for proper development of mines and minerals and better utilisation of the same it will be desirable that exploitation of such mines and minerals should be made by the public sector, the Central Government can certainly refuse approval of grant of any lease in favour of any other person and in the scheme of the Act, the Central Government certainly has unfettered discretion and power and no challenge can be made against the exercise of such power by the Central Government. He also submits that the decision of the Central Government that the area in question should be exploited by the public sector undertakings is also in conformity with the directive principle of the Constitution.

6. Mr. Sanghi, the learned counsel appearing for the MOIL, supports the aforesaid contentions of Mr. Gupta appearing for the Union of India. It may be noted here that Mr. Roy, the learned counsel appearing for the petitioner company has contended that when the Orissa Government has expressed its intention not to grant any lease in favour of MOIL, the MOIL cannot have any interest in the area in question and consequently the MOIL cannot have any locus standi in the instant Rule. Mr. Sanghi however submits that in a dispute raised by the petitioner company and also by the Govern-

ment of Orissa, that no reservation can be made for a public sector undertaking, MOIL who has been identified as the public sector undertaking for which such reservation has been made, has certainly an interest in the litigation before this Court and as such it cannot be contended that the MOIL has no locus standi. He also submits that MOIL has been added as party respondent by this Court and the party respondent being bound by the adjudication to be made, must have a right to place its case before the Court. Mr. Sanghi contends that Mines and Minerals (Regulation and Development) Act and the Mineral Concession Rules contain a complete code in respect of grant or renewal of a prospecting licence as well as a mining lease. He submits that there is no fundamental right to carry out mining operations but the rights to carry out mining operations are created and controlled by the aforesaid Statutes and no person can claim any right in mines or minerals except those created or conferred by the Statute. He submits that renewal of lease is nothing but grant of lease for a further period and for the said contention, he refers to a decision of the Supreme Court made in the case of Kangra Valley State Corporation Ltd. v. State of Punjab reported in (1969) 3 SCR 165. Mr. Sanghi submits that reservation need not be made expressly, and if an area is not included in the register as referred to in R. 58 or 59 of the Mineral Concession Rules, such non-inclusion in the register will only mean that the area is not open to public. Mr. Sanghi submits that simply because the State Government was directed to consider the case of the petitioner company on merits, it cannot be contended that by necessary implication, the Central Government agreed to accord approval if the State Government was inclined to grant a renewal. Mr. Sanghi submits that initially the State Government did not express any view and did not reject the application for renewal made by the petitioner company on merits but such rejection was only a deemed rejection because of non-consideration of the said application within the stipulated time. The Central Government intended to have the views of the State Government on merits of the case and for the said purpose directed the State Government to consider the case of the petitioner company on merits. Mr. Sanghi submits that the Central Government had certainly the right to grant or refuse approval after getting the views of the State Govern-

ment and he refutes the contention of Mr. Dipankar Gupta appearing for the State of Orissa that if on consideration of relevant facts and circumstances and following the guidelines contained in Section 8 of the Act, the State Government either agrees to grant or refuse to grant a mining lease, the Central Government cannot override the decision of the State Government. Mr. Sanghi submits that under the scheme of the Act, the Central Government has been made final authority in the matter of grant or renewal of a mining lease and/or prospecting licence and if such exercise of the ultimate discretion of the Central Government is not made maliciously or capriciously, then no objection can be raised against the exercise of power by the Central Government. Mr. Sanghi submits that in its wisdom the Central Government has thought it desirable that Manganese Ores in the area in question should be exploited by the public sector undertaking and not by any private individual or a company. The Court cannot question the wisdom of the Central Government in this regard and it cannot also be contended that the reason for not allowing the petitioner company to exploit the Manganese Ores from the area in question is wholly capricious and unamenable to any reason whatsoever. Accordingly, no interference is called for by the writ court and the Rules should be discharged.

7. After considering the respective submissions made by the learned counsels appearing for the parties, it appears to me that under the Act and the Rules framed thereunder, the Parliament has ensured that in the matter of development of mines and minerals in the country the Central Government will have an ultimate control and such control is not fettered by the decision of the State Government. In my view, Mr. Bhaskar Gupta is justified in his contention that the power of the Central Government under the Act and the Rules is very wide and the same is not fettered by the desire and or the decision of the State Government. It cannot be contended that if the State Government has followed the guidelines as referred to in S. 8 and has not taken into consideration any extraneous matter and thereafter comes to any decision either in favour or against the grant of a lease, the Central Government is to accept such decision as a matter of course. In my view, the Central Government for proper reasons, may not accept the decision of the State Government although such decision was taken on pro-

per consideration of the relevant facts after following the guidelines. There is no manner of doubt that the decision of the State Government cannot be lightly brushed aside by the Central Government and it is reasonably expected that such decision of the State Government which is the owner of the Mines, must have an anxious consideration by the Central Government for a harmonious relation of the States and the Centre. If, however, the Central Government does not agree with the decision of the State Government and overrides its decision for a valid reason, it cannot be contended that the Central Government has over-stepped its limit. In the instant case, the Central Government has refused to grant approval on the ground that the area in question should be better utilised by the public sector undertaking, and it cannot be contended that such consideration is not amenable to any reason. Whether such exploitation by a public sector undertaking will be more useful in the greater interest of the country or not, is not to be considered by this Court and the Court should not embark upon the uncharted ocean of public policy. In my view, the Central Government was quite within its right in refusing to accord approval for the renewal of the mining lease in favour of the petitioner company, although the State Government of Orissa had decided to grant such lease in favour of the company. Mr. Sanghi, in my view, is justified in his contention that by directing the State Government to consider the case of the petitioner company on merits, the Central Government did not express any opinion by necessary implication that it had agreed to grant renewal in favour of the petitioner company, provided the State Government was willing. In my view, after getting the views of the Orissa Government on merits the Central Government could take one view or the other and if it had taken a decision against the renewal of the mining lease in favour of the petitioner company because the Central Government was of the view that the Manganese Ores in the area in question should be better exploited by the public sector undertakings, no illegality has been committed by the Central Government. Accordingly, no interference is called for by the writ court and the Rule is discharged. There will be no order as to costs. All interim orders passed in the Rule, stand vacated.

Petition dismissed.

AIR 1982 CALCUTTA 407

ANIL K. SEN AND S. N. SANYAL, JJ.

Smt. Sudha Mukherjee, Appellant v. Sankar Chatterjee, Respondent.

A. F. A. D. No. 344 of 1981 with C. R. No. 510 of 1981, D/- 4-6-1982.

Civil P. C. (5 of 1908), O. 6, R. 17 — W. B. Premises Tenancy Act (12 of 1956), S. 13 (3A) — Amendment of plaint — Suit for eviction on ground of subletting — Ground of reasonable requirement could not be added in view of S. 13 (3A) — Amendment of plaint adding ground of personal requirement after lapse of three years as required by S. 13 (3A) allowed — Order allowing amendment is illegal. AIR 1979 Cal 221, Overruled.

The plaintiff purchased the suit premises and the defendant was in occupation of the premises as a pre-existing tenant. The plaintiff sought eviction on ground that the tenant had transferred, assigned or sublet portions of the premises. During pendency of this suit the plaintiff filed an application for amendment of the plaint seeking to incorporate the ground of reasonable requirement for own use and occupation which was allowed. The objection of the tenant defendant that such a ground was not admissible to the plaintiff in the suit which was filed within 3 years from the date of the plaintiff's purchase was overruled by the Munsif. He was of the view that the application for amendment having been filed beyond 3 years from the date of the plaintiff's purchase, plaintiff's suit for eviction on the grounds incorporated by the amendment must be deemed to be instituted on the date when such an application for amendment was filed and since that was beyond 3 years from the date of purchase there was no bar to the plaintiff's getting eviction on the ground so incorporated.

Held, that the order allowing the amendment was illegal. AIR 1979 Cal 221 Overruled. AIR 1975 SC 1146, Distinguished. (Para 11)

In the instant case when the plaintiff instituted the suit within 3 years from the date of her purchase she knew that under the law she could not institute the suit if it was based upon her own requirement. Having known as such she adopted the procedure of filing the suit on an irrelevant ground and completing the interlocutory steps to make the suit

ready for hearing and at the same time taking advantage of resulting lapse of time, she filed the application for amendment to bring in the real ground in support of her claim for eviction. In substance, the amendment so sought for was solely for the purpose of circumventing the legal bar incorporated by sub-sec. (3A) of S. 13 of the Act, which well barred the suit on the date it was instituted if the real ground in support of such a suit had been pleaded in the plaint. As such the amendment sought for could not have been allowed. The amendment should not have been allowed also for the reason that the amendment if allowed would not alter the date of institution of the suit. Hence the consequence of allowing the amendment would be introducing an infirmity which would render the suit not maintainable in law. (Para 9)

Cases Referred : Chronological Paras

AIR 1979 Cal 221	1, 9
AIR 1975 SC 1146	4, 5, 6, 7, 8
AIR 1975 Bom 13	10
AIR 1936 Mad 991	10
AIR 1915 Cal 103	9
(1909) 37 Ind App 27 (PC)	10
(1890) ILR 17 Cal 580 (PC)	10

S. P. Roy Chowdhury, S. Chatterjee, Aloke Banerjee and Tapan Kr. Roy, for Appellant; B. C. Dutt and Samir K. Roy Chowdhury, for Respondent.

ANIL K. SEN, J.:— This appeal from an appellate decree has been referred to us by a learned single Judge of this court as he was unable to share the view expressed by another learned single Judge in the case of Haripada Das v. Sristidhar Chakraborty, AIR 1979 Cal 221. The present appeal arises out of a suit for eviction which was decreed by the trial court but was dismissed on an appeal by the tenant defendant. The plaintiff is the appellant now before us.

2. The plaintiff purchased the suit premises on Dec. 2, 1975. At the time of such purchase the tenant defendant was in occupation of the suit premises as a pre-existing tenant. By a notice dated May 22, 1977, the plaintiff determined the tenancy in favour of the tenant defendant with the expiry of June 1977 and such a notice being a combined notice under S. 106 of the Transfer of Property Act and S. 13 (6) of the West Bengal Premises Tenancy Act, 1956, the plaintiff instituted the suit for eviction, being Title Suit No. 560 of 1977 of the 1st Court of

the learned Munsif at Sealdah on August 19, 1977. On the plaint as originally filed, such eviction was sought for on the sole ground that the tenant defendant had transferred, assigned and/or sublet portions of the ground floor to several persons without the previous consent in writing of the landlord. During the pendency of this suit on March 14, 1979, the plaintiff filed an application for amendment of the plaint under O. 6, R. 17 read with S. 151 of Civil P. C. By the amendment, the plaintiff sought to incorporate two more additional grounds in support of her claim for eviction, namely, (i) that the plaintiff requires the suit premises for her own use and occupation, in as much as, she purchased the property with a view to reside there with the members of her family she having no other alternative suitable accommodation of her own and (ii) that the plaintiff requires the suit premises for building and rebuilding. Such an amendment was allowed by an order dated March 27, 1979.

3. The suit was contested by the tenant defendant who denied all the material allegations made in the plaint. The allegation of subletting was specifically denied and the claim for eviction on the ground of requirement or for building and rebuilding was contested on the ground that such a claim is not bona fide and is not admissible in view of the provision of sub-sec. (3A) of S. 13 of the W. B. Premises Tenancy Act.

4. On the evidence led by the parties both the courts have concurrently overruled the plaintiff's claim of eviction based on the ground of subletting or the plaintiff's requirement for building and rebuilding. Neither of those two grounds according to the courts below could be substantiated by the plaintiff on the evidence led by her. The learned Munsif, however, decreed the suit upon a finding that the plaintiff had been able to make out the ground of reasonable requirement for her own use and occupation and for the use and occupation of the members of her family. The objection on the part of the tenant defendant that such a ground is not admissible to the plaintiff in the present suit which was filed within 3 years from the date of the plaintiff's purchase was overruled by the learned Munsif primarily relying upon the decision of the Supreme Court in the case of B. Banerjee v. Anita Pan, AIR 1975 SC 1146. He was of the view that the application for amendment having

been filed beyond 3 years from the date of the plaintiff's purchase, plaintiff's suit for eviction on the grounds incorporated by the amendment must be deemed to be instituted on the date when such an application for amendment was filed and since that was beyond 3 years from the date of purchase there was no bar to the plaintiff's getting eviction on the ground so incorporated.

5. The tenant defendant preferred an appeal. The court of appeal, it appears, upheld the plaintiff's case of requirement for her own use and occupation particularly in view of the admission of the defendant tenant in the cross-examination. But the learned judge in the court of appeal below failed to agree with the learned Munsif that sub-sec. (3A) of Section 13 would not stand in the way of plaintiff getting a decree for eviction in the present suit on the ground incorporated by the amendment. According to the learned judge of the court of appeal below the ratio of the decision of the Supreme Court in the case of *B. Banerji v. Anita Pan* (supra) would not be applicable to a suit instituted after the amendment of the W. B. Premises Tenancy Act by the Amending Act of 1969, when not only sub-sec. (3A) was introduced but original Section 13 (1) (f) was made into Ss. 13 (1) (f) and 13 (1) (ff). In that view, the learned judge in the court of appeal below held that the suit is hit by the provision of sub-sec. (3A) of Section 13 of the W. B. Premises Tenancy Act and he accordingly allowed the appeal and dismissed the suit. Feeling aggrieved, the plaintiff-landlord has preferred the present appeal.

6. Mr. Roychowdhury appearing in support of this appeal has strongly contended that the court of appeal below was not justified in holding that the ratio of the Supreme Court decision in the case of *B. Banerji v. Anita Pan* (AIR 1975 SC 1146) (supra) is not applicable to a post-Amendment Suit. According to Mr. Roychowdhury, the principle laid down therein with regard to filing of fresh pleadings and the effect thereof would be equally applicable to all suits whether instituted prior to or after the Amending Act came into force which was retrospective in operation. That apart, according to Mr. Roychowdhury, all amendments are not necessarily retrospective and when the court is entitled to take notice of subsequent events and allow the parties to mould their pleadings in

the light of subsequent events, in the present case the learned Munsif was fully justified in allowing the amendment by way of incorporating new grounds in support of her claim of eviction on a day when the legal bar to the pleading of such grounds in support of such a claim stood removed by efflux of time. According to Mr. Roychowdhury such an amendment takes its effect on the date it is made. Reliance is placed by Mr. Roychowdhury on those lines of cases where the court has either taken notice of subsequent events or had allowed to amend the plaint to incorporate new grounds in support of the original claim where such grounds arose subsequently. Particular reference is made to cases for recovery of possession on the ground of forfeiture of a lease where pending the suit the lease having expired the court had allowed the lessor to seek recovery of possession based on such expiry of the lease.

7. Mr. Dutt appearing on behalf of the tenant defendant has contested the point thus raised by Mr. Roychowdhury. According to Mr. Dutt the ratio of the Supreme Court decision in the case of *B. Banerji v. Anita Pan* (supra) is not applicable to a suit like the present one which had been filed after the amendment of the statute. Referring to the application for amendment itself Mr. Dutt has contended that the plaintiff instituted the suit really basing her claim on her own requirement on August 19, 1977, in breach of the bar already incorporated in the statute by way of sub-section (3A) though she circumvented the bar by not pleading the ground of requirement at the date of the institution but incorporating the same by a subsequent amendment. Such an amendment, according to Mr. Dutt, was neither bona fide nor permissible in law. In the case before the Supreme Court the suit for eviction having been filed before the amendment of the statute, the Supreme Court found that the bar under sub-sec. (3A) could have no application to such a suit but the suit would fail because of the amendment, in as much as, the ground on which the suit was instituted was lost by the amendment. In such a situation the Supreme Court allowed the parties to incorporate fresh pleadings making out a case in the light of the amended statute and since such a ground cannot refer back to the date of the institution of the

suit, it was held that the suit must be deemed to have been filed on the date the fresh pleading is filed. Such a principle can hardly be used for the purpose of circumventing a bar to the institution of a suit incorporated by sub-sec. (3A) of S. 13 of the W. B. Premises Tenancy Act. It has further been contended by Mr. Dutta that general principles relied on by Mr. Roychowdhury laid down by courts with regard to amendment having regard to subsequent events can have no application where the amendment has been sought for for the purpose of circumventing a statutory bar.

8. We have carefully considered the rival contentions put forward before us. In our view the dispute now raised before us has to be considered from two angles, viz., (1) whether such an amendment could have been lawfully allowed and (2) even if such an amendment be allowed whether the suit would still be hit by sub-sec. (3A) of S. 13 of the W. B. Premises Tenancy Act 1956. On the point of amendment though strong reliance is placed on the decision of the Supreme Court in the case of *B. Banerji v. Anita Pan* (AIR 1975 SC 1146). We do not think that the said decision can be of any help to the appellant. In the said decision, the Supreme Court upheld the constitutional validity of the retrospective operation of the Amending Act after overruling the contrary view expressed by this Court. Having done so, in para 27 of the judgement the Supreme Court considered the effect of the amendment on the pending litigation. The Supreme Court observed that the suits, there under consideration, as instituted in the year 1961 or 1964 would not be hit by sub-sec. (3A) as incorporated by the Amending Act of 1969 notwithstanding its retrospective operation because that sub-section prohibited suits for recovery of possession by transferee landlords on any of the grounds mentioned in cl. (f) or cl. (ff) of sub-sec. (1). But neither of those two grounds constituted the ground for eviction in those suits because such were the new grounds incorporated by the Amending Act which were not in existence prior to 1969. The Supreme Court, however, proceeded to hold that even then the suit must fail on the bar of S. 13 (1) because the ground on which those suits were instituted were lost by the amendment. It is only in that background when the plaintiffs in suits pending since before the amendment were found to be non-

sued by the change incorporated by the Amending Act that the Supreme Court prescribed a just resolution of the complex situation by filing of fresh pleadings in accordance with the changed law. The Supreme Court held that in such cases the plaintiffs should be allowed to file fresh pleadings averring grounds as contemplated by the Act as amended and proceed with the suit on such grounds. Since a suit on such a ground could be instituted only after the amendment and not earlier that the Supreme Court held that fresh pleadings being filed the suit must be deemed to have been instituted on such grounds on the date of filing of such fresh pleadings. Supreme Court made it further clear that 'institution of a suit earlier has to be ignored for this purpose since that was not based on grounds covered by cls. (f) and/or (ff) and is not attracted by sub-sec. (3A)'. The position, however, is totally different in a case like the present one now under consideration. Here the ground for eviction was available to the plaintiff on the day the suit was instituted but the law prohibited the plaintiff from instituting a suit on such a ground before the expiry of 3 years from the date of her purchase. The prohibition was against instituting the suit on such a ground of requirement. Such a prohibition is being circumvented when the plaintiff institutes the suit pleading a different ground though her real intention is to get a decree on such a ground of requirement which is well established by the fact that she incorporates such a ground into the pleading by subsequent amendment and when she obtains the decree on such a ground. Unlike the case before the Supreme Court here the ground being available to the plaintiff the law had incorporated a prohibition and to allow the amendment is to circumvent the prohibition and not resolve a complexity brought about by the statute as in the case before the Supreme Court. It is not a case where the earlier institution of the suit can be ignored because of non-existence of the grounds on which the claim of eviction rests.

9. Mr. Roychowdhury may be right in his contention that in law to do justice between the parties and in order to shorten the litigation the court not only takes note of subsequent events but also allows amendment of pleadings in the light of such subsequent events where it is shown that the original relief claimed

has by reason of subsequent change of circumstances become inappropriate or that it is necessary to have the decision of the court on the altered circumstances in order to shorten the litigation or to do complete justice between the parties and it becomes incumbent upon a court of justice to take notice of event which has happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made and leave to amend may be granted for this purpose. (See *Rai Charan v. Biswanath*, AIR 1915 Cal 103). But this is a principle adopted as an exception to the general rule that an action must be tried in all its stages on the cause of action as it existed at the commencement of the action. Such a principle cannot, however, be invoked to nullify the effect of a statutory prohibition as in sub-sec. (3A) of S. 13 of the W. B. Premises Tenancy Act. Looking at the substance there is no subsequent event in the strict sense of the term. Upon the plaintiff's application for amendment she had purchased the house as she needed it for her personal use and occupation. When she instituted the suit within 3 years from the date of her purchase she knew that under the law she could not institute the suit if it was based upon her own requirement. Having known as such she adopted the procedure of filing the suit on an irrelevant ground and completing the interlocutory steps to make the suit ready for hearing and at the same time taking advantage of resulting lapse of time, she filed the application for amendment to bring in the real ground in support of her claim for eviction. In substance, the amendment so sought for was solely for the purpose of circumventing the legal bar incorporated by sub-sec. (3A) of S. 13 of the W. B. Premises Tenancy Act, 1956, which well barred the suit on the date it was instituted if the real ground in support of such a suit had been pleaded in the plaint. As such the amendment sought for could not have been allowed. There is one more reason why the amendment should not have been allowed. The amendment if allowed would not alter the date of institution of the suit. This will be so for reasons given hereinafter. Hence the consequence of allowing the amendment would be introducing an infirmity which would render the suit not maintainable in law. Though the single Bench decision of this Court in the case

of *Haripada Das v. Sristidhar Chakraborty*, (AIR 1979 Cal 221) well supports the contention of Mr. Roychowdhury on the point, we are, with due respect to the learned judge, unable to share the view expressed therein. We, therefore, hold that in the present case the trial court erred in law in allowing the amendment as it did on March 27, 1979.

10. We now proceed to consider the other aspect, viz., whether the amendment when allowed would render the suit not maintainable because the bar under sub-sec. (3A) of S. 13 of the W. B. Premises Tenancy Act would be attracted to such a suit. In our considered opinion the answer to the above question must be in the affirmative. The amendment allowed was made only to add new grounds in support of the original claim for recovery of possession on eviction of the tenant defendant. Such an amendment does not alter the nature of the suit nor does it bring in new parties. Those new grounds again are not strictly new in the sense of those accruing after the institution of the suit. In our view it is well settled that even in cases of such amendments, the date of original presentation of the plaint continues to remain the date of the suit. In cases of amendments which do not change the nature and character of the suit or do not attract S. 21 of the Limitation Act, there is no resultant change of the date of the suit. (See *Peary Mohan Mukherji v. Narendra Nath Mukherji*, (1909) 37 Ind App 27 and *Mohini Mohan v. Bangsi*, (1890) ILR 17 Cal 580 (PC). In cases where the court takes note of subsequent events or allows grounds which arise subsequently to be pleaded in support of the original claim, the court, does so in the absence of any legal bar as an exception either to shorten the litigation or do complete justice to the parties; that, however, does not ordinarily mean that the date of institution of the suit is altered or that the suit itself is made post-dated. This position is made further clear where in cases of legal bar existing on the date of institution of the suit like those in S. 80 of Civil P. C. or S. 69 of Partnership Act, such bar is not removed by taking of subsequent steps to cure the defect and a consequent amendment pleading such subsequent removal of the defect. Reference may be made to the decisions in the cases of *M. S. A. S. Mudaliar v. East Asiatic Co. Ltd.*, AIR

1936 Mad 991 and Ebrahimbhai v. State, AIR 1975 Bom 13, (para 12). In this view even of the amendment, the suit would be hit by sub-sec. (3A) of S. 13 of the W. B. Premises Tenancy Act, 1956, and the learned judge in the court of appeal below was right in holding that the suit should be dismissed on that ground.

11. In the result, the only point raised by Mr. Roychowdhury must fail for reasons given, the appeal fails and is dismissed. Plaintiff-appellant's suit for eviction stands dismissed as the ground of subletting could not be substantiated on evidence led by her and the suit in so far as it is based on grounds incorporated by the amendment is concerned, is hit by sub-sec. (3A) of S. 13 of W. B. Premises Tenancy Act, 1956. Parties do bear their costs throughout.

12. Since the appeal is disposed of, the Rule becomes infructuous and is, accordingly, disposed of.

S. N. SANYAL, J.:— I agree.

Appeal dismissed.

AIR 1982 CALCUTTA 412

ARUN KUMAR JANAH, J.

Prof. A. K. Sanyal, Petitioner v. Dr. Chitta Ranjan Basistha and others, Respondents.

Civil Order No. 1585 of 1982, D/- 4-6-1982.

Civil P. C. (5 of 1908), O. 39 R. 1 — Application for ad interim injunction — Suppression of material facts — Application would be liable to be dismissed.

Where in an application for ad interim injunction restraining the governing body of the college from giving effect to its resolution terminating applicant's services as Principal, the applicant had not disclosed the limited order of injunction passed by the High Court in writ petition and the letter addressed to the Secretary, Education Department was also not disclosed by him, the application would be liable to be dismissed on suppression of the material facts. Case law discussed. (Para 4)

Cases Referred : Chronological Paras

1976 Lab IC 796 (Cal)	3
(1967) 71 Cal WN 385	3
AIR 1952 Cal 72 : 56 Cal WN 302	3
(1917) 1 KB 486 : 86 LJKB 257 : 116 LT 136, The King v. The General Commissioner for the Purposes of the Income Tax Act for the District of Kensington	3

Somnath Chatterjee, Tapash Roy and Sumit Kr. Panja, for Petitioner; Saktinath Mukherjee and Pradipta Roy, for Respondents.

ORDER:— In this application the petitioner is challenging an order dated December 23, 1980 passed in Miscellaneous Appeal No. 246 of 1980 by the District Judge, Burdwan. By the said order the learned District Judge allowed the appeal filed by the opposite party No. 1 against an order dated Dec. 22, 1980 passed by the learned Munsif, Second Court, Burdwan in Title Suit No. 313 of 1980 refusing to grant an ad interim injunction as prayed for by the opposite party No. 1. The said suit was filed by the opposite party No. 1 for certain declarations and also for an injunction restraining the governing body of the Burdwan Raj College from giving effect to its resolution dated Dec. 22, 1980 terminating the services of the opposite party No. 1 as Principal of the said College. The prayer for ad interim injunction was disallowed by the trial court and the trial court directed notices to be issued to the defendants and fixed the hearing of the injunction after one week. Against the said order the opposite party No. 1 preferred the miscellaneous appeal to the Court of the District Judge who allowed the appeal and granted an ad interim injunction. Against this appellate order the petitioner has filed this application.

2. Elaborate arguments were advanced by the learned Advocates for the parties in support of their respective contentions on the merits of the case. It is not necessary nor is it desirable to enter into the merits of the case and express any opinion at this stage, as that may prejudice either of the parties at the final hearing of the suit.

3. Mr. Chatterjee, learned Advocate for the petitioner has contended that the order of ad interim injunction granted by the lower appellate court cannot be sustained inasmuch as the opposite party No. 1 in his plaint as well as in the application for injunction did not truly and faithfully state all the relevant facts. He therefore contended that the opposite party No. 1 being guilty of suppression of material facts, his application was liable to be dismissed in limine. It was contended that the opposite party No. 1 had earlier moved this Court under Art. 226 of the Constitution and ob-

tained a Rule and a limited order of injunction. By that order of injunction this Court directed that the opposite party No. 1 would be entitled to get his remunerations as previously drawn by him, but he would not act as the Principal of the College. The opposite party No. 1 mentioned about the Rule which was obtained by him from this Court, but he did not mention the limited order of injunction which was granted by this Court. It was further contended that the letter of the opposite party No. 1 dated 22/24 Nov. 1978 addressed to the Secretary, Education Department, Government of West Bengal, was also not disclosed by the opposite party No. 1. The statement made by the opposite party No. 1 in paragraph 6 of his petition for temporary injunction was not consistent with this letter. Other instances of suppression of material facts were also urged by Mr. Chatterjee in support of his contention that the application for temporary injunction was liable to be dismissed in limine. In support of his contention Mr. Chatterjee has relied upon the leading decision on this point in *The King v. The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington* reported in (1917) 1 KB 486 which has been followed by subsequent decisions by this Court as well as by other High Courts and the Supreme Court (See *Ratan Chandra Nayak v. Adhar Biswas* reported in (1952) 56 Cal WN 302 : (AIR 1952 Cal 72); *Mishri Debi Agarwal v. Asstt. Collector of Central Excise* reported in (1967) 71 Cal WN 385 and *Bimal Kumar Sur v. State of West Bengal* reported in (1976 Lab IC 796) (Cal). It has been observed in *Rex v. Kensington Income-tax Commissioners* ((1917) 1 KB 486), the decision of the King's Bench Division referred to above that "it is perfectly well settled that a person who makes an ex parte application to Court.....is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest possible disclosure, then he cannot obtain any advantage which he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it."

4. In the present case it is quite clear from the plaint as well as the application for injunction that the opposite

party No. 1 did not disclose the various correspondence and orders which were made from time to time as contained in the annexures to the present revisional application. That being the position in view of the principle of law laid down as stated above, an order for an ad interim injunction cannot be made in favour of the opposite party No. 1. The order passed by the lower appellate court cannot therefore be sustained.

5. This application is accordingly allowed, the order passed by the learned District Judge is set aside and that of the learned Munsif is restored. The learned Munsif is directed to hear out the application for temporary injunction within four weeks from the date of receipt of this order after giving the parties an opportunity to file their respective affidavits.

6. There will be no order as to costs in this application.

Application allowed.

AIR 1982 CALCUTTA 413

M. M. DUTT AND
AMITABHA DUTTA, JJ.

Shethia Mining & Manufacturing Corporation Ltd., Appellant v. Khas Dharmaband Colliery Company Pvt. Ltd., Respondent.

Appeal No. 449 of 1979. D/- 30-4-1982.

Limitation Act (36 of 1963), Art. 122 — Conditional order to file affirmed affidavit within stipulated time, on failure of which suit would stand dismissed — Failure of appellant — Appellant filing it on liberty given to him subsequently by Court — Respondent alleging that suit stood dismissed in view of conditional order — Application by appellant for condonation of delay and to proceed with hearing — Would not be barred by Art. 122. (Civil P. C. (5 of 1908), S. 148).

On 7-2-1972, the appellant filed a suit against the respondent. The respondent entered appearance in the suit and filed its written statement. On July 30, 1975 the appellant affirmed an affidavit of documents. The said affidavit was not, however, filed by the appellant. On Aug. 5, 1975 the Court below directed the appellant to file the affidavit of documents within 10 days and further directed that in default the suit would stand dismissed. A long time after the expiry of the

FZ/GZ/C758/82/VNP/MVJ

period of 10 days, that is to say, on April 24, 1976, the respondent consented in writing to the filing of the affidavit of documents. On April 30, 1976 the Court below granted liberty to the appellant to file the affidavit of documents which was affirmed on July 30, 1975 and the appellant filed the same on that date. Subsequently on mentioning the suit for hearing by the appellant, the suit was not fixed as it was alleged by the respondent that the suit stood dismissed by virtue of order of 5-8-1975. The appellant filed the application for condonation of delay in filing such affidavit and to proceed with hearing etc. which was dismissed as barred by limitation under Art. 122. The respondent had not made any complaint against the order of 30-4-1976.

Held, that Art. 122 would not be applicable to such application. After the said order dated April 30, 1976 was passed, there was an implied extension of the time to file affidavit of documents and also the recalling of the order dated Aug. 5, 1975 under which the suit was directed to be dismissed in default of the affidavit of documents being filed within the period allowed. It could not be said that the court had no power to extend the time after the expiry of the period of 10 days within which the appellant was directed to file its affidavit of documents. It would not be correct to say that in procedural matters the Court becomes powerless after the expiry of the period mentioned in a conditional order. Case law discussed.

(Paras 5 to 8)

Cases Referred : Chronological Paras

AIR 1982 SC 137: (1982 1 SCC 159 8
AIR 1961 SC 882 8

R. C. Deb, Batchwat and R. N. Mitra, for Appellant; Bhabra and P. K. Das for Respondent.

M. M. DUTT, J.:— This appeal has been preferred by the appellant, Shethia Mining & Manufacturing Corporation Limited against the order dated July 3, 1979 of a learned single Judge of this Court whereby the learned Judge dismissed the application of the appellant filed on Dec. 7, 1978.

2. On Feb. 7, 1972, the appellant filed a suit against the respondent in the Original Side of this Court praying for a decree for Rs. 12,25,615.62, being the balance of the price of the goods sold and delivered by the appellant to the

respondent. The respondent entered appearance in the suit and filed its written statement. On July 16, 1975, the respondent applied before the Court below for discovery of documents by the appellant. It appears that on July 30, 1975, the appellant affirmed an affidavit of documents. The said affidavit was not, however, filed by the appellant. It is the case of the appellant that the affidavit, after it was affirmed, was sent by the appellant to its Directors in Bombay for their approval, but it was lost sight of and so it could not be filed. Be that as it may, on Aug. 5, 1975 the Court below directed the appellant to file the affidavit of documents within 10 days and further directed that in default the suit would stand dismissed.

3. The affidavit of documents which was affirmed by the appellant on July 30, 1975 was not filed within 10 days that was allowed by the learned Judge. A long time after the expiry of the period of 10 days, that is to say, on Apr. 24, 1976, the respondent consented in writing to the filing of the affidavit of documents. On Apr. 30, 1976 the Court below granted liberty to the appellant to file the affidavit of documents which was affirmed on July 30, 1975 and the appellant filed the same on that date. Thereafter, the appellant gave notice to the respondent for mentioning the suit for hearing and in terms of the said notice on Nov. 20, 1978, the suit was mentioned by the appellant for fixing a date of hearing. It was, however, contended on behalf of the respondent that the suit stood dismissed by virtue of the order dated Aug. 5, 1975. In view of the said contention, the hearing of the suit was not fixed and that led to the appellant to the filing of an application, *inter alia*, praying for the following reliefs :

(1) Liberty to the appellant to proceed with the hearing of the suit;

(2) Extension of time to file the affidavit of documents till April 30, 1976 and

(3) Condonation of delay in filing its affidavit of documents which had been affirmed on July 30, 1975.

The said application was opposed by the respondent.

4. The learned Judge, after considering the facts and circumstances of the case and submissions made on behalf of either party, came to the finding that the application was barred by limitation

under Art. 122 of the Limitation Act, 1963. It was held by the learned Judge that the order dated Aug. 5, 1975 was final and binding, and that the same having been perfected, the Court could not exercise its inherent power to set it aside. The learned Judge observed, *inter alia*, that the default clause having become operative, there was no room for the application of the inherent power. Upon the said findings, the learned Judge dismissed the said application. Hence, this appeal.

5. The principal ground which weighed with the learned Judge was that the application was barred by Art. 122 of the Limitation Act. Article 122 prescribes a period of 30 days for filing an application for the restoration of a suit or appeal or application for review or revision, dismissed for default of appearance or for want of prosecution or for failure to pay cost of service of process or to furnish security for costs. It is apparent that the provision of Art. 122 does not in terms apply to the application with which we are concerned. The application is one for extension of time and/or for a direction for the hearing of the suit or condonation of the delay in filing the affidavit of documents. Art. 122 has, therefore, no manner of application. The learned Judge was, therefore, not right in holding that the application was barred by Art. 122 of the Lim. Act. Before we consider other points, it is significant to notice one fact, viz., that the respondent consented in writing to the filing of the affidavit of documents. It is, however, the case of the respondent before us that the said consent was obtained by the appellant by suppression of some facts. In the trial Court, no such plea was taken on behalf of the respondent. For the first time it is alleged before us that the respondent was misled to give its consent in writing for the filing of the affidavit of documents. We have considered the allegation of the respondent and we are of the view that there is no merit in the plea that the respondent was misled to give its consent in writing to the filing of the affidavit of documents.

6. Another significant fact which has not been considered by the learned Judge is that long after the order dated Aug. 5, 1975 was passed, Sabyasachi Mukherji, J. by his order dated April 30, 1976 granted liberty to the appellant to file the affidavit of documents which

was affirmed on July 30, 1975 and, as stated already, by virtue of that liberty the appellant filed the affidavit of documents. That order has not been recalled or set aside. Indeed, no complaint was made by the respondent against the said order dated April 30, 1976. It is, however, argued before us that the appellant procured the said order from the learned Judge without disclosing that the suit stood dismissed by virtue of the order dated Aug. 5, 1975. We do not know what representation was made by the appellant before the learned Judge, but all that we want to point out is that the respondent also did not bring to the notice of the Court that the said order was procured by the appellant by suppression of material facts. In our opinion, it is now too late to say that the order was passed by the learned Judge at the instance of the appellant who suppressed the fact of the dismissal of the suit. In the circumstances, we are unable to accept the contention of the respondent that the said order should be ignored. The learned Judge has not considered the effect of the said order. In the face of the said order, we are afraid, the learned Judge had no jurisdiction to hold that the suit stood dismissed. It is clear that after the said order dated April 30, 1976 was passed, there was an implied extension of the time to file affidavit of documents and also the recalling of the order dated Aug. 5, 1975 under which the suit was directed to be dismissed in default of the affidavit of documents being filed within the period allowed.

7. It is contended on behalf of the respondent that as the consequence that has been indicated in the order dated Aug. 5, 1975 had taken place, the Court became *functus officio* and had no jurisdiction to entertain any prayer for extension of time. Indeed the contention is that the Court had no power to extend the time after the expiry of the period of 10 days within which the appellant was directed to file its affidavit of documents. This contention, in our opinion, is not sound. It is true that sometimes in a procedural matter the Court has to pass a conditional order, that is to say, an order in *terrorem* for the purpose of compelling a litigant to comply with the procedure and thereby avoiding prolongation of the suit or proceeding, but that does not mean that in such matters the Court is powerless to

extend the time which it had initially granted.

8. In *Mahanth Ram Das v. Ganga Das*, AIR 1961 SC 882, the Supreme Court made the following observation (para 5):

"Such procedural orders, though peremptory (conditional decrees apart) are, in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a Court from taking note of events and circumstances which happened within the time fixed."

Again, in a recent decision of the Supreme Court in *Chinnamarkathian v. Ayyavoo*, (1982) 1 SCC 159 : (AIR 1982 SC 137), the Supreme Court on an interpretation of S. 148 of the Civil P. C. has observed that the true purport of conditional orders is that such orders merely create something like a guarantee or sanction for obedience of the court's order but would not take away the court's jurisdiction to act according to the mandate of the statute or on relevant equitable considerations if the statute does not deny such consideration. Under Sec. 148 of the Civil P. C., the Court has undoubtedly the power to grant extension of time even after the expiry of the period initially granted. There is a similar provision under R. 46 of Chap. 38 of the Original Side Rules which confers a power on the Court or a Judge to extend time even though the application for extension is not made until after the expiration of the time appointed or allowed. In this connection, it may be said that there is some difference between extension of time in a procedural matter and extension of time in regard to a conditional decree which has also been noticed by the Supreme Court in *Mahanth Ram's case* (supra), the relevant observation having been already set out above. In our opinion, it is wrong to think that in procedural matters the Court becomes powerless after the expiry of the period mentioned in a conditional order. If any contention in this regard is accepted that may operate harshly against bona fide litigants and will hinder justice. We are, therefore, of the view that the learned Judge was not right in entertaining the view that the Court had no power to extend time after the conditional order had taken effect.

9. For the reasons aforesaid, we set aside the order of the learned Judge and

allow the application for extension or for condonation of delay. The delay in filing the affidavit of documents is condoned. We direct that the affidavit of documents shall be accepted. Further, we direct that the Court below will proceed with the hearing of the suit in accordance with law. The appeal is allowed. The appellant shall, however, pay the costs of this appeal to the respondent, hearing fee being assessed at 30 G.Ms.

10. After the judgment was delivered Mr. P. K. Das, learned counsel who was assisting Mr. Bhabra, the learned senior counsel for the respondent, takes a point against the maintainability of the appeal. It may be stated that at the very outset when Mr. Bhabra was not present, Mr. Das took the point. After the appellant's counsel finished his submissions in support of the appeal, we called upon Mr. Bhabra to reply. Mr. Bhabra, however, did not argue any point against the maintainability of the appeal, although he made his submissions on other points. In the circumstances, we had no occasion to consider the question of maintainability of the appeal, nor was there any scope for calling upon the appellant for a reply on the point. Had Mr. Bhabra taken or raised the point as to the maintainability of the appeal, we would have surely considered the same after calling upon the appellant to reply to the point, if thought necessary. We are, therefore, not at all inclined to consider the point as to the maintainability of the appeal as submitted by Mr. Das, after the delivery of the judgment and in the absence of Mr. Bhabra.

11. Mr. Das prays for a certificate for appeal to the Supreme Court under Art. 134A of the Constitution. We do not think that any substantial question of law is involved in this appeal, nor do we think that any point is required to be decided by the Supreme Court. The oral prayer for a certificate for appeal to the Supreme Court is, accordingly, disallowed. We also disallow the prayer of the respondent for stay of operation of this judgment.

AMITABHA DUTTA, J.:— I agree.

Order accordingly.

AIR 1982 CALCUTTA 417

ANIL K. SEN AND
B. C. CHAKRABARTI, JJ.

Sushil Chandra Sur and others, Appellants v. Smt. Sadhana Bakobi and another, Respondents.

F. M. A. Nos. 926-928 of 1975, D/- 8-4-1982.

Civil P. C. (5 of 1908), S. 47 — W. B. Premises Tenancy Act (12 of 1956), S. 13 (1) — Suit to evict tenant on ground of default in payment of rent and requirement of premises for rebuilding — Compromise decree — No indication that Court while passing decree applied its mind as to existence of statutory ground of eviction — Decree is nullity and cannot be executed — Executing Court cannot go behind decree.

Under S. 13 (1) the Court cannot pass a decree for eviction except on one or more of the grounds enumerated in the section. Therefore it is the existence of one or more of the statutory grounds that confers jurisdiction on the Court to pass a decree for eviction. Where in the suit for eviction on the grounds of default in payment of rent, subletting and requirement of the premises for rebuilding the Court even before the filing of the written statement and recording of any evidence passed a compromise decree entitling the plaintiff to execute it and take possession of the premises through Court if on notice the tenant failed to vacate and there is nothing on the record or in the compromise decree itself to show that the Court had, before passing the decree, applied its mind and satisfied itself that a statutory ground for eviction did in fact exist the decree would be null and void and as such not executable. The mere fact that the Court recorded having heard the Advocates before recording the compromise is by itself not sufficient to show that the Court had applied its mind as to the existence of the statutory grounds far less that it was satisfied in that regard. The executing Court is not entitled to entertain any evidence to see if there was a good ground for eviction. It is not competent to go behind the decree. At the most it may look into the materials on the record to see if there was some material on the basis of which the Court could have been satisfied as

to the existence of a statutory ground of eviction, (1969) 2 SCR 432, AIR 1970 SC 838, AIR 1970 SC 794 and AIR 1973 SC 1311, Rel. on.; AIR 1974 SC 471 and AIR 1978 SC 952 and (1981) 85 Cal WN 120, Dist. (Paras 11, 14, 16)

Cases Referred : Chronological Paras

(1981) 85 Cal WN 120 :	(1981) 1 Cal LJ
1	13, 15
AIR 1978 SC 952	12
AIR 1974 SC 471	11, 15, 16
AIR 1973 SC 1311	7
AIR 1970 SC 794	7
AIR 1970 SC 838 :	(1969) 2 SCR 1048 7
(1969) 2 SCR 432 :	(1970) 2 SCJ 153 7

B. C. Datta and G. N. Chandra, for Appellants; Sudhin Das Gupta and R. S. Mishra, for Respondents.

B. C. CHAKRABARTI, J. :— These three appeals are directed against a common judgment dated Aug. 24, 1974 by which three miscellaneous cases, arising out of three objections under S. 47, C. P. Code were disposed of.

2. Facts are not very much in dispute. The appellants instituted three ejectment suits in the City Civil Court, Calcutta for eviction of the respondents from different portions of premises No. 125, Canning Street, now known as 125, Bip-labi Rash Behari Road, Calcutta, which the respondents held as tenants under the plaintiff-appellants. They are Ejectment Suits Nos. 1129/65, 1130/65 and 1138/65. The grounds upon which the claims for eviction were founded were default in the payment of rent and reasonable requirement of the landlord for purposes of building and rebuilding. There was an additional ground in suit No. 1129/65 namely that the tenant had illegally and unauthorisedly sublet portions of the tenanted premises. All the three suits were decreed on compromise shortly after the defendants entered appearance. They did not file any written statements. The terms of the compromise were identical in all the cases and the material part of it runs as follows:—

"1. That the above suit be decreed with costs by consent of parties on the following terms and conditions:—

(a) That the defendant will vacate the suit premises within one month from the receipt of the notice from the plaintiffs.

(b) That the defendant will pay up all arrears of rent, if any, within one month

from the date and current damages to the plaintiffs, month by month within the fifteenth of the following month at the existing rate of rent.

(c) That if the defendant fails to vacate the suit premises after receipt of the notice from the plaintiffs as mentioned in cl. (a) above or fails to pay up all arrears of rent and current damages within the period mentioned in cl. (b) above, the plaintiffs will have the liberty to execute the decree and take possession of the suit premises through court.

(d) That the plaintiffs will have the liberty to withdraw all monies from court deposited in the above suit to their credit."

3. In one of the suits there was a minor defendant and permission was sought for entering into compromise on behalf of the minor defendant.

4. These compromise petitions which were filed before the Registrar of the court, on being placed before the Bench the court passed orders decreeing the suits on compromise and further directing the sole name to form part of the decrees. In the suit in which leave to compromise on behalf of the minor was filed, there was a further order granting the leave as the terms appeared to be legal.

5. All these 3 suits were thus disposed of on compromise on different dates in 1965. Admittedly the plaintiffs subsequently served notices on the defendants requiring them to vacate and they not having vacated applications for recovery of possession by execution of the decree were filed. They are Ejectment Execution Cases Nos. 445 of 1972, 219 of 1972 and 235 of 1972. The defendants on being served with notices under O. 21, R. 22 of the Code, entered appearance and filed separate objections under S. 47 which were registered as Misc. Cases Nos. 58/72, 98/72 and 149/73 respectively.

6. Besides some minor objections, the common stand taken by all the defendants judgment-debtors was that the decree in each of the suits was a nullity in so far as the court not having found that any of the grounds enumerated in S. 13 (1) of the West Bengal Premises Tenancy Act existed, had no jurisdiction to pass the decree. The plaintiffs (decree-holders) resisted the misc. cases on the plea that the judgment-debtor hav-

ing consented to the decree being passed were estopped from questioning the validity or legality of the same.

7. All the three misc. cases were heard analogously and disposed of by the order appealed against. It appears that both parties adduced some evidence in support of their respective contentions. The learned Judge, relying on the principles laid down by the Supreme Court in the cases of Bahadur Singh v. Muni Subrat, (1969) 2 SCR 432, Kausallya Debi v. K. L. Bansal, 1969 (2) SCR 1048: (AIR 1970 SC 838); Ferozilal v. Man Mal, AIR 1970 SC 794 and K. K. Chari v. Sheshadri, AIR 1973 SC 1311, found that there was nothing to indicate that the court while passing the decree had applied its mind to the question as to whether any of the grounds upon which the claim for eviction was founded, existed or not, and not having found that it really existed was incompetent to pass the decrees. The decrees were accordingly found to be null and void and as such not executable. On that view the objections under S. 47, C.P.C. were allowed and the execution cases were struck off. The other objections urged before the executing court without success, need not be adverted to as they were not pressed before us.

8. Being aggrieved at the decision the plaintiffs-decree-holders have preferred these present appeals. These appeals have been heard analogously and this judgment shall govern all of them.

9. Mr. Dutt appearing in support of the appeals contended that it is not necessary that there should be a positive and affirmative finding that there exists a ground for eviction but that what is required is to see whether the court was satisfied as to its existence. It was argued that the satisfaction of the court need not necessarily be manifested by a positive judicial finding and that if there are intrinsic materials on the record to justify an inference that the court had applied its mind, that would be sufficient to confer jurisdiction on the court to pass the decree. Mr. Dutt in this context also drew our attention to the evidence adduced by the parties in the misc. cases and argued that the evidence would indicate that really a ground for eviction existed.

10. Mr. Das Gupta in opposing the appeals on the other hand argued that the decrees were passed at a very initial

stage of the suits, that there is no material on record either in the shape of admissions or otherwise to justify any inference as to the existence of any of the grounds on which the claim for eviction was founded. He argued that the evidence given during the hearing of the misc. cases could not be looked into for the purpose of finding that the court was satisfied as the time when the decrees were passed.

11. Section 13 (1) of the W. B. P. T. Act provided that no court shall pass a decree except on one or more of the grounds enumerated in the section. It is therefore clear that it is the existence of one or more of the grounds that confers jurisdiction on the court to pass a decree for eviction. From a conspectus of the decisions relied on by the learned Judge in the court below the principle that emerges is, that if at the time of passing of the decree there was some material before the court, on the basis of which the court could be *prima facie* satisfied about the existence of a statutory ground for eviction it will be presumed that the court was so satisfied. The principle has been further explained and elucidated in the case of *Nagindas v. Dalpatram*, AIR 1974 SC 471. It has been held there:

"such material may take the shape either of evidence recorded or produced in the case, or, it may partly or wholly be in the shape of an express or implied admission made in the compromise agreement itself."

In that case the compromise contained an admission of a material fact which constituted a ground for eviction. It was laid down in that case that if on the face of it the decree does not show that existence of such material or jurisdictional fact, executing court may look to the original record of the trial court to ascertain whether there was any material furnishing a foundation for the trial courts' jurisdiction to pass the decree it did.

12. In a still later case, *Suleman v. Umarbhai*, AIR 1978 SC 952, it was held that where there are abundant intrinsic material in the compromise itself that the decree passed upon its basis was not in violation of the Act but was in accordance with it, the compromise decree was not a nullity and could be executed on non-compliance,

13. In a more recent decision of this court in the case of *Biswa Bhushan v. Kusum Agarwalla*, (1981) 85 Cal WN 120, this Court held that it is the existence of the ground for passing a decree for eviction under S. 13 (1) of the W. B. P. T. Act and the satisfaction of the court as to such existence which confers jurisdiction on the court to pass a decree and that such jurisdiction is not dependent on the recording of such satisfaction in the judgment/decreed itself.

14. Mr. Dutt relied particularly on the last mentioned cases to build up an argument that the defendant judgment-debtor must, in the facts of the case, be presumed to have conceded the existence of a ground for eviction. We are however unable to agree with Mr. Dutt on this point, we have already indicated the terms of the compromise in details. There is no admission in the compromise as to the existence of any of the statutory grounds the proof of which alone could confer jurisdiction on the court to pass a decree. On the contrary the reference to arrears "if any" in Cl. (b) of the compromise suggests that the factum of arrears even, far less a default for more than 4 occasions within a period of 12 months as alleged, was not admitted. There is no reference to the requirement of the landlord for purposes of building or rebuilding. Apart from the compromise agreement there is no question of any other material being on the record from which a legitimate inference as to the existence of a ground for eviction, could be made. It will bear repetition that the suits were compromised even before the written statements were filed. No evidence was recorded. In such circumstances we are unable to look to any other material except the compromise itself and we have already indicated that the agreement leads us no where so far as the jurisdictional fact is concerned.

15. The cases of *Nagindas v. Dalpatram* (AIR 1974 SC 471); *Suleman v. Umarbhai* (AIR 1978 SC 952) and *Biswa Bhushan v. Kusum Agarwalla* ((1981) 85 Cal WN 120) stand on different footing. In the former two cases the court found that there were clear admissions as to the existence of a ground for eviction which could be spelt out from the compromise petition itself. In the last mentioned case the facts were still stronger. There the court had gone into the issue

of default while disposing of an application under S. 17 (2). That was a part of the proceeding in the suit and the satisfaction of the court was explicit on the records of the proceedings. Consequently non-recording of such satisfaction once again while passing the decree ex parte after the defence against delivery of possession had been struck out, could not render the decree a nullity. None of these cases therefore can assist the decree-holder to support a contention that the decrees were in accordance with law.

16. This apart, there is nothing on the record to show that the court had, before passing the decree, applied its mind to the relevant fact and satisfied itself that a statutory ground for eviction did in fact exist. Mr. Dutt contended that the trial Court had heard the learned advocates before recording the compromise and that he must have been satisfied upon hearing the advocates that a ground existed. We do not think that the mere fact that the learned Judge had recorded having heard the advocates before recording the compromise, by itself and without more is a sufficient pointer to the fact that he had applied his mind as to the statutory requirements, far less that he was satisfied in that regard. Mr. Dutt then referred to the evidence recorded in the misc. cases and argued that the evidence suggests that in reality a ground for eviction as provided in S. 13 (1) was there; we do not think that we would be justified in looking into such evidence to ascertain whether or not a good case for eviction existed at the time when the decrees were passed. The executing court is not entitled to entertain evidence to see if there was a good ground for eviction. The executing court is not competent to go behind the decree. At the most it may look into the materials on record to see whether there was some material on the basis of which the court could have been satisfied as to the existence of a statutory ground of eviction. To allow the executing court to go beyond that limit would be to exalt the Executing Court to the status of a super court sitting in appeal, over the decision of the trial Court (see *Nagindas v. Dalpatram* (AIR 1974 SC 471) (supra)).

17. Mr. Dutt however was fair enough to concede this position but argued that

the evidence may be looked in the interest of equity. Principles of equity cannot be invoked to override a statutory requirement. The evidence which was not on the record at the time when the decrees were passed, cannot be availed of to confer jurisdiction on the court to make the decree. This contention of Mr. Dutt must also therefore fail.

18. In the result the appeals fail and are hereby dismissed.

19. The defendants (respondents) will now be entitled to contest the suits by filing written statement. The learned trial Judge shall give reasonable opportunity to the defendants to file written statements and the suits shall thereupon proceed from the stage of filing of the compromise petitions.

20. There will be no order for costs in these appeals.

21. No formal decrees need be drawn up.

A. K. SEN, J.:— I agree.

Appeals dismissed.

AIR 1982 CALCUTTA 420

G. N. RAY, J.

In Re: Sm. Ranu Sengupta and others.
D/- 25-3-1982.

(A) Bengal Municipal Act (15 of 1932), S. 56A — Constitution of India, Art. 245 — S. 56A providing for appointment of committee to administer affairs of municipality — S. 56A is not illegal or unconstitutional as conferring uncontrolled power or as colourable piece of legislation or for not providing tenure of committee.

Section 56A providing for appointment of a committee to administer the affairs of the municipality is not a colourable piece of legislation. It has been incorporated for tiding over the exigency created under certain circumstances when the elected Commissioners cannot hold the office and there is difficulty in holding election. As the duration of such exigency cannot be precisely anticipated no period for which the committee constituted under S. 56A will continue has been provided. S. 56A therefore does not become invalid for not mentioning the tenure of the committee. Moreover fixation of tenure may defeat the very pur-

DZ/EZ/B664/82/GNB/MVJ-H

pose of S. 56A. There is indication in S. 56A as to when and under what circumstances the committee is to be appointed and the number of members and their disqualifications have also been prescribed. Though a better guideline may have been given for exercise of power under S. 56A it cannot be said that the provision is wholly uncontrolled or uncanalised and as such liable to be struck down. Therefore S. 56A cannot be challenged on the ground of being illegal or unconstitutional. AIR 1954 SC 215 and AIR 1965 SC 1017, Ref.

(Para 8)

(B) Constitution of India, Art. 226 — Bengal Municipal Act (15 of 1932), Section 56A — Prayer for writ of quo warranto — Assumption of office by members of committee challenged — Statutory authority for assumption of office under S. 56A established — Prayer for writ must fail.

The prayer for the issue of a writ of quo warranto to prevent the members of the committee appointed by Govt. to administer affairs of the municipality must fail if statutory authority for constituting the committee and assumption of office by the members under S. 56A is established. For the purpose of a writ of quo warranto it is not necessary to investigate the legality or validity of the provisions of the statute under which the assumption of office is made. Such investigation may be made for the purpose of issuing writs in the nature of mandamus or certiorari. AIR 1969 SC 302, Rel. on; AIR 1970 Ker 312, Ref.

(Para 8)

(C) Constitution of India, Art. 226 — Bengal Municipal Act (15 of 1932), Section 56A — Appointment of committee by Govt. under S. 56A to administer affairs of municipality — Selection of members from political party by which Govt. was formed — Validity.

In a democratic set up the Govt. elected by one or a few political parties while appointing a committee under S. 56A to administer the affairs of the municipality may reasonably select members professing faith in the political party or parties by which the Govt. was formed and such selection would not per se be illegal or bad justifying interference under Art. 226. If, however, it is shown that the Govt. in selecting the personnel has left out eligible

candidates simply on the score of political affiliation and has selected persons not otherwise suitable there may be occasion to presume mala fide action. AIR 1971 Delhi 73, Ref. (Para 8)

(D) Constitution of India, Art. 226 — Bengal Municipal Act (15 of 1932), Section 56A — Committee appointed under S. 56A — Transfer of Midwives from one ward to other by Committee — Validity.

The transfer of Midwives from one ward to other and allotment of residential accommodation to them at a particular place by the Committee by the Govt. under S. 56A to administer the affairs of the municipality cannot per se be said to be illegal or mala fide so as to call for interference under Art. 226.

(Para 8)

Cases Referred: Chronological Paras

AIR 1980 SC 112	5
AIR 1980 SC 1149: 1980 SCC (Supp) 707	5
(1979) 1 Cal LJ 565	1
AIR 1971 Delhi 73	5
AIR 1970 Ker 312	5
AIR 1969 SC 302	5
AIR 1965 SC 1017	7
AIR 1954 SC 215	7

Braja Gopal Chakraborti, for Petitioners; A. P. Chatterjee, D. C. Chakraborty and Ashit Kumar Goswami, for Respondents Nos. 1 and 2; Mukul Prakash Banerjee and Mrs. Monjula Chaudhuri, for Respondents Nos. 3 to 32.

ORDER:— The petitioners in the instant writ petition are Midwives working in the Howrah Municipality. An order of transfer of the petitioners to different wards of the Howrah Municipality was passed by the President of the Howrah Municipality on June 3, 1980 and in the instant writ petition, the legality and validity of the said order of transfer has been challenged by the petitioners on the allegation that the constitution of a committee to administer the affairs of the Howrah Municipality under S. 56A of the Bengal Municipal Act was illegal and void and as such the members of the said illegal committee had no jurisdiction to assume their offices and discharge their duties and functions as members of the said committee. Consequently, the order of transfer passed by the President of the said Committee was illegal and void. It appears that the Howrah Municipality was governed under the provisions of the Bengal Muni-

icipal Act, 1932. A new Act, namely, Howrah Municipal Act, 1965 was enacted by the State Legislature making the Howrah Municipality a Corporation and elections were held in respect of the said Howrah Municipality since converted to a Corporation sometime in May, 1967. But the Corporation could not be constituted because the said Howrah Municipal Act was challenged before this Court in a writ proceeding whereupon a Rule being Civil Rule No. 548 (W) of 1967 was issued by this Court and an interim order was also passed by this Court. It appears that Howrah Municipal Act, 1965 was thereafter repealed and in the year 1974, electoral rolls of the Municipality had also been prepared. As the State Government contemplated for an establishment of a Municipal Corporation for the city of Howrah and adjoining areas, a comprehensive bill, namely, the Howrah Municipal Corporation Bill, was drafted by the Legislative Department of the State. A draft bill for the amendment of the Bengal Municipal Act was also taken. Simultaneously a draft bill for amending Calcutta Municipal Act was also made. It appears that the Bengal Municipalities Amendment Bill was passed by the West Bengal Legislative Assembly and the assent of the said Bill was given by the President of India on 1st Jan., 1981 and the new Act has now come into force. Under the provisions of the said amended Act, elections in 87 Municipalities out of 93 Municipalities in the State of West Bengal have already been held. As the earlier election of the Howrah Municipality was abortive, the State Government in order to run the administration of the Howrah Municipality appointed an Executive Officer under S. 67A of the Bengal Municipal Act sometime in the middle of 1967 and such appointment was extended from time to time. It is the case of the State Government in the instant Rule that as it was contemplated to introduce a comprehensive bill relating to the Howrah Municipality, no election could be held in respect of the Howrah Municipality before the proposed bill was enacted and the assent of the President was received. But in 1977, the State Government thought it desirable that instead of administering the Municipality with the help of an Executive Officer, an Advisory Committee should be appointed and according to the State Government, such Advisory Committee

was constituted under Notification dated 30th Aug., 1977. It appears that the Constitution of the Advisory Committee was challenged and the State Government rescinded the said Notification appointing an Advisory Committee. Thereafter, with a view to have popular voice in the civic administration, pending regular election, the State Government issued notification dated 28th Feb., 1978 appointing a committee of 30 members under the provision of S. 56A of the Bengal Municipal Act, 1932. It appears that one Sri Sureswar Dutta challenged the validity of the said notification appointing a committee of 30 members in the Constitutional Writ Jurisdiction of this Court in Matter No. 336 of 1978. The said Rule was disposed of on 30th Jan., 1979 and the decision of the said case has since been reported in (1979) 1 Cal LJ 565. It appears that no appeal was preferred against the said judgment but the time to hold election as contained in the operative part of the said judgment was extended from time to time by the trial Court. Ultimately an appeal was preferred against the order extending the period to hold election up to 31st Jan., 1981 and the Court of Appeal held that after the disposal of the Rule the trial Court had no jurisdiction to extend the period as referred to in the operative part of the judgment. It appears that the previous committee appointed under S. 56A of the Bengal Municipal Act was cancelled and by Notification dated 1st Aug., 1980 another committee under S. 56A was constituted and it may be noted in this connection that in the subsequent committee under the said notification dated 1st Aug., 1980 most of the members of the previous committee were included.

2. The petitioners in the instant Rule contend that the impugned order of transfer is unreasonable, mala fide and capricious and as such even on merits, the said order of transfers cannot be sustained in law. The petitioners also contend that as the constitution of the committee under S. 56A was illegal and without jurisdiction the said committee had no authority to assume the office and administer the affairs of the Howrah Municipality. Accordingly, the order of transfer passed by the President of the said Committee is per se illegal and void. The petitioners have therefore also prayed for a writ in the nature of quo warranto directing the respondents Nos,

3 to 32, namely, the members of the Committee appointed under S. 56A in Aug., 1980 to vacate the office and not to hold the office and administer the affairs of the Howrah Municipality.

3. Mr. Chakraborti, the learned counsel appearing for the petitioners, has contended that S. 56A of the Bengal Municipal Act is ultra vires the Constitution and also the Bengal Municipal Act. It is contended that the provision of S. 56A is a colourable piece of legislation attempted to achieve something indirectly which it cannot achieve directly. It is also contended that the provision of S. 56A is arbitrary as no guideline has been laid down either for ascertaining the reasons for the constitution of a Committee or the selection or choice of the members of the committee by nomination. The learned counsel has also contended that the provision of S. 56A is liable to be struck down because no time limit has been fixed for the tenure of the Committee to be appointed under S. 56A. As a result, the ratepayers of the Municipality may be perpetually denied of their right to vote and elect their own representatives for the administration of the Municipality. Mr. Chakraborti has further submitted that provision of S. 56A of the Bengal Municipal Act is a direct negation of the principles of the parent Act, namely, the Bengal Municipal Act and it destroys the integral scheme enshrined in the main Act. It is also contended that the provision of S. 56A has created a double standard for the administration of the Municipality one by the elected representatives for a limited period and another by the nominated members under S. 56A for an indefinite period. He also submits that S. 56A suffers from the vices of excessive delegation of unguided, uncontrolled and uncanalised power to the executive which enables the executive Government to abdicate its basic statutory duty contrary to the other provisions of the Bengal Municipal Act. It is also contended in this connection that the Legislature itself cannot abdicate its constitutional responsibility by conferring an unguided power on the executive. Mr. Chakraborti has also submitted that the Notification appointing a committee under Section 56A is bad because the selection of the members of the committee has been made with no intelligible differentia,

thereby offending Art. 14 of the Constitution. Mr. Chakraborti has submitted that under the provisions of the Bengal Municipal Act the tenure of the Commissioners of the Municipality is fixed by the provision of the Statute, but the period of tenure of the Committee to be appointed under S. 56A has not been fixed and the State Government, if it so desires, can go on extending the period of tenure of the committee thereby depriving the ratepayers to hold the election and select their representatives for administering the affairs of the Municipality. It has also been contended by Mr. Chakraborti that about the selection of the members of the committee there is no guideline and the State Government has been given an absolutely free hand in selecting the members of the Committee according to its own choice. Such unguided and uncanalised power given to the Executive must be held to be bad on the vice of excessive delegation. Mr. Chakraborti has submitted that unfortunately since 1967, the popular representatives elected by the ratepayers of the Municipality could not hold their office and administer the affairs of the Municipality. The State Government appointed executive Officers under S. 67A of the Bengal Municipal Act and got the Municipality administered by such executive officers from time to time. He submits that simply because the State Government felt that a more comprehensive Act relating to the affairs of the Howrah Municipality should be passed by the State Legislature and simply because such a bill was introduced in the Legislative anvil, there was no reason to hold back the election of the Municipality on the basis of the existing Act and the appointment of the Committee under S. 56A on the plea that the election of the Municipality could not have been held is devoid of any substance. As such, even assuming that the provision of S. 56A is not ultra vires, there was no reasonable ground for appointment of the Committee under S. 56A and the purported notification appointing a committee under S. 56A must be held to be a colourable exercise of power. Mr. Chakraborti has submitted that in the writ proceeding initiated at the instance of Sri Sureswar Dutta as referred to hereinbefore, this Court specifically observed that within a specified time the election of the Municipality must be held and the commit-

tee should not be allowed to function beyond the prescribed period. The State Government in order to circumvent the said direction given by this Court again appointed a Committee under S. 56A on 1st Aug., 1980 by cancelling the previous committee. Although the previous committee was cancelled and a new committee was sought to be set up by notification dated 1st Aug., 1980, in reality, the State Government retained the same old committee because excepting about 4 members, all the members of the previous committee were included in the new committee. Such action on the part of the State Government, according to Mr. Chakraborti, is nothing but fraud on the statute and a glaring example of colourable exercise of power.

4. So far as the merits of the impugned order of transfer are concerned, Mr. Chakraborti has contended that the services of the petitioners are transferable but any order of transfer must be subject to the convenience of the concerned members of the staff on one hand and public interest on the other. It is contended by the petitioners that orders of transfers are always passed long ahead of the actual date of transfer. But in the instant case the impugned order of transfer was passed on June 3, 1980 and the transfer was sought to be given effect to immediately. Such order of transfer in the middle of year was made only to ensure great hardship and inconvenience of the petitioners without any administrative necessity. It is also contended by the petitioners that the petitioners were asked by the other impugned order consequent to the order of transfer namely order dated July 7, 1981 to shift to Giribala Memorial Free Primary School situated in Ward No. VIII although it was not physically possible for the petitioners to render public services in different wards while staying in Ward No. VIII together. It is contended by the petitioners that services of the Midwives are to be rendered round the clock and there should not be any communication gap between the public who require the services of the petitioners as Midwives and the petitioners. It is also contended by the petitioners that there is no transport facility to cover the distance between different wards and the petitioners being ladies, it will be unsafe to move around through different wards particularly at night and

if prompt services cannot be given by the petitioners, the very purpose may be frustrated and at times their delayed arrivals may prove fatal.

5. Mr. Mukul Prokash Banerjee, the learned counsel appearing for the respondents Nos. 3 to 32, namely, the members of the impugned committee appointed under S. 56A of the Bengal Municipal Act, contends in the first place that the Committee under S. 56A was appointed under Notification dated 28th Feb., 1978. Thereafter, such committee under S. 56A had continued all along and the administration of the Municipality was made by the Committee appointed under S. 56A. The petitioners being employees of the Municipality were under the administrative control of the members of the committee appointed under S. 56A ever since 1978 but at no point of time the petitioners challenged the authority of such committee to hold the office. It is only in 1981 that the instant writ petition was filed by the petitioners. Accordingly, there is an inordinate delay in moving the writ court and on that score alone the writ petition should be dismissed. He submits that the power of the High Court to issue writ under Art. 226 of the Constitution is discretionary and if there is no satisfactory explanation for the inordinate delay the High Court may reject the petition, more so if the High Court is of the opinion that the issue of the writ as prayed for will lead to public inconvenience and interference with rights of others. For this contention, Mr. Banerjee has referred to the decision of the Supreme Court made in the case of Ashok Kumar Mishra v. Collector, Raipur reported in AIR 1980 SC 112. Mr. Banerjee also contends that as the State Government contemplated to amend the provisions of the Bengal Municipal Act and as it was contemplated to constitute the Howrah Municipality differently and to hold elections after the amendment of the Act, the State Government was quite justified in not holding the elections earlier. He submits that no useful purpose would have been served in holding an election of the Howrah Municipality under the existing Act and thereafter to scrap the election when the proposed amendment was effected. Accordingly the affairs of the Municipality had been administered by an executive officer appointed under S. 67A. Subsequently the State Government thought it desir-

able to have the affairs of the Municipality administered not by a single individual namely the Executive Officer but a member of local persons and for the said purpose a committee under S. 56A was appointed in 1978. Mr. Banerjee submits that although in the writ proceeding initiated by Sri Sureswar Dutta, this Court observed that the election should be held at an early date, such election could not be held for reasons beyond the control of the State Government and in deference to the observation and direction of this Court made in the said decision in Sureswar Dutta's case, the earlier committee appointed under S. 56A was dissolved by the State Government and a new Committee was formed. It is immaterial if in the new Committee, a large number of the members of the earlier committee were included. Mr. Banerjee has contended that every Government has a right to appoint members of the committee according to its own choice and in the absence of any material establishing want of good faith on the part of the Government in the selection of the personnel of the committee, the constitution of the committee cannot be held to be bad. For this contention, Mr. Banerjee has referred to a decision of the Delhi High Court made in the case of *Durga Chand v. Administrator* reported in AIR 1971 Delhi 73. Mr. Banerjee also submits that the power under S. 56A can be exercised not only where the order of the Court stands in the way of holding election but also in a case where election cannot be held for other reasons and 'other reasons' referred to in S. 56A are not similar to the reasons of pendency of legal proceedings or injunctions issued therein. He also contends that if the decision of the constitutional question is not absolutely necessary, the writ court will not decide such question. For this contention, he refers to a decision of the Supreme Court made in the case of *Union of India v. C. Damani & Co.* reported in 1980 SCC (Supp) 707: (AIR 1980 SC 1149). Mr. Banerjee also contends that a prayer for a writ of quo warranto must fail if an authority of law can be shown for the purpose of assumption of office. It is not necessary to examine any further the validity of the law on the basis of which the authority is assumed. Such question may be gone into if the writ for mandamus or certiorari is to be issued. For this contention, Mr. Banerjee

relies on a decision of the Kerala High Court made in the case of *Alex Beets v. M. A. Urmese* reported in AIR 1970 Ker 312. In this connection, Mr. Banerjee has also referred to the decision of the Supreme Court made in the case of *Abdul Rahim Khan v. Sadasiva Tripathi* reported in AIR 1969 SC 302 where the Supreme Court has held that the scope of quo warranto is very limited namely whether or not the appointment in question is by a proper authority and in accordance with the law. If there is an express statute governing such appointment, such appointments will be a sufficient answer to the motion for a writ of quo warranto even if the order of appointment is otherwise bad being violative of Article 16 of the Constitution. Hence, invalidity though may be heard in a motion for a certiorari or prohibition cannot be heard in a writ of quo warranto.

6. Mr. Chatterjee, the learned Senior Standing Counsel appearing for the State respondents, has supported Mr. Banerjee in the aforesaid contentions raised by him. He has also submitted that it is incorrect to contend that there is no guideline in the matter of selection of committee members under S. 56A and the provisions of S. 56A suffer from the vice of excessive delegation of unguided, uncontrolled and uncanalised power. For appreciating the scope and import of S. 56A and the contention of respective parties, the provisions of S. 56A are set out hereunder:—

56A. Appointment of Committee in case of failure of or delay in holding general election— (1) Whereafter the expiry of the term of office of the Commissioners of a Municipality under sub-sec. (1) or sub-sec. (5) of S. 56, the State Government is of opinion that by reason of the order of a court preventing the holding of a general election of Commissioners in the Municipality or setting aside such election or for any other reason, there is no likelihood of a new body of Commissioners being formed within a reasonable time to take over municipal administration, the State Government may, if it thinks fit so to do in the public interest, by order, appoint a committee consisting of the same number of members as the Commissioners of the Municipality to take charge of the administration of the affairs of the Municipality in accordance with the provisions of

this Act and the rules and bye-laws made thereunder,

(2) No person shall be appointed as a member of the committee if he is subject to any of the disqualifications mentioned in S. 22. * * *

Referring to the provisions of S. 56-A, Mr. Chatterjee submits that the discretion of the State Government is controlled in various ways. The number of the members of the Committee and the disqualification of such members have been provided for and the circumstances under which appointment of the committee can be made have also been indicated. Even assuming that there might have been further guidelines for a better exercise of the power, it cannot be said that there is no guideline whatsoever for the purpose of exercising power under S. 56A and as such S. 56A is liable to be struck down on that score. Mr. Chatterjee has also contended that the petitioners have failed to produce any material to show that the members of the committee appointed under S. 56A belong to a political party or simply on political consideration other eligible persons have been left out. In order to bring home of a case of mala fide action, sufficient materials must be disclosed by the petitioners. He submits that out of 30 members of the committee, 14 are the members who were elected earlier but because of the challenge of the said election in a court of law, they could not assume office as Commissioners. Mr. Chatterjee also submits that S. 56A does not evade the spirit of the Act but it really provides for administration by the members of the public at a point of time when for circumstances indicated in Section 56A, it is not possible to hold election of the Municipality and/or to get the Municipality administered by the elected Commissioners. He also submits that right to be elected is not a fundamental right but such right is governed by the Statute. Hence, if a right which is created by the Statute is taken away by the Statute itself, no objection can be raised. Mr. Chatterjee also submits that S. 56A is not bad but the same has been enacted to tide over the exigencies when the elected Commissioners cannot administer the affairs of the Municipality but at the same time there is a necessity of administration of the Municipality by a democratic body. Mr. Chatterjee contends that if exercise of power

under S. 56A has not been made properly then such mala fide exercise of power may be quashed but the contention of the petitioners that S. 56A is ultra vires and as such assumption of powers by the respondents Nos. 3 to 32 is illegal and without jurisdiction, is wholly untenable. Mr. Chatterjee has submitted that legislative enactment involves different stages and it is often time consuming. He has also drawn the attention of the Court that in the instant case although the West Bengal State Legislature passed the Amendment Act the same could not be operative because it took quite long time for getting the assent of the President. On instruction, Mr. Chatterjee has submitted that the State Government has no intention to hold back the election of the Commissioners of the Howrah Municipality under the provisions of the amended Act. A supplementary affidavit has also been filed on behalf of the State respondents and it has been contended therein that the State Government intends to hold election of the Howrah Municipality as early as practicable under the provisions of the amended Act, but such holding of election will take a few months for complying with various formalities and the reasons for such time to hold the proposed election have also been explained in the supplementary affidavit.

7. In reply to the contention raised by Mr. Banerjee and Mr. Chatterjee, appearing for the respective respondents, Mr. Chakraborti contends that if the provision of a Statute has a possibility to be abused or misused by the concerned authority because of unguided and uncanalised power given therein, the said provision is liable to be struck down even if the action actually taken under the said Statute is quite reasonable and the concerned authority has in fact acted with prudence. He contends that unguided discretion patently violates the doctrine of equality. Mr. Chakraborti also submits that it is true that the presumption is in favour of constitutionality of a legislative enactment and it has to be presumed that the Legislature understood and appreciated correctly the needs of the people. But when on the face of it, there was no classification at all and no attempt has been made to select any individual or group with reference to any differentiating attribute peculiar to that individual or group and not possessed by the others,

this presumption will be of little or no assistance. For this contention, he refers to the decision of the Supreme Court made in the case of Ram Prasad v. State of Bihar reported in AIR 1954 SC 215. Mr. Chakraborti contends that the provision of Sec. 56A is a colourable piece of legislation and it is not correct to contend that the provision is legal and valid. He contends that colourable legislation is a legislation which the legislature has enacted by transgressing its legislative powers in a covert or indirect manner and it adopts a device to outstep the limits of its power. He submits that under the provisions of the Bengal Municipal Act, the Commissioners of the Municipality have a fixed tenure and the extension of such tenure is also fixed by the provisions of the Statute. The affairs of the Municipality cannot be administered by the elected Commissioners beyond the term of their tenure but by the provisions of Section 56A, the State Legislature in an indirect manner had provided for administration of a Municipality by some persons without any time limit. This is a device to outstep the limits of its powers. For this contention, Mr. Chakraborti refers to a decision of the Supreme Court made in the case of I. P. Vajravelu Mudaliar v. Special Deputy Controller for Land Acquisition reported in AIR 1965 SC 1017. Mr. Chakraborti has also contended that there is no question of acquiescence or estoppel in the instant case so far as the petitioners are concerned. It is nobody's case that the petitioners had the occasion to know the invalidity of the constitution of the Committee but even after coming to know of such illegality of the constitution of the committee, the petitioners accepted the said committee and submitted to its jurisdiction. Mr. Chakraborti also contends that in a writ of quo warranto mere delay should not be fatal if the assumption of office is illegal and without authority of law. The moment such illegal assumption of jurisdiction is established, such person should be prevented from assumption of office by the appropriate writ in the nature of quo warranto.

8. After giving my anxious consideration to the respective submissions made by the learned counsel for the parties, it appears to me that S. 56A of the Bengal Municipal Act is not a colourable piece of legislation. The said provi-

sion has been incorporated in order to tide over exigencies or circumstances where the election of the Municipality cannot be held or the elected Commissioners cannot discharge their duties and functions. It also appears to me that there is indication in S. 56A as to when and under what circumstances the Committee under S. 56A is to be appointed. The number of the members of such committee and their disqualification have also been prescribed. In my view, the learned standing counsel is justified in his contention that a better guideline might have been given in the matter of exercise of power under S. 56A but it cannot be contended that the provision is wholly uncontrolled or uncanalised and as such the same is liable to be struck down. It also appears to me that S. 56A has been incorporated in the statute for tiding over the exigency created under certain circumstances when the elected Commissioners cannot hold the office and there is difficulty in holding election. As the duration of such exigency cannot be precisely anticipated no period for which the committee constituted under S. 56A will continue, has been prescribed. If the exigency for which the committee was constituted comes to an end and there is no impediment to hold regular election or assumption of office by the elected Commissioners, then there will be no occasion for continuance of the Committee under S. 56A. The continuance of the Committee beyond any period of exigency may be questioned and in an appropriate case such continuance may be a case of mala fide exercise of power. But Section 56A does not become invalid for not mentioning the tenure of the Committee. It may be noted that the fixation of tenure of the Committee constituted under S. 56A may defeat the very purpose of S. 56A. I am also inclined to accept the contention raised by Mr. Banerjee appearing for the respondents Nos. 3 to 32 that the provision of S. 56A is an answer to the assumption of power by the respondents Nos. 3 to 32 and a prayer for writ of quo warranto must fail if the statutory authority for assumption of office under S. 56A is established. For the purpose of a writ of quo warranto, it is not necessary to investigate the legality or validity of the provisions of the Statute under which the assumption of office is made and such investigation may be made for the purpose of issuing

writes in the nature of mandamus or certiorari. About the selection of personnel of the members of the committee, it does not appear to me that the petitioners have produced any material on the basis of which it can be held by this Court that the State Government has acted mala fide and/or in abuse of the powers given under S. 56A in selecting the members of the committee. It appears that 14 members were elected as Commissioners of the Municipality in the earlier election which was held illegal by a court of law. In a democratic set up a Government elected by one or a few political parties may reasonably select persons professing faith in the political party or parties by which the Government is formed and such selection is not per se illegal or bad. If, however, it can be shown that the Government in selecting personnel or in the matter of exercising discretion has left out the eligible candidates simply on the score of political affiliation and has selected persons who are not otherwise suitable, there may be occasion to presume mala fide action. It may be noted here that a Government although elected by one or few political parties nevertheless remains a Government of all the people of the State and as such it has a basic duty to represent the cause of the State in an unbiased manner. In the aforesaid circumstances, it does not appear to me that the provision of S. 56A of the Bengal Municipal Act is illegal or unconstitutional and the challenge of the petitioners in this regard must fail. So far as the merits of the case are concerned, it may be noted that the Municipality has specifically contended before this Court that at night no Midwives will be required to attend any call and transport to any from the patient's house from the residence of the Midwives will be arranged by the Municipality. It has been specifically submitted by the learned counsel appearing on behalf of the Municipality that when a call for a Midwife is received at the Municipality's office, the Municipality sends Ambulance Car with necessary assistants to pick up the particular Midwife and takes her back from the patient's house. The learned counsel for the respondents Nos. 3 to 32 has also submitted that the question of personal hardship of any of the petitioners can always be considered if a representation to that effect is made and the case of such hardship is brought

home. In the aforesaid circumstances, it does not appear to me that the transfer of Midwives from one ward to other and the allotment of residential accommodation to them at a particular place are illegal and mala fide on the face of them. Accordingly, no interference is called for and this Rule fails and is discharged. It is, however, reasonably expected that the respondents Nos. 3 to 32 should give anxious consideration to personal problems and/or hardship of the petitioners who have rendered long useful service to the Municipality and whose services may still be utilised by the municipality very effectively. There will be no order as to costs in this Rule.

Rule discharged.

AIR 1982 CALCUTTA 428

PRADYOT KUMAR BANERJEE AND
BIMALENDRA NATH MAITRA, JJ.

Probodh Kumar Das, Appellant v. Prafulla Kumar Das and others, Respondents.

A.F.O.D. No. 107 of 1976, D/- 2-3-1982.

Evidence Act (1 of 1872), Ss. 101-104 — Will — Burden of proof — Presence of suspicious circumstances makes initial onus heavy — Judicial conscience must be satisfied. (Succession Act (1925), Section 264).

Presence of suspicious circumstances makes the initial burden of proving the Will heavy and judicial conscience must be satisfied. In the instant case Will in question is a simple one and there was a natural dispensation in favour of executant's brother's sons with whom she was residing. Evidence on record established that she had physical and mental capacity. There was no evidence to show that there was any invariable practice that the draft of Will had to be preserved; Held, no importance need be attached to non-preservation of draft of Will, more so when a long time has elapsed. Discrepancy as to who read over the Will and overwriting in the circumstances of the case are not material and the conscience of court has been satisfied. Probate ordered to be granted to executor. (Paras 6, 7, 8, 9, 10)

EZ/FZ/C104/82/VSS/SNV-H

Cases Referred: Chronological Paras

AIR 1982 SC 133	8
AIR 1959 SC 443	6
(1838) 2 Moo PC 480: 12 ER 1089, Barry v. Butlin	6

P. B. Chatterjee and A. N. Basu, for Appellant; S. N. Mukherjee and M. K. Das, for Respondents.

B. N. MAITRA, J.:— The plaintiff is the alleged executor of the Will of one Kiron Sashi Dasi. He has alleged that on 15-5-1968 she executed a Will and appointed him executor. Then on 16-6-1968 she died childless at Gormi, P. S. Dum Dum. The beneficiaries of the Will are her brother's sons.

2. The defendants Nos. 5 and 6 contested the suit by filing a written statement. It has been alleged inter alia that she has no mental and physical capacity to execute the alleged Will. She was bed-ridden for more than six months before the execution of the alleged Will. She was under the supervision and care of the defendant Broja Bala Dasi. It was a forged and fabricated Will with a view to depriving her natural heirs.

3. The learned Additional District Judge rejected the plaintiff's contention and dismissed the suit by observing that the suspicious circumstances had not been removed. Hence this appeal by the executor.

4. It has been contended on behalf of the appellant that there are no suspicious circumstances. The learned Judge did not consider the contents of the registered sale deed Ext. B executed and registered by her on 17-5-1968. That conclusively shows that she had physical and mental capacity to execute the sale deed on 17-5-1968, which had been executed only two days after the execution of the alleged Will Ext. 2. The case has been proved by the evidence given by P.W. 2 Bijay.

5. The learned Advocate appearing on behalf of the respondent has stated that Kiron Sashi was about eighty at the execution of the alleged Will. She was a childless and illiterate lady. No relation was consulted when the Will was executed. The evidence of P.Ws. cannot be believed. The draft of the Will has not been produced. There is discrepancy as to who read out the contents of the alleged Will Ext. 2 to her. Further there is discrepancy regarding the date of execution of the alleged Will be-

cause it appears from the Will Ext. 2 that there is an overwriting whether it is executed on the 1st Jaistha or 2nd Jaistha, 1375 B.S.

6. It is true that presence of suspicious circumstances makes the initial onus heavy. It is in connection with Wills that present such suspicious circumstances that the decision of the English Courts often mentioned tests of the satisfaction of judicial conscience. This has been stated in the case of Barry v. Butlin in (1838) 2 Moo PC 480 and followed by Gajendragadkar, J. in the case of H. Venkatchala v. Thimmajamma reported in AIR 1959 SC 443.

7. P.W. 1 Probodh was the alleged executor. He says that Kiran was his father's sister and after her husband's death she lived at Gorui. P.W. 2 Bijay Narayan says that the Will was written by P.W. Adhir in his presence and he was an attesting witness. He has been corroborated by P.W. 3 Adhir, who is the scribe. He says that he scribed the Will according to the instruction given by Kiran. It is true that there is discrepancy as to who read over the alleged Will Ext. 2 to Kiran. But this is a minor one and not a major discrepancy.

8. About non-production of the alleged draft of the Will the learned Advocate appearing on behalf of the appellant has referred to the latest case of Indubala v. Manindra Chandra reported in AIR 1982 SC 133 at p. 136 to show that where there is no evidence to show that there was any invariable practice that the draft of the Will had to be preserved, that question was of no importance. Kiran Bala was an illiterate aged widow. A long time has expired and at this stage of the proceedings it is immaterial if the draft of the alleged Will was not produced.

9. Let us now turn to the evidence given by the objectors. D.W. 1 Narendra Das has stated that Kiran was not at Hoogly on 17-5-1968, though that statement is being belied by contents of the registered sale deed Ext. B executed by her on 17-5-1968. There her address has been given as Hooghly Jagudaspara. That document is very important because it was executed on the 3rd Jaistha 1375 B. S. corresponding to 17-5-1968, that is, only two days after the execu-

tion of the alleged Will on 15-5-1968. In such circumstances, it has been rightly contended on behalf of the appellant that she had physical and mental capacity on 15-5-1968. This version finds corroboration from the statement of D.W. 1 Narendra Das, who has stated in his cross-examination that when that sale deed Ext. B was executed, Kiran was in sound mind. Of course he has stated that Kiran's house at Jagudaspara was not broken. It has been pointed out on behalf of the appellant that she had executed the registered kobala Ext. B on 17-5-1968 because her house at Jagudaspara had been razed to the ground. There is no manner of doubt that D.W. 1 Narendra Das is not at all a witness of truth. This is evident from the fact that the deed itself Ext. B reveals that both Narendra Das and Bhabendra Nath Das, sons of Panchanan Das, are the confirming parties to that document. The discrepancy about 1st and 2nd Jaistha is not material, as the English date was correctly written in the Will.

10. It is a simple Will, which contains no complications. There was a natural dispensation in favour of Kiran's brother's sons. She was residing there. It is, therefore, clear that the conscience of the Court has been satisfied that the evidence given by P.Ws. on this is acceptable. We believe this evidence and find that the disputed Will Ext. 2 was duly executed and attested, that Kiran Sashi had testamentary capacity at that time and it is not at all a forged and fabricated document.

11. The appeal is allowed. The judgment and decree appealed against are set aside and the suit is decreed. Let a probate be granted to the plaintiff-executor with a copy of the Will annexed.

12. There will be no order as to costs.

13. The records be sent down to the court below as early as possible.

BANERJEE, J.:— I agree.

Appeal allowed.

AIR 1982 CALCUTTA 430

BANKIM CHANDRA RAY, J.

Subrata Mukherjee, Petitioner v. State of West Bengal and others, Respondents.
Civil Rule No. 14109 (W) of 1981, D/- 18-2-1982.

(A) Constitution of India, Art. 226 — Writ petition — Laches — Notice of requisition under S. 3 served on petitioner in 1974 — Petition challenging it filed in 1981 — Petition liable to fail on ground of delay. (W. B. Land Requisition and Acquisition) Act (2 of 1948), S. 3).

(Para 6)

(B) Constitution of India, Art. 226 — Writ petition — Necessary parties — Writ challenging notice of requisition of land by one of its co-owners alone — Notice of requisition served by State on petitioner alone and on no other co-sharer — Petition cannot fail for non-joinder of other co-sharers. (W. B. Land (Requisition and Acquisition) Act (2 of 1948), S. 3).

(Para 7)

(C) W. B. Land (Requisition and Acquisition) Act (2 of 1948), S. 3 — Land requisitioned for one public purpose used for another — Legality.

Land requisitioned for purposes of widening of road and also for maintaining supplies and services essential to the life of the community and/or for providing proper facilities for transport, communication, etc. — Govt. using it for constructing police station — Construction of house to accommodate a police station is a purpose allied to creation of better living condition in urban areas — Order of requisition cannot be quashed on that ground. AIR 1980 Cal 13 Disting. (1980) 2 Cal LJ 19, Rel. on.

(Para 8)

Cases Referred: Chronological Paras
AIR 1980 Cal 13 4, 8
(1980) 2 Cal LJ 19: 84 Cal WN 661 8

R. N. Mitra and A. K. Ganguly, for Petitioner; A. N. Banerjee and T. K. Sen Gupta, for the State.

ORDER:— This application is at the instance of the petitioner who is one of the co-owners of the plots Nos. 13851 and 13852 of khatian No. 4494, mouza Behala challenging the validity of the notice of requisition issued u/s. 3 of the West Bengal Act II of 1948 i.e. West Bengal Land (Requisition and Acquisition) Act, 1948 whereby these lands

along with other plots of lands were notified for requisition for public purposes mentioned in the said notice at annexure A to the petition on the ground that the land in question purported to be requisitioned for a purpose were being utilised for another purpose viz. for construction of Behala Police Station which has been demolished on account of widening of the Diamond Harbour Road.

2. The facts in brief are as follows. The aforesaid plots of lands along with other lands were notified for requisition u/s. 3 (1) of the said Act for the purposes viz. for widening Diamond Harbour Road at Behala and also for maintaining supplies and services essential to the life of the community and/or for providing proper facilities for transport, communication, etc. This requisition notice was served admittedly in 1974 and thereafter the work was taken up for widening the road and the Diamond Harbour Road was completed also long before. The petitioner has stated that when the authorities concerned came to implement the requisition notice in respect of these particular lands of the petitioner and his co-owners they raised objection and thereafter they have come before this Court with the instant writ application on 26-6-81.

3. A Rule was issued and an interim order was made restraining the respondents from proceeding any further on the basis of the notice which has been annexed as annexure A to the petition for a period of two weeks with liberty to pray for extension of the interim order on notice to the respondents on the same application. On 24-11-81 after hearing the learned Advocates for both the parties the interim order was vacated. Then an application for restoration was filed and that was heard on 9-12-81. The application for restoration was however not allowed.

4. Mr. Mitra, learned Advocate appearing on behalf of the petitioner, has made a twofold submission before this court. His first submission is that the concerned authorities cannot proceed to construct buildings on the lands in question for the purpose of accommodating the Behala Police Station which is not a purpose mentioned in the notice of requisition. In other words, Mr. Mitra has contended that the action of the respondents is wholly arbitrary, illegal and bad

inasmuch as they purport to use the land for a purpose other than that mentioned in the requisition notice. In support of this submission Mr. Mitra cited a decision reported in AIR 1980 Cal 13. Mr. Mitra next submitted that in the impugned notice only one purpose was mentioned i.e. for widening Diamond Harbour Road and as such the land in question cannot be used for purposes not mentioned therein. It has been also submitted by Mr. Mitra that the notice was served only on the petitioner who is admittedly one of the owners of these two plots and as such the petitioner alone has come up before this Court to assail the said notice without impleading the other co-owners of the said lands. This non-impleading the other co-owners according to the submission of Mr. Mitra does not in any way invalidate the instant writ application. Mr. Mitra further submitted that there is delay in moving this application undoubtedly but the petitioner immediately when the respondents tried to implement the order came up before this Court and as such this should be considered and the application should not be rejected on the ground of delay.

5. Mr. Amar Nath Banerjee, learned Advocate appearing on behalf of the State, has, on the other hand, submitted that this application should be rejected on the ground of inordinate delay in coming up before this jurisdiction to challenge the notice which was served on the petitioner as early as on 14-6-74 and the possession of the land was taken on 16-6-74. It has also been submitted in this connection by Mr. Banerjee that after taking possession the respondents have started construction of the building for the Behala Police Station and the construction work was made up to the plinth level when this instant application was made before this Court, therefore on the ground of inordinate delay in coming before this court the application should not be entertained and no relief should be granted. It has been next submitted by Mr. Banerjee, learned Advocate for the State respondents, that the construction of structures for housing a police station i.e. Behala Police Station is a purpose of the State and it is also a purpose allied to, connected with and/or incidental to the purposes to create better living conditions

in urban areas as well as for the purpose of maintaining supplies and services essential to the life of the community which are the purposes mentioned in S. 3 (1) of the W.B. Land (Requisition and Acquisition) Act. Reference has been made in this connection by Mr. Banerjee to a Division Bench decision of this Court. It has been next submitted by Mr. Banerjee that this application will fail for non-joinder of necessary parties as it is evident from the statement made in paragraphs 2 and 5 of the said (sic) petitioner in respect of these plots of lands.

6. The first question that poses itself for consideration is whether this writ application in the facts and circumstances can be entertained by this Court. Admittedly the order of requisition was served on the petitioner in 1974 and according to the State respondents they have taken possession on 16-6-74 which the petitioner of course denies. But it is evident from the statements and averments made in the writ petition as well as in the affidavit in reply that on the date when this application was made the petitioner was not in actual possession of these lands. It is now well settled by several pronouncements of this Court as well as of the Supreme Court that to have relief from this Equity Court one must come at the earliest possible opportunity. In the instant case since June 1974 till June 25, 1981 the petitioner did not take any steps to agitate this matter before this forum. The explanation that has been given and also the submissions that have been made by the learned Advocate for the petitioner on this score are in my opinion not sufficient for this purpose. Therefore, on the ground of inordinate delay I am constrained to hold that this Rule will fail.

7. Now regarding non-joinder of necessary parties I am not inclined to refuse relief sitting in this equity jurisdiction and as such I am unable to accept the contentions put forth by the learned Advocate on behalf of the State on this score, more so when the order u/s. 3 (1) of the impugned Act was served by the State only on the petitioner and not on any of his co-sharers.

8. Coming to the merits, the argument of Mr. Mitra is that there has been a diversion of purpose in the matter of use of the land for the purpose of making structures for accommodating Be-

hala Police Station which purpose was not mentioned in the order u/s. 3 (1) of the said Act and as such the entire order is bad being illegal and unwarranted. To consider this submission in its proper perspective it is necessary to consider whether the purpose for which the lands in question are being utilised is a purpose connected with or incidental to the purposes mentioned in S. 3 of the Act viz. "for maintaining supplies and services essential to the life of the community, for creating better living conditions". It has been stated in the affidavit in opposition sworn on behalf of respondent No. 2 that the purpose for which the land is being used is connected with and/or incidental to the aforesaid purposes. Mr. Banerjee has also submitted that the construction of house to accommodate a police station is a purpose allied to creation of better living condition in urban areas. In my opinion there is substance in this contention. My attention was also drawn to the decision in (1980) 2 Cal LJ 19 (Sm. Sushila Devi Fomra v. State of West Bengal) where the requisition of the premises was made for the purpose of the State Transport Corporation. A challenge was thrown on the ground that it is not a purpose envisaged in S. 3 (1) of the West Bengal Land (Requisition and Acquisition) Act. It has been held by a Division Bench of this Court that "It is the duty of the State to make suitable arrangement for road transport and for that purpose the State Transport Corporation has been created. Any requirement of the Corporation is the requirement of the State. In these circumstances it is difficult to accept the contention of the appellant that the purpose for which the requisition has been made is not the purpose of the State Government and as such the order of requisition should be quashed on that ground. We hold that the land can be requisitioned or acquired for the purposes of the State Transport Corporation under the provisions of the Act. The contentions of the appellant is accordingly overruled." The decision in the case of Sailendra Nath Ray v. State of West Bengal, (AIR 1980 Cal 13) is distinguishable on facts because in this case the requisition u/s. 3 of the said Act was made for the purpose of requisitioning land for settlement of small traders displaced as a result of some other acquisition. Question arose whether requisi-

tion of land for such a purpose was a purpose falling within the meaning of S. 3 (1) of the said Act. It has been held that the settlement of the displaced small traders is not connected with or incidental to either of the aforesaid purposes i.e. providing facilities for transport and widening of road and in the alternative for maintaining supplies and services essential to the life of the community. This judgment therefore does not apply to the facts of the instant case inasmuch as as has been stated hereinbefore the lands of the petitioner are used for the purpose of construction of building for housing the Behala Police Station which has been demolished for widening Diamond Harbour Road.

9. For the reasons aforesaid the contentions raised on behalf of the petitioner having failed this Rule fails. It is therefore discharged. No order is made as to costs. All interim orders are vacated.

Rule discharged.

AIR 1982 CALCUTTA 433

CHITTATOSH MOOKERJEE AND

RAMKRISHNA SHARMA, JJ.

M/s. Martin Harris (Pvt.) Ltd., Appellant v. M/s. Elgin Properties, Respondent.

A.F.O.D. No. 259 of 1980, D/- 11-2-1982.*

W. B. Premises Tenancy Act (12 of 1956), S. 13 — Eviction — Tenant surrendering leased premises — Possession of two rooms in such premises not handed over — Claim that he became statutory tenant of such rooms — Not sustainable — He could be treated only as licensee — Protection against eviction would not be available. (Transfer of Property Act (1882), Ss. 107, 111).

The tenant at his own had surrendered the premises to the landlord. However, the possession of two rooms in the said premises was not handed over. Subsequently the landlord filed a suit for eviction against him. It was alleged by the tenant that he was a continuing ten-

ant in the said rooms and could not be evicted under S. 13.

Held, that the tenant could not be said to have become statutory tenant of those two rooms, but he was a mere licensee. He would not be entitled to any protection against eviction under the Act. Case law discussed. (Paras 9, 13)

Cases Referred: Chronological Paras

AIR 1979 SC 1745	11
AIR 1952 Cal 196	6
AIR 1952 Cal 455	6
(1931) 2 Ch 210: 100 LJ Ch 274: 145 LT	
17, Re : Savile Settle Estates	7
(1878) 39 Lt 500: 43 JP 112, Jones v. Bridgman	7

P. P. Ginwala, K. N. Srivastava and A. N. Mukherjee, for Appellant; Somnath Chatterjee; Nigam Chakraborty and Sanjib Misra, for Respondent.

CHITTATOSH MOOKERJEE, J.:—

M/s. Martin Harris (Pvt.) Ltd., the defendant-appellant, had been a lessee in respect of premises No. 1B, Asutosh Mookerjee Road under successive leases periodically granted by the Official Trustee, West Bengal as Trustee of the Estate of D. A. David for the Davidean Girls' School. Lastly, on 13th of July, 1968 the Official Trustee, West Bengal had granted to the defendant-appellant lease of the said premises with retrospective effect from 1st of January, 1965 up to the 31st of Dec., 1968. The said lease in favour of the defendant-appellant was not renewed for any further period. On 21st April 1969 the defendant-appellant wrote to the Official Trustee of West Bengal the following letter:

"Dear Sir,

Re: 1B, Asutosh Mukherjee Road.

We wish to surrender the tenancy rights of the above premises with immediate effect. Please arrange to take possession.

Thanking you,

Yours faithfully,

For Martin & Harris (Private) Ltd
Illegible
Director. "

2. The defendant-appellant in para. (9) of their written statement pleaded that on the expiry of the aforesaid lease there was holding over of the tenancy in respect of the entire premises No. 1B, Asutosh Mookerjee Road on and from 1st of Jan., 1969 as a tenant from month to month. The defen-

*Against decree of A. K. Dasgupta, Sub-J., 4th Court at Alipore, D/- 17-12-1979.

dant further averred in the said paragraph that since it had decided to deliver vacant possession of the major portion of the said tenancy, it did so on 30th of April 1969 and kept in its possession two rooms in the said premises. According to the defendant, as such its tenancy continued under the Official Trustee of West Bengal in respect of the said two rooms.

3. On 20th Sept., 1974 the Official Trustee, West Bengal by a registered deed granted a lease in favour of M/s. Elgin Properties, the plaintiff-respondent of the entire premises No. 18, Asutosh Mookerjee Road for a term of 21 years with retrospective effect from 1st of May, 1969. The plaintiff respondent had demanded from the defendant appellant payment of occupation charges in respect of the two ground floor rooms in premises No. 1B, Asutosh Mookerjee Road in possession of the defendant. The defendant by a letter had denied its liability. Thereafter, the plaintiff by a registered letter dated 17th July, 1975 had purported to terminate the alleged licence in favour of the defendant appellant for occupying the said two rooms and thereafter on 7th of April, 1976 instituted a suit against the defendant in the 4th Court of the Subordinate Judge, Alipore for recovery of vacant possession by evicting the defendants from the said two rooms described in the Schedule B of the plaint, for recovery of Rs. 72,542/- as occupation charges and also for recovery of further sums on account of mesne profits tentatively valued at Rs. 100/- up to the actual date of recovery of possession of the suit rooms. The defendant had contested the said suit, *inter alia*, denying that the defendant was a mere licensee in respect of the said two suit rooms and it claimed to be still a tenant under the Official Trustee, West Bengal in respect of the suit premises. The defendant also had denied its liability to pay occupation charges or mesne profits to the plaintiff.

4. The learned Subordinate Judge, 4th Court, Alipore has decreed the suit in part and has ordered that the plaintiff would get a decree for recovery of khas possession and also a decree for Rupees 43700/- against the defendant for occupation charges. The learned Subordinate Judge has also granted in preliminary form a decree for mesne profits. Being aggrieved, the defendant has preferred the instant appeal.

5. Mr. Ginwala, learned advocate for the appellant, has submitted that the provisions of the West Bengal Premises Tenancy Act applied to the defendant's tenancy under the registered lease dated 13th July, 1968 which was for a term of three years. Therefore, even after the expiry of the term of the said lease, the defendant had continued to be a statutory tenant. After the defendant had given vacant possession of the major portion of the Premises No. 1B, Asutosh Mookerjee Road its continued occupation of the two ground floor rooms in the said premises by operation of law must be deemed to be as a statutory tenant. Therefore, according to Mr. Ginwala, the plaintiff appellant (respondent 3) under sub-sec. (1) of S. 13 of the West Bengal Premises Tenancy Act was not entitled to recover possession of the said two rooms from the defendant appellant except upon establishing any one or more of the grounds set out under the proviso to said sub-sec. (1) of S. 13 of the Act. The defendant was neither a licensee nor a trespasser and, therefore, the instant suit brought by the plaintiff respondent ought to fail. Mr. Ginwala however did not make any submission regarding the decree of the learned Subordinate Judge for recovery of occupation charges and mesne profits.

6. Even if it is assumed that after the defendant's registered lease was expired by efflux of time, the defendant had continued as a tenant and enjoying protection under the West Bengal Premises Tenancy Act, as a statutory tenant the defendant had surrendered the said tenancy. Undisputedly, after the lease for a term of 3 years in its favour had expired by efflux of time, the defendant company by its said letter dated 21st April, 1969 had informed the Official Trustee that it wished to surrender its tenancy rights with immediate effect and had requested the Official Trustee to arrange to take possession. In view of the clear language of the said letter and the conduct of the parties proved in the case, we find no substance in the submission of Mr. Ginwala that the defendant's said letter (Ext. 1) contained a mere promise to do something in future. We have already referred to para 3 of the defendant's written statement wherein it had admitted that it had decided to deliver vacant possession of the major portion of its tenancy and it had done

so on 30th of April, 1969 keeping in its possession two rooms in the said premises. The defendant's said letter (Ex. 1) had been marked as an exhibit on admission. In our view, the aforesaid act of the parties amounted to surrender of the tenancy of the suit premises held by the defendant under the Official Trustee. The defendant had yielded up his tenancy interest and the landlord, Official Trustee, had accepted the same. Therefore, there was a valid mutual agreement resulting in surrender of the defendant's tenancy which the defendant was holding after the expiry of the term of its lease dated 13th July, 1968. Even if the defendant did not immediately deliver to the Official Trustee its possession of the two ground floor rooms, the defendant's tenancy stood determined by implied surrender. It is settled law that implied surrender or surrender by operation of law occurs, (1) by the creation of new relationship or (2) by relinquishment of possession (vide Mulla on Transfer of Property Act, 6th Edn., page 744. See also observations in Muhammad Ibrahim v. Bani Madhab Mullick, AIR 1952 Cal 196, para 11, and in Sm. Sailabala Dassee v. H. A. Tappassier, AIR 1952 Cal 455, para 19). Mulla on Transfer of Property Act, 6th Edn., at pages 744 and 745 has, inter alia, pointed out that implied surrender is put on the ground of estoppel and the intention of the parties is immaterial. It has been further pointed out that relinquishment of possession operates as an implied surrender. There must be a taking of possession but not necessarily a physical taking out something amounting to a virtual taking possession.

7. We find no substance in the appellant's submission that although in pursuance of its letter dated 21st April, 1969 (Ext. 1), it had delivered to the lessor, Official Trustee, West Bengal, the possession of the entire Premises No. 1B, Asutosh Mookerjee Road except the two rooms, the defendant continued to be a statutory tenant under the Official Trustee. In Halsbury's Laws of England (3rd Edn.), Vol. 23, para 1415 at p. 687, it has been observed "Any arrangement between the landlord and the tenant which operates as a fresh demise will work as a surrender of the old tenancy; and this may result from an agreement under which the tenant gives up part of the premises and pays a diminished rent for the remainder provided a sub-

stantial difference is thereby made in the conditions of the tenancy (vide Jones v. Bridgman (1878) 39 LT 500, Re: Savile Settle Estates (1931) 2 Ch 210 at page 216).

8. It is not necessary for us to examine the correctness of the submission of Mr. Ginwala, learned advocate for the appellant, that a part surrender of the lease is recognised in law. The learned advocate had relied upon the observations in para 1223 at page 557 of Halsbury's Laws of England, 3rd Edn., which deals with the question of apportionment of rent in case of cessation of possession of a part of premises by a lessee. Surrender under S. 111 (e) of the Transfer of Property Act consists of yielding up lessee's interest to the lessor by mutual agreement. Secondly, the defendant-appellant by its letter (Ext. 1) dated 21st April, 1969 had categorically expressed its intention to surrender its tenancy rights of Premises No. 1B, Asutosh Mookerjee Road without any reservation. The defendant has neither pleaded nor proved any mutual agreement by which it was granted a tenancy in respect of the two rooms in its occupation. Defendant's only witness, Rammurti, DW 1, in his examination-in-chief stated that defendant did not surrender the tenancy of the property. But during cross-examination, DW 1, admitted that he was not present at the time of surrender. He also had no talk with the Official Trustee, West Bengal on behalf of the defendant about the nature of its possession. Admittedly, after delivering possession of the major portion of the suit premises, the defendant did not pay any rent either to the Official Trustee or thereafter to the plaintiff. In fact, the defendant neither pleaded nor proved that there was ever any agreement regarding payment of rent or other terms of the alleged tenancy claimed by the defendant in respect of the said two rooms.

9. We reject the contention of the learned advocate for the appellant that by operation of law the defendant had become a statutory tenant in respect of the said two rooms. The defendant's previous lease admittedly stood determined and by mutual consent he had yielded up major portion of the premises and thereby he had surrendered his tenancy which might have been continuing by the operation of West Bengal Premises Tenancy Act, 1956.

10. Mr. Ginwala, learned advocate for the appellant, is not correct in his submission that after the expiry of the aforesaid registered lease the defendant's tenancy was a statutory one and, therefore, the defendant continued in possession as a tenant until any decree or order for eviction had been made by a court of a competent jurisdiction. The West Bengal Premises Act, 1956 provides for regulation of certain incidents of tenancies governed by the said Act. Section 13 (1) of the said Act has, inter alia, provided that no decree or order for recovery of possession of any premises shall be made by any court in favour of the landlord against a tenant excepting on one or more of the grounds set out thereunder. But as at present advised, we find no legal impediment in the way of the tenant himself voluntarily and lawfully surrendering his tenancy and amicably yielding up possession. Therefore, in the instant case when the defendant yielded up possession of the entire Premises No. 1B, Asutosh Mookerjee Road excepting two rooms in the suit and the plaintiff landlord accepted the same, the defendant's tenancy which was continuing by operation of law stood determined at the instance of the tenant.

11. The decision in *V. Dhanapal Chettiar v. Yesodai Ammal*, AIR 1979 SC 1745, upon which Mr. Ginwala has placed his reliance, does not really support the case of the appellant. The controversy in the said case centered round the question whether a notice under S. 106 of the T. P. Act was at all necessary to be given by the landlord before getting a decree or order for eviction against a tenant protected under any State Rent Control Act. The Supreme Court in the said case has held that such a notice under S. 106 by the landlord was unnecessary and a mere surplusage and making out a case under the Rent Control Act for eviction of the tenant by itself is sufficient. *Untwallia, J.* in para 5 of his judgment in *V. Dhanapal Chettiar's case* (AIR 1979 SC 1745) (supra), had clearly recognised that under the T. P. Act purely as a matter of contract a lease comes into existence but there has been appreciably inroad on the freedom of contract. *Untwallia, J.* further held that none of the State Acts has abrogated or affected the provision of S. 107 of the T. P. Act which lay down how leases are made. We have al-

ready held that by reason of the defendant expressing his intention in writing to surrender his tenancy and to deliver immediate possession (vide Ext. 1) and thereafter yielding up possession of the demised premises except two rooms which was accepted by the then lessor, the defendant's tenancy stood determined. There was no provision in the West Bengal Premises Tenancy Act by which relationship of landlord and tenant between the defendant and the then owner, Official Trustee, West Bengal in respect of the said two rooms in defendant's occupation could be created, continued or imposed upon the Official Trustee or the persons claiming under it. The defendant could have claimed a new tenancy in respect of the said rooms by establishing that there was a fresh contract between the parties. In the facts of this case the defendant's occupation of the two rooms by itself to make the defendant either a contractual or even a statutory tenant between the Official Trustee, on the one hand, and the defendant, on the other, there was neither any registered instrument nor any agreement accompanied by delivery of possession of the said two rooms to the latter. Therefore, the defendant could not claim that he was a tenant in respect of the said two rooms. The expression 'tenant' under S. 2 (h) no doubt includes any person continuing in possession after termination of his tenancy or in the event of such person's death such of his heirs as were ordinarily residing with him at the time of his death. Not only persons against whom any decree or order for eviction has been made by a Court of competent jurisdiction but also a tenant who has surrendered his tenancy and no longer continuing in possession are excluded from the category of contractual and statutory tenants.

12. After the defendant had surrendered his tenancy rights and had delivered possession of the premises except two rooms, the defendant neither pleaded nor proved that his said occupation of the two rooms was based on any contract. The Deputy Official Trustee by his letter dated 27th Jan. 1971 addressed to the defendant (Ext. 9), inter alia, stated that the defendant had not yet made over vacant possession of the room on the ground of the premises which had been retained at the time of delivery of

vacant possession on surrendering the lease. Vacant possession of the rooms found in occupation of Sri Arun Ghosh and M/s. Caxton & Co. was also not delivered. The Deputy Official Trustee had inter alia requested the defendant to vacate the rooms still in defendant's occupation and to settle occupation charges until delivery of possession. The defendant did not deny the receipt of the said letter and never sent any reply disputing the correctness of the assertions made in the said letter (Ext. 9). After obtaining lease from the Official Trustee the plaintiffs by their letters (Exts. 3a and 3b) had again called upon the defendant to settle up occupation charges in the rooms occupied by the defendant with leave and licence. It is significant that the defendant in reply did not categorically deny that its occupation of the said rooms was under a leave and licence. But by its letter (Ext. 3) dated 18th Mar. 1975 the defendant merely denied liability in respect of the contention in the plaintiff's letter dated 1st Mar. 1975 (Ext. 3b). The defendant also did not deny the assertions made in the subsequent letters of the plaintiff dated 31st May and 1st June, 1975 (Exts. 3d and 3e) that it was liable to pay occupation charges in respect of the suit rooms as a licensee under the plaintiff. Prior to the suit, the defendant did not assert that by contract or by operation of law it had become a tenant in respect of the disputed rooms. At the trial, the defendant did not allege or prove any agreement of tenancy in respect of the said rooms. As the defendant failed to prove a tenancy based on contract, it cannot successfully defend the plaintiff's claim for recovery of possession. Since there was no contract of tenancy, the defendant cannot claim that the West Bengal Premises Tenancy Act either imposed or continued the defendant's tenancy upon the plaintiff landlord.

13. The plaintiff also proved that it had obtained a decree for eviction against M/s. Caxton & Co. who had been previously a sub-tenant in respect of a portion of the ground floor of Premises No. 1B, Asutosh Mookerjee Road under the defendant. The High Court had also affirmed the said decree against the said M/s. Caxton & Co. The defendant was made pro forma defendant in the said suit. In the circumstances, we hold that the defendant was a mere licensee and

did not enjoy any protection against eviction under the West Bengal Premises Tenancy Act and the court below rightly decreed the suit in favour of the plaintiff respondent.

14. We, accordingly dismiss this appeal without any order as to costs.

15. After the judgment is delivered, the learned Advocate for the appellant prays for a certificate under Art. 133 of the Constitution of India. We do not consider that the case involves any substantial question of law of general importance and, therefore, in our opinion, the said question does not need to be decided by the Supreme Court.

16. Accordingly, we reject the oral prayer for certificate.

17. On the prayer of the learned Advocate for the appellant, we direct that the operation of the judgment and decree shall remain stayed for two months. During the period stay would operate the appellant would be bound to comply with the interim order granted in this Court.

18. Let the records be sent down expeditiously.

SHARMA, J.:— I agree.

Appeal dismissed.

AIR 1982 CALCUTTA 437

Mrs. PADMA KHASTGIR, J.

Shyam Sundar Kajaria, Plaintiff v. Eastern Commercial Corporation, Defendant.

Suit No. 512 of 1975, D/- 9-2-1982.

Civil P. C. (5 of 1908), O. 6, R. 17 and O. 1, R. 10 — Application for amendment of plaint for impleading a person as defendant — Amendment when can be allowed — Considerations.

Where an application for amendment of plaint for impleading R as defendant is filed, the main consideration is whether or not the presence of R is necessary to enable the Court to effectually and completely adjudicate upon and settle the questions involved in the suit. A proper party is one without whose presence the questions in the suit cannot be completely and effectually adjudicated upon. If he is neither a necessary party nor a proper party, the court has no jurisdiction to add him as a party.

(Para 2)

DZ/EZ/B552/82/VSS/MVJ—H

In the instant case, no order can be passed on plaintiff's application inasmuch as R is neither a necessary party nor a proper party to be joined in as a defendant. In view of the fact that the alleged claim of R stands barred by laws of limitation, it would not be proper and fair to add him as a party to this suit filed by plaintiff for recovery of amount lent and advanced on Khatapeta account to defendant. AIR 1974 Cal 358, AIR 1980 Cal 106 and AIR 1968 Mad 287, Rel. on. (Para 2)

Cases Referred : Chronological Paras

AIR 1980 Cal 106 :	(1981) 1 Cal LJ	
252		2
AIR 1974 Cal 358		2
AIR 1968 Mad 287		2

ORDER :— This is an application by the plaintiff Shyam Sundar Kajaria for amendment of the plaint. The suit was filed by Shyam Sundar Kajaria for recovery of a sum of Rupees 60,656/- and for other consequential reliefs. It was the positive case of the plaintiff, as made out in the plaint, that on 3rd Dec. 1974 and on 18th Dec. 1974 the plaintiff lent and advanced short term commercial loan on Khatapeta account to the defendant amounting to Rupees 25,000/- and Rupees 30,000/- respectively, aggregating Rs. 55,000/-. The defendant agreed to repay the said sum with interest at the rate of 15%. Acknowledging receipt of the said loan the defendant executed Purjas at the request and direction of the plaintiff in the name of Ramdeo Prosad Agarwalla. The defendant acknowledged its liability to pay with interest at the rate of 15%. Inasmuch as according to the plaintiff the defendant failed and neglected to make payment of the said loan in spite of demands, the plaintiff had been compelled to file the present suit and the suit was filed on the 9th September, 1975.

2. After the suit was in part heard, an application was taken out for examination of the plaintiff's witness on commission. Examination of witness on commission had been concluded. Now an application has been taken out by the plaintiff for amendment of the plaint impleading therein Ramdeo Prosad Agarwalla as a party defendant. In paragraph 8 of the proposed amended plaint the plaintiff had stated that the plaintiff did not make any claim in this suit against the defendant No. 2 Ramdeo

Prosad Agarwalla, who was sought to be impleaded in order that the issues involved in the present suit may be adjudicated upon in his presence. However, from the averments made in the petition, it appears that no ground has been disclosed by the petitioner for which the proposed amendment has been sought for. The said Ramdeo Prosad Agarwalla, according to the petitioner, also known as Ramdeo Kajaria, is the brother of the plaintiff who had already deposed in the suit on commission. Save and except the averments in paragraph 8 of the petition that in view of the nature and character of the defence taken by the defendant, the petitioner had been advised to take out this application for necessary amendment, no other ground whatsoever has been stated therein. Although it has been stated in the petition that the proposed amendment would not prejudice the defendant in any way but the fact remains that the claim, if any, of the said Ramdeo Prosad Agarwalla against the defendant today stands barred by the laws of limitation. There are no compelling circumstances which have been set out in the petition for allowing such an amendment even after the laws of limitation have set in. Order 1, R. 10 sub-rule (2) provides as follows :

"The Court may at any stage of the proceedings, either upon or without the application of either party, and on such term as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

The facts disclosed in the petition do not indicate that the said Ramdeo Prosad Agarwalla is a necessary party who ought to have been joined as a party defendant inasmuch as his presence before this Court is not necessary in order to effectually and completely adjudicate upon and settle all questions involved in this suit. It is the definite case of the defendant as made out in the written statement that the present transaction in suit has no connection whatsoever with the transaction that the defendant had with Ramdeo Prosad Agarwalla. It is the

case of the defendant in the written statement that the plaintiff had no transaction and/or dealing with the defendant on any occasion as no money was lent and advanced by the plaintiff to the defendant. The defendant did not execute any purja at the request or direction of the plaintiff in the name of Ramdeo Prosad Agarwalla acknowledging receipt of the loans nor acknowledged liability in respect thereof. In paragraph 3 it has been stated that the defendant borrowed a sum of Rs. 55,000/- from one Ramdeo Prosad Agarwalla by executing relevant documents and upon production of the original purjas, it was the case of the defendant, that the defendant paid up the loan in two instalments. The defendants craved reference to various correspondence that passed between B. M. Bagaria, Solicitor acting on behalf of Ramdeo Prosad Agarwalla and the defendant. From the said correspondence it would appear, according to the defendant, that the transaction that the defendant had with Ramdeo Prosad Agarwalla had no connection whatsoever with the transaction that had been stated by the plaintiff in the plaint. In the circumstances the defendant Ramdeo Prosad Agarwalla is not a necessary party and his presence is not required for the purpose of proper adjudication of the disputes between the plaintiff and the defendant. In the case reported in AIR 1974 Cal 358 it had been held that a person is not to be added as a defendant merely because he or she would be incidentally affected by the judgment. The main consideration is whether or not the presence of such a person is necessary to enable the Court to effectually and completely adjudicate upon and settle the questions involved in the suit. If the question at issue between the parties can be worked out without any one else being brought in, the stranger should not be added as a party. Similar view had been expressed in the case reported in (1981) 1 Cal LJ 252 : (AIR 1980 Cal 106) where it has been held by a Division Bench of this High Court that the Court would surely not encourage any attempt to implead a party who may be called a spectator or a dummy defendant. The plea of bringing one on record simply to watch proceedings is not proper. Similar views have been expressed in the case reported in AIR 1968 Mad 287 where in paragraph 2 it has been observed that

a proper party is one without whose presence the questions in the suit cannot be completely and effectually adjudicated upon. If he is neither a necessary party nor a proper party, the court has no jurisdiction to add him as a party. In view of the facts and circumstances of the case it appears that no order can be passed on the plaintiff's application inasmuch as Ramdeo Prosad Agarwalla is neither a necessary party nor proper party to be joined in as a defendant without whose presence the dispute by and between the plaintiff and the defendant cannot be adjudicated effectually and completely by this Court. In view of the fact that the alleged claim of Ramdeo Prosad Agarwalla as on today stands barred by the laws of limitation, it would not be proper and not fair to add him as a party to this suit.

3. In the circumstances, I dismiss this application with costs.

Application dismissed.

AIR 1982 CALCUTTA 439

M. M. DUTT AND

MONOJ KUMAR MUKHERJEE, JJ.

Director of Enforcement, Enforcement Directorate, Calcutta and others. Appellants v. Bird & Co. Pvt. Ltd. and others, Respondents.

A. F. O. O. No. 153 of 1976 in Matter No 399 of 1973, D/- 8-2-1982.

(A) Foreign Exchange Regulation Act (7 of 1947), S. 19 (2) — Notice under S. 19 (2) — Authority issuing it had not applied its mind before issuing it — Notice invalid. (Para 2)

(B) Foreign Exchange Regulation Act (7 of 1947), S. 19 (2) — Notice under — Authority issuing it, not empowered to issue the same under Sec. 19 (2) — Notice invalid — Appropriate Authority given opportunity to issue valid notices. (Para 2)

D. K. Sen with T. K. Basu, for Appellants.

M. M. DUTT, J. :— This appeal has been preferred by the Director of Enforcement, Enforcement Directorate, Calcutta, and others against the judgment of A. N. Sen, J. (as His Lordship then was) whereby the learned Judge struck down the two notices, one dated Nov. 22, 1963 and the other dated May

DZ/EZ/B669/82/VSS/SNV

18, 1967 issued under Sec. 19 (2) of the Foreign Exchange Regulation Act, 1947.

2. The notice dated Nov. 22, 1963 was struck down on the ground that the authority issuing the notice had not applied its mind before issuing the said notice under S. 19 (2) of the Act. So far as the notice dated May 18, 1967 is concerned, it was held to be invalid as the authority issuing the notice was not empowered to issue the same under S. 19 (2) of the Act. After considering the submissions made on behalf of the appellants, we are of the view that the learned Judge was justified in striking down the notices on the ground that the same were not issued in conformity with the provisions of S. 19 (2) of the Act. The learned Judge directed the Customs Authorities to return to the respondents writ petitioners the documents which were not relevant for the purpose of the pending cases against the respondents under the Customs Act and the Customs authorities were ordered and directed to return all such documents to the respondents writ petitioners on the expiry of the period of three months from the date of the order of the learned Judge, if within the said period no valid notice under the Foreign Exchange Regulation Act was served on the respondents writ petitioners by the appropriate authority, requiring production or making over of the documents in the custody and possession of the Customs authorities. In our view also, the appellants should be given an opportunity to issue notices in accordance with law and in compliance with the direction given by the learned Judge. In the circumstances, we direct that the documents should be returned by the Customs authorities to the respondents writ petitioners on the expiry of a period of two months from date unless valid notices in accordance with law are issued by the appropriate authorities concerned requisitioning the documents within the said period. The notices, if issued, shall specify the documents which are considered to be relevant by the authorities concerned.

3. The appeal is disposed of as above.

4. There will be no order as to costs.

MONOJ KUMAR MUKHERJEE, J. :-

I agree.

Appeal dismissed.

AIR 1982 CALCUTTA 440
SABYASACHI MUKHARJI AND

C. K. BANERJI, JJ.

I. T. C. Ltd., Appellant v. George Joseph Fernandez and another, Respondents.

Appeal No. 75 of 1981, D/- 3-2-1982.*

Arbitration Act (10 of 1940), S. 34 — Stay of suit — Application for — Court has discretion to decide validity of contract impugned as void, in summary proceedings of application under S. 34 — Charterparty agreement in respect of imported trawlers — Charterer undertaking to repair refrigeration system of trawlers — Contract cannot be said to be void on ground of mutual mistake as to defects in refrigeration system — S. 14 of Limitation Act — Applicability of, to arbitration proceedings. (Imports and Exports (Control) Act (18 of 1947), S. 5; (ii) Limitation Act (1963), S. 14).

While determining in an application for stay of suit whether the matter is arbitrable or not within the arbitration clauses agreed between the parties the Court should confine itself to the pleadings and not embark upon the examination of the question whether the case pleaded was correct or genuine or not, it is also true that where a issue arose as to whether the contract which contained the arbitration clause was arbitrable or not whether that issue be decided in a suit or application under S. 34 was a matter of procedure and the Court must exercise the discretion in this matter properly. (Para 7)

A charterer of two fishing trawlers imported under import licence which imposed certain obligations on the owner filed a suit to have the charterparty contract with arbitration clause, declared void on the ground that the same was entered into under a mutual mistake of fact as to an essential condition of trawlers, i.e. their refrigeration system and also on the ground that there was violation of Import and Export Control Act in respect of the contract and on the ground that the modification of the agreement was illegal. The contract was entered into after obtaining permission of the Chief Controller of Imports and

*Against judgment and order passed by Salil Kumar Roy Choudhury, J., in Matter No. 306 of 1979, D/- 11-2-1981.

Exports. Under the contract the trawlers were to be delivered to the charterer to ascertain the repairs to be carried out to the trawlers for making them fully operational without any defect whatsoever and also to ascertain the cost of such repairs and thereafter to undertake the repairs at the cost of the owner and bring them to fully operational condition without any defect including all aspects of refrigeration equipment. The trawlers were accordingly delivered to the charterer and repairs were carried out. There was no allegation and no proof during the long period that preceded the institution of the suit as to what actually were the defects in the refrigeration system which could not be repaired or which made the trawlers different from what the parties had agreed to take under the contract. The plaintiff charterer was used to using trawlers and they had technical advice and inspection of trawlers before. Indeed in this background there was nothing else in view of the statement in the annual report of the charterer company for the year that ended after chartering of trawlers which specifically referred to 'two Mexican Trawlers' and it was stated therein they had certain initial defects and these had been overcome. The owner of the trawlers filed an application for stay of suit and a single Judge of the High Court accepted it by holding that there was no mutual mistake while entering into the agreement as to basic condition of the trawlers, i.e. refrigeration system of the trawlers and the matters were arbitrable under the wide arbitration clause in the contract. The exercise of discretion in determining the validity of the contract in summary proceedings under S. 34 was challenged.

Held : (i) the single Judge was not in error in holding that there was no mutual mistake whereby the contract could be avoided. The averments made in the pleadings in the background of the facts and circumstances of the case and the admitted documents do not make out a case of such a mutual mistake as to the quality of the thing contracted for which affected the assent of the parties, if that was so, then it could not be said that even if these defects were there, these defects would not make the contract a contract for a thing for which the parties did not bargain. As there was no case of fraudulent misrepresentation

there was no scope for any allegation of mutual mistake or mistake of the plaintiff charterer. (Para 7)

(ii) As in the original charterparty agreement there was permission of the Chief Controller the subsequent modification of the agreement in respect of the rental to be paid thereunder was not such which affected in view of the fact that the owner of the license had fulfilled the obligations imposed upon him before entering into the agreement and, therefore, there was no non-compliance with the provisions of the Imports and Exports (Control) Act. (Para 8)

(iii) As the counsel for the owner of trawlers gave an undertaking not to raise the question of limitation before arbitration, in the facts and in the circumstances of the case and in view of the principles embodied in S. 14 of the Limitation Act which are applicable to arbitration there was no ground for not exercising the discretion in favour of the owners under S. 34 of the Arbitration Act on the plea that claim of the charterparty might become barred before the arbitrator. (Para 2)

Cases Referred : Chronological Paras

AIR 1978 Cal 307	5
AIR 1978 Cal 386	10
AIR 1978 Cal 407	5
AIR 1977 SC 536 : 1977 Tax LR 1638	9
AIR 1977 SC 640	11
AIR 1975 SC 1039 : 1975 Tax LR 1529	11
(1971) 75 Cal WN 767	10
AIR 1967 Cal 372	10
AIR 1960 Andh Pra 625	11
1957 AC 136 : (1957) 2 WLR 254	101
SJ 128, Sheikh Brothers Ltd. v. Arnold Julius Ochsner	6
AIR 1955 SC 53	2
AIR 1954 Bom 309	10
(1949) 53 Cal WN 505	5
AIR 1944 Lah 136 (FB)	11, 17
1932 AC 161 : 146 LT 258 : 101 LJKB	
129, Bell v. Lever Bros	5, 7
AIR 1929 PC 103	10
AIR 1919 Cal 381	11
(1871) 6 QB 597 ; 25 LT 329 : 19 WR	
1059, Smith v. Hughes	6
(1867) 2 QB 580 : 17 LT 62 : 15 WR	
1039, Kennedy v. Panama etc. Royal Mail Co.	6

Dipankar Gupta with Bhaskar Gupta, for Appellant; A. C. Bhabra with B. L. Vyas, for Respondent No. 1.

SABYASACHI MUKHARJI, J.:— This is an appeal from a judgment and order passed by Mr. Justice Salil Kumar Roy-

choudhury on 11th of February, 1981 granting the stay asked for and directing the parties to take immediate steps for initiation of the reference under the arbitration agreement contained in the contract mentioned in the plaint. The judgment was passed on an application under S. 34 of the Arbitration Act, 1940 for stay of Suit No. 736 of 1978 instituted by I. T. C. Ltd. v. G. J. Fernandez. Before I refer to the relevant averments in the plaint it will be important to understand the background under which this application came to be made. The suit was filed on 29th of September, 1978 by the Charterer, for a declaration that the contract and modifications mentioned in the plaint were void and illegal and a decree for Rs. 39,64,341/- or an enquiry as to what amount was due to the plaintiff. In that suit instituted by I. T. C. Limited there were two defendants namely, G. J. Fernandez who was defendant No. 1 and secondly, Canara Bank, defendant No. 2. George Joseph Fernandez being the defendant No. 1 made an application on 24th of April, 1979. George Joseph Fernandez was the absolute owner of two fishing Trawlers Avemaria I and Ave Maria II registered under Nos. 1567 and 1568 dated the 30th of January, 1974 with the Registrar of Indian Ships, Cochin. The said trawlers were imported by the said petitioner under an import licence No. P/CG/2062299 dated 3rd of March, 1971. As good deal of arguments were advanced on the conditions of licence it would be relevant to refer to some of the relevant provisions of the licence. The licence was headed "Industry Processed Food (Fishing)". Under Column No. 2 the description and quality of the goods were indicated as two Nos. of fishing trawlers as per list. The approximate value of CIF was stated to be Rs. 23,55,000/- only. The period of shipment was indicated 12 months the date of issue and revalidated up to 6th of January, 1973. The licence was granted, under Govt. of India, Ministry of Commerce and Industry Order No. 17/55 dated 7th of December, 1955 as subsequently amended, issued under the Import and Export Control Act, 1947 and was without prejudice to the application of any other prohibition or regulation affecting the importation of the goods which might be enforced at the time of their arrival. In the instruction columns it was stated that the provision which

was inapplicable should be struck off. It was further stated that the licence was issued from file No. CGIII/25/143/71. In column I which was not struck off, indicated as follows:—

"(i) This licence is issued with an initial validity period of twelve/twenty-four months from the date of issue. It will be revalidated at or before the end of the said period of twelve-twenty-four months, for a further period of two-one year(s), upon request provided the licensing authority is satisfied that a firm order has been placed on and accepted by the foreign supplier but shipment could not be effected within the initial validity period of the licence. Normally the validity period will not be extended beyond three years from the date of issue.

(ii) This licence will be subject to the conditions in force relating to the goods covered by the licence, as described in the relevant import Trade Control Policy Book, or any amendment thereof made up to, and including, the date of issue of the licence, unless otherwise specified.

(iii) It is also the condition of this licence that:—

(a) where an irrevocable letter of credit is opened by the holder of licence to finance the import of any goods covered thereby, then the authorised dealer in foreign exchange through whom the credit is opened shall be deemed to be a joint holder of this licence to the extent of the goods covered by the credit.

(b) The goods imported under this licence will be utilised in the licence holder's factory and that no portion thereof will be sold to or be permitted to be utilised by any other party or pledged with any financier other than Banks authorised to deal in the foreign exchange and State Financial Corporation provided that particulars of goods to be pledged are reported by the licensee in advance to the licensing authority.

(c) a half yearly return in the attached pro forma shall be furnished by the licensee to the Director of Statistics, Office of the Chief Controller of Imports & Exports, New Delhi, indicating the actual imports and remittance made against the licence as on 28th February, and 31st August, each year. The return for each half year shall be furnished within a period of 15 days from the close of the half year as indicated."

Clause (d) of sub-clause (iii) was not printed because it was not applicable. Column (iv) is also not relevant. Cl. 3 was as follows:—

"3. The licence shall also be subject to the conditions mentioned in APP 31 to the ITC Hand Book of Rules and Procedure 1970."

Clauses 4 and 5 are also not relevant for our present purpose. The Code of export conditions attached to the import licence in question contained, inter alia, the following clauses:—

"1. The proprietor of the licensee firm shall give a personal guarantee to the effect that the value of the export of fish and fish products during a period of seven years from the date of acquisition of the trawlers will not be less than Rupees 47,10,000/- (Rupees forty-seven lakhs and ten thousand only) and that the licensee shall become a member of the Marine Products Export Promotion Council, if already not a member and shall continue to be a member during this seven year period and shall send periodical returns to the Council and the Ministry of Foreign Trade and Dy. CCI & E, Ernakulam, giving information regarding export preformance. The above exports should be over and above the licensee's present level of exports. and if, and will be in addition to any export obligation the licensee might have given in respect of any other import of capital goods or otherwise".

"6. The licensee shall furnish to the Deputy Chief Controller of Imports and Exports, Ernakulam, before clearance of the goods, imported against this licence, from Customs, the personal guarantee and the Bank Guarantee stipulated in paras 1 and 2 above."

"7. The goods covered by this import licence shall not under any circumstances be released by the Customs authorities unless the personal guarantee and Bank Guarantee as stipulated in para 6 above has been furnished by the licensee."

It appears that sometimes after the grant of the licence the fishing trawlers were imported from Mexico and were hypothecated to Canara Bank. It appears from the reading of the plaint that the said defendant No. 2 being the present respondent No. 2 was made only a pro forma defendant to the suit. On the 21st of March, 1977 there was a Charterparty Agreement between the owner namely,

defendant No. 1, and the petitioner herein and the I. T. C. Limited for letting the trawlers for a term of 2 years from the date of actual delivery on certain terms. As the contentions of the parties turn on the effect of these terms it would be appropriate to refer to some of the terms. In the recital it was stated that this was a Bare Boat Charterparty made on the 21st of March, 1977 between defendant No. 1, the proprietor and I. T. C. Limited and it was stipulated that the defendant No. 1 would be described in the agreement as the owner and I. T. C. Limited would be described as the Charterer. The recital further went on to observe as follows:—

"3. The owner has undertaken to obtain permission in writing of the Chief Controller of Imports and Exports, Government of India and the No-objection Certificate of the Canara Bank for chartering the trawlers to the Charterers."

"1. The owner shall obtain the permission in writing of the Chief Controller of Imports and Exports, Government of India and the No-objection Certificate from the Canara Bank to charter the trawlers to the charterer. This agreement shall receive from the Chief Controller of Imports and Exports and from the Canara Bank permission and No-objection Certificate respectively."

"2. Within 7 days of the receipt of the approval of the JOCIE or the No-objection Certificate from the Canara Bank whichever is later the owner shall deliver the said trawlers to the Charterer at the Port of Vishakhapatnam for carrying out an inspection of the said trawlers by its Authorised Agents to ascertain the repairs to be carried out to the trawlers for making them fully operational without any defect whatsoever and also to ascertain the cost of such repairs. Thereafter the Charterer shall undertake the repairs at the cost of the owner and bring them to fully operational condition without any defect including all aspects of refrigeration equipment. The Charterer will then conduct fishing trials to ascertain the actual condition of the trawlers and in case the condition is fully satisfactory according to the Charterer and the owner furnishes to the Charterer all documents certifying seaworthiness and also supplies sufficient proof that all port charges, pilotages and all pre-conditions to the lawful operations of the trawlers

have been complied with the Charter hire shall commence on and from the date the fishing trials are ended.

The cost of the repairs as mentioned above shall be borne by the charterer initially who will have the right to set off and adjust the said cost against the first quarterly instalment of the charter hire reserved hereunder and as stipulated hereinafter and if there is any balance left, it will be adjusted against the subsequent monthly instalments in their entirety until the cost of repairs undertaken by the charterers shall be fully set off and adjusted against charter hire reserved hereunder."

Clause 3, Clauses 4, 5, 6, 7, 8 and 9 are not relevant for our present purpose. Clause 10 was as follows:—

"10. (1) The charterer shall pay to the owner for the use and hire of the trawlers Rs. 50,000 per trawler per month from the date of actual delivery and acceptance of each trawler to the charterer at Vishakapatnam. The charter hire shall be payable in advance every month. However the charter hire for the first three months of the charter period in advance at the time the trawlers are delivered to the charterer in accordance with this agreement. The charter hire shall continue to be paid up to and including the date of re-delivery of each trawler to the owner at Vishakapatnam (unless lost/sunk). The charterer will have no right to adjust the charter hire charges against the deposit paid by it to the owner or against any other claims of the charterer, except as provided in this agreement.

(ii) The charterer agrees to keep a deposit of Rs. one lakh per trawler with the owner during the period of the charter. This deposit will be paid by the charterer at the time of taking delivery of each trawler and will not bear any interest and will be adjusted by the charterer towards the charter hire due to the owner against the last two months of the charter period."

Clauses 11, 12, 13, 14, 15, 16 and 17 are not relevant for our present purpose. Clause 18 contained the arbitration clause which was as follows:—

"18. Any dispute or difference at any time arising between the parties hereto in respect of the construction meaning or effect or as to the rights and liabilities of the parties aforesaid hereunder or any matter arising out of this Agree-

ment, shall be referred to arbitration in accordance with and subject to the provision of the Indian Arbitration Act, 1940 or any statutory modification or re-enactment thereto for the time being in force and the venue of Arbitration shall be Madras or Calcutta, and not elsewhere and the Award or Awards in such arbitration shall be made a rule of Court of competent jurisdiction at the instance of either party."

It is the case of the respondent to this appeal being the applicant under S. 34 of the Arbitration Act, and defendant No. 1 to the suit that by 28th of February, 1976 the export obligation in the licence had been fulfilled and guarantee bond was cancelled by the Chief Controller of Import and Export. It appears further that on 10th of July, 1977 the trawlers were delivered to the charterer for repairs. On 1st of August, 1977 there was a telex message from the charterer to the owner forwarding the message from the Canara Bank by which the bank signified their non-objection to the vessels being chartered subject to the condition that the bank would have the first charge over the said two trawlers and that payment arising out of the Charter Party Agreement such as advance rent and monthly rental were to be channelled through Canara Bank only and the lease agreement, the copies of which were to be given to the bank and the period of the lease agreement to be intimated. The charterer was agreeable to those terms. Thereafter, repairs commenced. It is not clear from the petition as to the actual date. On the 17th of August, 1977 permission was given by the Chief Controller, Import and Export to charter the two vessels at Rs. 50,000 per month per trawler to I.T.C. for a period of 3 years. It would be appropriate to refer to the letter dated 17th August, 1977 which contained as follows:—

"Gentlemen,

With reference to your letter No. EEE; F24; 1010 dated 2nd May, 1977 on the above subject, I write to say that it has been decided to allow the charting of the two trawlers imported by you against your licence No. P/CC/2062299 dated 3rd March, 1971 on a charter rental of Rs. 50,000 per month per trawler to Messrs I.T.C. (India) Ltd. Calcutta for a period of three years."

Thereafter, on 30th of September, 1977 the plaintiff took out insurance cover with effect from 30th of September, 1977. Thereafter formal delivery was given for repairs as it appears from the averments made in paragraph 8 of the plaint about which we shall presently refer. On 12th of November, 1977 there was a letter from the owner to the charterer asking for payment of the hire from October 1, 1977. In that letter written in the trade name of the respondent to the appellant dated 12th of November, 1977 it was stated, inter alia, as follows:—

"The above two trawlers were handed to you for dry-docking and effecting necessary repairs, as early as 10th July, 1977. But, unfortunately there has been undue delay and it is not known when the repairs would be completed.

As you know your Mr. B. P. Singh and our Mr. Fernandez were not in favour of Mr. Sundaram. But in view of the good work done earlier by him in respect of Electronics items, and his assurance that he will do quick work. Mr. Sundaram was accepted for Refrigeration and also Hydraulics' work when Mr. Fernandez was here last, he made it clear to Mr. Sundaram that the whole Refrigeration System should be made perfect on both trawlers including Hydraulics, through capable men, latest by 25th September, 1977. But this work is still to be completed and we do not know when.

Subsequently we understand, you had engaged Mr. Sundaram for other works also, like Electrical, Electronics, including Auto Pilot, R.T. etc. and for every thing he is looked up to. Unfortunately his men are not regularly present or working, with the result, there is little or no progress.

In view of the fact there has been inordinate delay, you shall make the charter charges, payable to us, which has become effective from 1st October, 1977 for both trawlers, irrespective of when the trawlers will be completely repaired, including the refrigeration and Hydraulic System, or when the same will be sent out to sea for fishing.

Also kindly arrange to pay the Port charges with effect from 1st October, 1977 for both trawlers."

2. By a letter dated 22nd November 1977 the owner again asked the charterer to pay the rental of the two vessels from 1st October 1977 and also for de-

positing Rs. 2,00,000 and it was stated that Mr. Sundaram who was engaged to carry out the refrigeration work at the instance of the charterer had neither the capacity nor the organisational set up even to commence the work in right earnest. In the letter dated 28th of November, 1977 from the charterer to the owner it was informed that the trawlers had been insured for one year from 30th Sept., 1977 to 28th Sept., 1978. On 2nd of Feb., 1978 there was an agreement between the owner and the charterer modifying the Charterparty dated 21st March, 1977 in certain respects. The said agreement dated 2nd of February, 1978 after reciting the past events stated, inter alia, as follows:—

"Now it is hereby agreed by and, between the parties hereto as follows:—

1. Clause 2 of the Agreement dated 21st March between the parties hereto (hereinafter called the "Original Agreement") will be substituted by the following clause numbered as 2.

The charter hire of the trawlers has commenced from 15th day of January, 1978.

The Charterer has incurred substantial expenses on repairs of the two trawlers which are the subject matter of this agreement. It is strictly understood and agreed between the parties hereto that the owner will bear only Rupees 1,50,000 per trawler of such repair expenses for repairs already carried out up to the date of commencement of the charter hire.

The Charterer will have the right to set off and adjust the abovementioned sum of Rs. 1,50,000 per trawler (i.e. a total of Rs. 3,00,000) against the charter hire reserved hereunder. Such adjustment will commence with effect from the four of the month of the charter and the sum of Rs. 1,50,000 per trawler will be recovered by way of such adjustment in ten equal monthly instalments."

It was stipulated that the charter hire was to commence from 15th of January, 1978 and the owner was to bear the repair expenses to the extent of Rupees 1,50,000 for each trawler to be adjusted against rental from the 4th month of the charter in equal monthly instalments and the rental would be Rs. 53,000 per month from the first month of the year and for subsequent months Rs. 52,000 and the deposit of Rs. 100,000 for each trawler to be kept. It appears that by the first week of February, 1978 Rs. 2,00,000 was

deposited and hire of Rs. 4,70,000 up to May, 1978 was paid. Our attention was drawn to a portion of the Director's report of the appellant company for the year ending 31st March, 1978 and it would therefore be appropriate to refer to the said relevant extract which has been printed in the Paper Book at page 178. There it was stated, *inter alia*, as follows:—

"The company has already established itself as a substantial exporter of Marine Foods. During the course of the year Rs. 3.85 crores worth of Marine foods was exported.

The company acquired two Mexican Trawlers and although there were certain initial difficulties in the commissioning of these boats, these have now been overcome. The two Japanese vessels on charter mentioned in the Director's Report for the previous year have now been purchased and with your Company having chartered two more Mexican Vessels, a fleet of 6 large Trawlers is now operating, thus ensuring a firm basis for the procurement of quality raw materials.

A substantial drop in the prices of exportable shrimps during the financial year adversely affected many of the exporters, including your Company. Prices have however now recovered from the low levels that prevailed at the end of 1977 and the Company can once again look forward to improved trading results."

On 18th of July, 1978 there was a letter from the charterer to the owner sending hire up to July, 1978 against adjustment of the repair charges. On 14th Sept. 1978 the letter from the charterer to the owner stated that the charterparty was illegal and in breach of the permission of the Chief Controller of Import and Export and as such was void. It was also stated that the modification was also void and the charterparty had become impossible of performance and asking the trawlers to be taken back. On 16th Sept. 1978 there was a letter from the owner to the charterer confirming a telegram sent on 16th Sept. 1978 and holding the charterer liable under the agreement and objecting to the unilateral termination of the contract and denying the allegations in the charterer's letter dated 14th Sept. 1978. On 29th of Sept. 1978 Suit No. 736 of 1978 was filed by the charterer against the owner which was the subject matter of the said ap-

plication under S. 34 of the Arbitration Act and is also the subject matter of the present appeal. In paragraph 5 of the plaint it was stated that in or about August, 1977 Canara Bank had intimated that it had no objection to the defendant No. 1 chartering the said trawlers to the plaintiff subject to certain terms and conditions and it was further alleged by the present appellant that all of which were complied with and accepted. It was further stated in the plaint that there was a purported permission granted to the respondent No. 1 to the present appeal by the Chief Controller of Imports and Exports who chartered the trawlers to the plaintiff for a charter rental of Rs. 50,000 per month per trawler for a period of three years. Thereafter, the modifications referred to the charterparty agreement dated 2nd of Feb. 1978 were indicated and it was described as purported modification. Thereafter, the plaint alleged in paragraphs 10, 11 and 12 as follows:—

"10. The said purported permission dated 18th August, 1977 granted by the Chief Controller of Imports and Exports to the defendant No. 1 for chartering the said trawlers to the plaintiff was given under the said import licence of the defendant No. 1. Such purported permission was given subject to two conditions, namely, that the charter rental would be Rs. 50,000 per month and that the charter would be for a period of 3 years. The said purported agreement dated the 21st March, 1977 was in fact for a period of 2 years with an option to the plaintiff to continue the hiring for a further period of 3 years. The said purported agreement, therefore, was in contravention of and contrary to the terms of the said purported permission and consequently the said import licence. The said purported agreement was or is illegal, against public policy and void.

11. Alternatively, or in any event, the said purported agreement dated 21st March, 1977 was contingent contract, the future events on which the contract was contingent being the receipt of the no-objection certificate from the Canara Bank (the defendant No. 2 herein) and the permission of the Chief Controller of Imports and Exports for chartering the trawlers to the plaintiff on the terms and conditions as agreed between the plaintiff and the defendant No. 1. The purported permission of the Chief Controller of Imports and Exports did not

approve of or give permission in the said purported agreement dated 21st March, 1977 but purported to approve of or give permission for different forms or an agreement containing different terms; and as such, no permission, rated or otherwise was at all given for the said purported agreement dated 21st March, 1977. In the premises as aforesaid the said agreement was in violation of the provisions of the Imports and Exports (Control) Act 1947 and was and/or became illegal, void and inoperative.

12. The purported modification agreement dated 2nd February, 1978, which, inter alia, provided that the charter rental would be Rs. 53,000, in the first month of the year beginning 15th January, 1978 and Rs. 52,000 per month for the subsequent months, was also in contravention of the said purported permission dated 18th August, 1977 of the Chief Controller of Imports and Exports and consequently in contravention of the said purported licence according to the allegations in the plaint. There was no or no valid permission for the said modification agreement and as such the same was in violation of the provisions of the said Act, as much illegal, against public policy and void.

In paragraphs 14 and 15 it was stated as follows:—

"14. Further, the plaintiff states that after various tests, trials and repair works made on the trawlers it was found in or about August, 1978, that there are several inherent and latent defects in the refrigeration system of the said trawlers, which is an essential part of such trawlers and which such defects were not discoverable by ordinary diligence at the time of entering into the said purported agreement dated 21st March, 1977 or at the time of said purported modification thereof. Those defects are such that without changing the entire refrigeration system and/or without incurring expenses which would be prohibitory, unreasonable and/or prohibitory, it is not possible to remove or

(contd. on col. 2)

rectify the same. The trawlers could not and cannot be made fully operational and free from any defects whatsoever, by making repairs as contemplated by the said purported agreement and the modification thereof. The particulars of some such defects are given in a schedule annexed hereto and marked "C". The plaintiff craves leave to treat the said schedule as a part of this plaint.

15. Further and/or in any event the plaintiff states that the plaintiff and the defendant No. 1, entered into the said purported agreement dated 21st March, 1977 and the purported modification thereof dated 2nd February, 1978 on the basis of essential and fundamental assumption that the trawlers could be made fully operational and free from all defects by effecting repairs so contemplated thereby. Such assumption was mistaken and not true and was subsequently discovered to be so mistaken. In the premises the said purported agreement modified as aforesaid was and is void."

After setting out the other facts as we have mentioned hereinbefore it was claimed that the charterer being the respondent No. 1 to this appeal was bound to pay the compensation for all the advantages which it had received under the said purported agreement dated 21st of March, 1977 and the purported modification thereof and the costs, charges and expenses which the plaintiff has incurred on the said trawlers. It was further alleged that such compensation incurred on the said trawlers was assessed at Rs. 39,64,341 the particulars whereof were given in Schedule 'D'. The said Annexure 'D' was comprised of the following:—

(For annexure 'D' see below)

It was further claimed in the alternative in paragraph 19 that in supplying the said trawlers the defendant No. 1 committed a fundamental breach of the said purported agreement dated 31st March, 1977 and the purported modification thereof which went to the root and affected the very substance of the same

"Annexure 'D'

	Ave Maria I	Ave Maria II	Total
1. Charter Hire	2,94,000	2,94,000	5,88,000
2. Deposit	1,00,000	1,00,000	2,00,000
3. Payment against Spares	6,000	87,000	1,35,000(?)
4. Expenses up to 31st August, 1978.	15,38,795	15,04,546	30,41,341
	19,98,895	19,66,046	39,64,341"

and which made performance thereof impossible. Such a breach on the part of the said respondent it was further alleged had produced a situation fundamentally different from which the parties could not have reasonably contemplated when the said agreement and the modifications were entered into. The plaintiff, it was further alleged, had not been able to obtain any benefit out of the said trawlers and the appellant being the plaintiff never was nor was bound by any obligation under the said purported agreement dated 21st March, 1977 and the purported modification thereof and was entitled to and had duly rescinded the same and the plaintiff had in the premises suffered loss and damages which the respondent No. 1 was bound to compensate. It was alleged that such loss and damages were assessed reasonably at Rs. 39,64,341. For this purpose also reference was made to the particulars mentioned in the said schedule. In the further alternative, it was claimed that the plaintiff was entitled to recover the said sum of Rs. 39,64,341 as per particulars given in the Schedule 'D' as money paid to and/or on account of the respondent No. 1 and expenses so incurred. Thereafter, the plaintiff claimed, inter alia, a declaration that the said purported agreement dated 21st March, 1977 and the purported modification thereof dated 2nd of February, 1978 were and are illegal, against public policy and void; for a decree for Rupees 39,64,341-00 as per particulars mentioned in Schedule 'D' or alternatively an enquiry. There was also an enquiry claimed in the further alternative. A letter was written to the charterer by Mr. Sampat Kumar, Advocate for the respondent No. 1 on 9th of Oct., 1978. There was letter prior thereto on the 27th of September, 1978 from the Charterer to Mr. A. N. Huskar, Chairman ITC Limited making the grievance of the unilateral repudiation by the ITC Limited of the contract to charter fishing trawlers. The other relevant letters to which we must refer is the letter dated 23rd of Nov., 1978 nominating one Mr. K. S. Venkataraman, I.C.S., retired Judge of the High Court at Madras as the Arbitrator of the respondent No. 1. This letter was written on behalf of the character being the respondent No. 1 herein. On the 12th of Dec., 1978 I.T.C. Limited replied that this suit had been filed on 29th of Sept., 1978 as indicated

before it was not in a position to participate in the arbitration. On the 12th of March, 1981 a letter was written by the respondent No. 1 to I.T.C. Limited which is as follows:—

Dear Sirs,

Whereas by the Bare Boat Charter Party Agreement dated 21st March, 1977 between G. J. Fernandez, Proprietor, Esmario Export Enterprises, Kanand, Quilon, Kerala State and M/s. I. T. C. Limited, Virginia House, 37, Chowringhee, Calcutta-700071, as modified by the agreement dated the 2nd February, 1978 between the said two parties it was agreed inter alia that any dispute, difference at any time arising between the parties hereto in respect of the construction, meaning or effect or as to the rights and liabilities of the parties aforesaid hereunder or any other matter arising out of the agreement shall be referred to arbitration in accordance with and subject to the Indian Arbitration Act, 1940 and the venue of the arbitration shall be in Madras or at Calcutta and not elsewhere.

2. Whereas the dispute have arisen between the said parties arising out of the said agreement.

Now, therefore, I.G.J. Fernandez hereby nominate and appoint Mr. K. S. Venkataraman, I.C.S. Retired Judge of Madras High Court, 'O H M' Prithivi Avenue Madras-600018 as the arbitrator to hear and determine the dispute aforesaid in accordance with the provisions of the said agreement. I call upon you to concur on the said appointment of Mr. K. S. Venkataraman as such Arbitrator.

Please send the reply immediately."

Thereafter, an application was moved under S. 34 of the Arbitration Act for the stay of suit by ITC Limited, the present appellant, on 24th of April, 1979 and after affidavits the matter ultimately was disposed of by the judgment and order of the learned trial Judge dated 11th of February, 1981 as mentioned hereinbefore.

2-A. After setting out the letters the learned Judge observed that the letters indicated that the transaction was given effect to and acted upon by the parties and the parties understood what was the agreement and what were the terms. The learned Judge thereafter referred to the averments made in the plaint the substance of which we have set out

hereinbefore. The learned Judge observed that the pleadings required for fundamental breach, mistake and illegality had been pleaded by artful drafting filing the plaint through competent lawyers on legal advice. The learned Judge came to the conclusion that there was no basis for the cause of action in the plaint and of the alleged discovery of mistakes as to the essential conditions that is, the refrigeration system being defective was a patent defect and also illegality, modification, frustration, lack of consideration and impossibility of performance of the contract were all afterthoughts. The learned Judge observed several authorities that was cited before him. A submission was made that these questions could not be gone into in an application under S. 34 nor were these questions capable to be decided on affidavits and where the learned Judge doubted the bona fides of the statements then the matter should have been tried on evidence. The learned Judge thereafter made a categorical finding that in the instant case there was no mistake and in any event there was no question of mutual mistake on the date of the agreement as the fact that the refrigeration system of the said two trawlers needed repairs was known to both the parties and the appellant had undertaken to get the said repairs done at the cost of the petitioner through their nominated repairer about whose competency the respondent No. 1 had doubts. Thereafter, the learned Judge held that there was no question of any mistake at any time of the contract or at any time alleged by the appellant in the plaint. The learned Judge further went on to hold that chartering out a vessel was not contemplated and was not within the operation of Appendix 31 of the hand book and the relevant clauses which were applicable to the present case namely, Clause 5 being one of the conditions regarding the use or disposal of the imported goods stated as follows:—

"Import licences issued to actual users shall be subject to the condition that the licensee shall use the material imported thereunder only for the purpose for which the licence has been issued and no portion thereof shall be sold, disposed of or utilised in any other manner without the written permission of the licensing authority."

1982 Cal./29 IX G—17

Condition 8 was as follows:—

(8) C.G./HKP Licences, i.e. those issued to actual users for import of capital goods, machinery, heavy electrical plant or machine tools shall be subject to the following conditions inter alia:—

(a) the goods imported under the licence shall be utilised in the licence holder's factory at the address shown in the application against which the licence is issued, and for the purpose for which the licence is issued; and that no portion thereof shall be sold to or be permitted to be utilised by any other party or pledged with any financier other than Banks authorised to deal in the foreign exchange and State Financial Corporation, provided that particulars of goods to be pledged are reported by the licensee in advance to the licensing authority.

(b) The import of spare parts against this licence shall be governed by the provisions of paragraph 152 of the Import Trade Control Hand Book, of Rules and procedure in force at the time of shipment of the goods.

(c) The goods covered by this licence shall be used only for the manufacture of..... (name of end product(s) and for the capacity licensed under the Industries (Dev. & Reg.) Act, 1951 or approved by Government.

(d) a half yearly return in the prescribed pro forma shall be furnished by the licensee to the Director of Statistics, Office of the Chief Controller of Imports & Exports, New Delhi, indicating the actual imports and remittance made against the licence as on 28th February and 31st August each year. The return for each half year shall be furnished within a period of 15 days from the close of the half year as indicated." The learned Judge was of the view that the provision appeared to be applicable to raw materials used for manufacturing purposes and also for the transfer, mortgage, sale etc. of plant and machinery, it could be hardly said to apply to charterparty in respect of vessels which were imported for the purpose of deep sea fishing and in fact the same was used accordingly by the charterer and there was no question of any transfer affecting the ownership of the respondent in the licence in any way. Further, the learned Judge held that permission was in fact obtained, it was duly granted and as the modification of the charter

party had not affected the essential conditions it was not necessary to obtain further permission. In the premises, the learned Judge was of the view that there was no question of any illegality or any mutual mistake. He referred to several decisions to which attention has been drawn and he thereafter observed that if the validity of the contract was challenged the Court might go into it which might incidentally affect the question of the contract containing the arbitration clause in an application under S. 34 of the Arbitration Act for stay of the suit. Therefore, having regard to the principles laid down by the Supreme Court in the case of *Anderson Wright Ltd. v. Moran & Co.* (AIR 1955 SC 53) that the Court could go into the question of the validity of the contract which contained an arbitration clause whether the arbitration clause was valid or not. He, therefore, considered that question and having regard to all the facts he characterised the averments made as afterthoughts and the alleged difference on the question of fundamental breach, if any, according to the learned Judge, was fully covered by the arbitration clause as these related to the breach of the terms of the contract and was within the jurisdiction of the arbitrator within the wide arbitration clause in the present case. He, therefore, was unable to accept the submission that there was no valid arbitration agreement. Therefore the conditions for the fulfilment of stay under S. 34 of the Arbitration Act, according to the learned Judge had been fulfilled. He, therefore, granted a stay of the suit and directed the parties to take immediate steps for reference of the disputes to the arbitration.

3. It is the propriety and the correctness of the said decision of the learned Judge which are under challenge in this appeal before us.

4. In support of this appeal it was urged on behalf of the appellant that in order to decide whether stay under S. 34 of the Arbitration Act should be granted or not it was necessary for the Court to consider whether the case as pleaded or the issues as raised in the plaint were within the ambit of the arbitration clause to be adjudicated by the arbitrator and for this purpose the Court must confine itself to the pleadings in the suit and not embark upon the examination of the question whether the case pleaded was

correct or genuine or not. It was, secondly, urged that where the issue arose as to whether the contract was void ab initio, and as such the same was not arbitrable, then whether that issue should be decided in a suit or in an application was a matter of procedure and the Court must exercise its discretion properly, having regard to the magnitude and the nature of the evidence required to adjudicate the question. It was submitted that in the instant case it should not have been decided on affidavits in the application because it was urged that the issue as to mistake should not be disposed of summarily, in the facts and circumstances of the case it was better to decide the same in the suit and the issues involved in the suit should not have been decided piecemeal. It was, thirdly, urged that in view of the nature of the pleadings the plea of illegality of the contract as raised in the instant case was not a pure question of law because it involved the adjudication of the facts whether the parties had agreed to obtain the permission. Therefore, in view of the nature of the pleadings and the letters between the parties it was submitted that the question as to mistake which went to the root of the contract or as to illegality involved in this case could not and should not have been decided in this manner. In the premises, it was urged that in exercising his discretion in the manner he has done the learned Judge had proceeded erroneously. It was, further, submitted in support of this appeal that if the suit was stayed and the parties were directed to go before the arbitrator the claim of the plaintiff might be considered to be barred by law of limitation and if that was so then, this was a factor which should be taken into consideration in exercising the discretion of this Court even at the appellate stage in the matter of grant of stay under S. 34 of the Arbitration Act. It was, lastly, urged that the learned Judge overemphasised and was mistaken in taking a wrong view of the conduct of the plaintiff and basing his judgment on hypothesis that the plaintiff had pleaded the case in the manner it had done in order to avoid the jurisdiction of the arbitrator within the arbitration clause. It was, then, urged that the mistake which was pleaded in the facts and in the circumstances of the case was a mistake of such magnitude and was a mutual mistake which went

at the root of the contract and made the contract void.

5. Before we consider these contentions our attention was drawn to certain authorities dealing with the question as to how should the Court approach an application under S. 34 of the Arbitration Act, in the facts and in the circumstances of this case. Reliance was placed on behalf of the respondent as well as on behalf of the appellant to the decision of the learned single Judge at that time of this Court in the case of *Khusiram v. Hanutmal* (1949) 53 Cal WN 505 where it was held that where an application was made under S. 34 of the Indian Arbitration Act for stay of a suit and an issue was sought to be raised as to the formation, existence or validity of the contract containing the arbitration clause, the Court was not bound to refuse the stay but might in its discretion on the application for stay decide the issue as to existence or the validity of the arbitration agreement even though it might involve incidentally a decision as to the validity or existence of the parent contract. Our attention was drawn to the observations of the learned Judge at page 509 of the report where the learned Judge has set out the issues and one of the issues, *inter alia*, was that the parties were not *ad idem* and as such there was no contract and there was no arbitration clause. It was, further, pleaded in that case that the contract was void by reason of mutual mistake as to a fact essential thereto. Dealing with this contention at page 513 of the report after reference to several authorities the learned Judge observed that the Court had the power to decide on the application for stay whether an arbitration agreement subsisted for it was the subsistence of the arbitration agreement which alone could give jurisdiction to the arbitrator. Our attention was drawn on the observations dealing with the question as to in what manner the Court should dispose of such a contention. It was submitted that it was held by the learned Judge in that case that whether in a particular case the issue should be decided on affidavit evidence or should be relegated to a suit or the issue should be decided on trial on evidence, must depend upon the facts and the circumstances of a particular case, and must be adjudicated in the background of that particular case. It was open, according to the learned

Judge, to also consider the case as pleaded and find out whether the issues as to formation of the contract had been raised *bona fide* or merely to avoid the contract. In the facts and circumstances of the case the learned Judge examined the application and refused to grant stay. Our attention was drawn to the observations of this Court in the decision in the case of *General Enterprises v. Jardine Handerson Ltd.*, AIR 1978 Cal 407 where sitting singly I had held that stay should not be granted. In that case *Jardine Handerson Ltd.*, a registered company carried on the business of rendering advisory and technical services for remuneration to various other companies regarding the latter's Provident Fund, Pension Fund, Gratuity etc. M who was an actuary by qualification was an assistant and a whole time employee of the company. M represented that he needed assistance of an independent agent and at his instance an agreement was entered into between the company and *General Enterprises* under which the latter agreed to work as agent on commission. There was an arbitration clause in the contract for reference of dispute if any, to the Bengal Chamber of Commerce and Industry. Subsequently the agreement was terminated. There was some dispute about payment of commission. The company refused to pay on the ground that the firm of *General Enterprises* was consisting of the wife and daughter of M and one named lender partner. The contract, it was urged was obtained by fraud. The company filed a suit for a declaration that the contract was void. The *General Enterprises* referred the dispute to arbitration of Bengal Chamber and Commerce. It also filed an application in the Court under S. 34 of the Act for stay of the suit. In those circumstances, it was held that stay of suit should not be granted. At page 412 I had discussed the several authorities and at page 415 referring to the decision of *Khusiram Bannarsi Lal* (*supra*) I had observed that the Court in its discretion in a particular case might decide in S. 34 application as to the existence of the contract. More or less similar view was expressed by Mr. Justice S. K. Roychowdhury in the case of *Union of India v. Naresh Chand*, AIR 1978 Cal 307 where at pages 309 and 310 the learned Judge reiterated more or less the same principles,

6. Therefore, bearing the aforesaid principles in mind it is necessary to examine whether the allegations as pleaded really avoided the contract or in other words, whether there was any pleading of such latent defect which caused mutual mistake which made the contract void ab initio. In order to appreciate the principles which should be applied in examining the pleadings in this case reliance was placed on the observations in Anson's Law of Contract, 24th Edition and our attention was drawn to page 276 where the learned editor has given instances as to what kind of mistakes avoid the contract. In the examples *inter alia* in clauses (c) and (d) at page 276 of the book the editor has observed that (c) mistake as to the quality of the thing contracted for and (d) a false and fundamental assumption going to the root of the contract, avoid the contract. At page 280 the learned editor has referred to the decision in the case of *Bell v. Lever Bros.*, 1932 AC 161 to which we shall refer independently later. Our attention was also drawn to the observations as to the mistake as to quality which does not generally avoid the contract and where several examples were indicated. It would be desirable first to refer to the enunciation of the principles on this aspect to the observations in the case of *Bell v. Lever Bros. Ltd.*, 1932 AC 161. There one L. Company which held more than 99% of the share capital of the N Company agreed with one, B that he should be in the service of L Company for a term of years during which he should act as chairman of the board of directors of N Company at a salary of 8,000L a year. They made a similar agreement with an S that he should be vice-chairman of the board at a salary of 6000L a year. While acting as chairman and vice-chairman respectively B and S entered on their own account into secret speculations in cocoa, a commodity in which N Company dealt, of such character, as on the finding of the jury in answer to a specific question, would have justified L Company in terminating the agreement of service and the N Company in dismissing them from their offices of chairman and vice-chairman. Subsequently the N Company became amalgamated with another company and it became necessary to cancel the appointments of B and S as chairman and vice-chairman. Being unaware of the

aforesaid breaches of duty by B and S, the L Company agreed to pay to B 30,000L & to S 20,000L as compensation for terminating their services, B and S agreed to accept these sums and they were duly paid. The jury, in answer to a further specific question, found that the L Company if they have been aware of the breaches of duty by B and S would have terminated their agreement and B and S would have been dismissed from their offices without any compensation. The action in which the jury so found was brought in the first instance by the L Company alone and N Company joined in the course of proceedings as co-plaintiffs against B and S claiming rescission of the compensation agreements and re-payment of the sums paid thereunder on the ground of fraudulent misrepresentation and alternatively, as the House construed the points of claim, on the ground of unilateral mistake induced by fraud, but not on the ground of mutual mistake innocently made by the defendants so far as they were concerned. There was a specific alternative claim that the agreements of settlement and the payments under them were made under a mistake of fact. The jury negatived the charges of fraud and found that at the time of negotiating the compensation agreements B and S had not in mind their breaches of duty. Wright, J., was of the opinion on the construction of the points of claim that an issue based upon an allegation of mutual mistake was thereby raised and the Court of Appeal being of the opinion that if the issue was not raised the pleadings would be treated as amended in order to raise it, held that the compensation agreements were void having been made under a common mistake as to the legal relation between the parties and each party believing it, contrary to the truth, that one was entitled to claim and the other was bound to pay compensation. The Court of Appeal further held that such a case had not been raised before Wright, J., and each of the defendants owed a duty to the plaintiff to disclose their breaches of duty and their non-disclosure invalidated the compensation agreement. The defendants appealed. It was held first by Lord Blanesburgh, with special reference to the course of the trial and the circumstances of the case, that any amendment of their pleadings to enable the plaintiffs to raise the case of mutual mistake implying

good faith on the part of the defendants could not without injustices to them be allowed after an action based exclusively on fraud had failed and accordingly the issue was not open to the plaintiffs in the House of Lords. But on the footing that the points of claim were amended so as to raise them which it was held by Lord Blanesburgh, Lord Atkin and Lord Thankerton (Viscount Hailsham and Lord Warrington of Clyffe dissenting), that the action failed, as to mutual mistake on the ground that the mutual mistake related only not to the subject-matter, but to the quality of the service contracts; as to unilateral mistake, on the ground that the defendants under this contract, of service with the L Company owed no duty to them to disclose the impugned transactions. In this connection it may be instructive to refer to the observations of Lord Atkin at page 217 where the learned Lord had observed that the rules dealing with the effect of mistake on contracts appeared to be established with reasonable clearness and has stated certain instances but at page 218 it was observed by the learned Judge that mistake as to quality of the thing contracted for raised more difficult questions. It was observed that in such a case the mistake would not affect assent unless it was a mistake of both parties and was as to the existence of some quality which made the thing without the quality essentially different from the thing as it was believed to be. Of course it may appear that the parties contracted that the article should possess the quality which one or other or both have mistakenly believed it to possess. But in such a case there was a contract and the enquiry was a different one, being whether the contract as to quality amounted to a condition or a warranty, a different branch of law. His Lordship referred that the principles to be applied were to be found in two cases, and the first one was the case of *Kennedy v. Panama etc. Royal Mail Co.*, (1867) 2 QB 580. The next case was the decision in the case of *Smith v. Hughes*, (1871) 2 QB 597. It is not necessary to set out in extenso the observations made from the said two decisions which were referred to by Lord Atkin. Then the learned Judge applied these principles to the facts of that case as found by the jury and came to the decision as we have indicated before. Reliance was placed on the observations of Lord

Thankerton at pages 232 onwards. There at page 234 Lord Thankerton had given example that where a horse was bought under a belief that it was sound and if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness the contract might be rescinded. If it was induced by an honest misrepresentation as to the soundness though it may be clear that both vendor and purchaser thought that they were dealings about a sound horse and were in error, yet the purchaser should pay the whole price unless there was a warranty. His Lordship referred to the phrase used "underlying assumption by the parties", as applying in the subject-matter of a contract in the case of *Kennedy's case* namely, (1867) 2 QB 580 that was applied to the subject-matter of the contract and it might be too widely interpreted to include something which one of the parties had not necessarily in mind at the time of the contract. According to Lord Thankerton this phrase could only properly relate to something which both parties must necessarily have accepted in their mind as an essential and integral element of the subject-matter. In this connection we would do well to refer to the observations of the Privy Council in the case of *Sheikh Brothers Ltd. v. Arnold Julius Ochsner*, 1957 AC 136 where at page 146 their Lordships of the Judicial Committee reiterated that on behalf of the appellant two points were urged namely, (1) that the mistake was not as to a matter of fact essential to the agreement and (2) that even if the licence in question with which the Judicial Committee was involved was void under S. 20 of the Indian Contract Act, S. 56 thereof was also applicable and therefore on that finding on the fact of the arbitrators with which the members of the Judicial Committee were concerned that the appellant did not know but the respondents might with reasonable diligence might have known of the impossibility, compensation was payable under the third paragraph of S. 56. The Judicial Committee was of the view that having regard to the nature of the contract before their Lordships that it was a kind of joint adventure and as to the provisions in particular of clauses 3 (c), 4 (a), 5, 6 and 11, the Judicial Committee was of the opinion that this was the very basis of the contract that the sisal area should be capable of producing an

average of 50 tons a month throughout the term of the licence. In that background the Judicial Committee was of the view that in that case the mistake was as to a matter of fact essential to the agreement,

7. Bearing the principles enunciated in those decisions we have to deal with the contentions urged in support of this appeal. We agree with the submission on behalf of the appellant that in determining in an application whether the matter is arbitrable or not within the arbitration clause agreed between the parties the Court should confine itself to the pleadings and not embark upon the examination of the question whether the case pleaded was correct or genuine or not. It was submitted that in view of the principles enunciated in the several decisions which we have set out hereinbefore rightly that where an issue arose as to whether the contract which contained the arbitration clause was arbitrable or not, whether that issue decided in a suit or application was a matter of procedure and the Court must exercise the discretion in this matter properly. Having regard to the facts and circumstances in this case and the pleadings and the annexures to the pleadings in the suit and the admitted documents, in our opinion, in the facts and in the circumstances of this case, it cannot be said that the Court erred in exercising its discretion to decide the controversy whether the contract being void the arbitration clause was void, in the application, without evidence and on the basis of pleadings only. Such a procedure is warranted by the decisions in appropriate cases which we have noted hereinbefore and in the facts and circumstances of the case, in our opinion, the learned Judge was not in error in exercising his discretion nor it was exercised improperly. It was submitted that the issue as to mistake should not have been disposed of summarily in this case, we are unable to accept this submission. In this case there are certain facts which are apparent from the pleadings and the documents namely, (1) the charterer had inspection of the trawlers, (2) both the parties knew that the trawlers and its refrigeration system required extensive repairs and provisions had been made for the same in the charter party agreement and thereafter, (3) repair works were done and

expenses were incurred and such repairs were done under the supervision and investigation of the charterer namely, the plaintiff appellant in this case and thereafter, (4) there was modification of the charter party agreement as pleaded as we have noted hereinbefore. Lastly, the so called latent defects which the plaintiff in the suit and the charterer in this case is alleged to have discovered were inter alia, defective hydraulic drive, defective power generator, defective cooling coil system, other components of the refrigeration system required major repairs and design changes involving 'prohibitive expenses', refrigeration system not capable of achieving 20F in the fish hold due to the system running under vacuum at 20F by reason of inherent defects in the design and causing damage to the system due to suction of brine water into the system. There is no allegation and no proof during the long period that preceded the institution of the suit as to what actually were the defects which could not be repaired or which made the trawlers different from what the parties had agreed to take. We have to bear this in the background of the fact that the plaintiff charterer was used to using trawlers and they had technical advice and inspection before. Indeed in this background when there was nothing else in view of the statement in the annual report of the charterer company for the year ended 31st March, 1978 which specifically referred to 'two Mexican Trawlers' and that they had certain initial defects and these had been overcome, in our opinion, the learned Judge was not wrong in coming to the conclusion that the mistake as pleaded as to quality of the goods was not a mistake of such a nature as to make the thing contracted for something different. As was observed by Lord Atkin in the case of *Bell v. Lever Bros.*, (1932 AC 161) (*supra*) that though mistake as to quality of the thing contracted for raised difficult question, the mistake would not affect the assent of the parties unless it was a mistake of both the parties and was as to the existence of some quality which made the thing without the quality essentially different from the thing as it was believed to be. In this case confining ourselves even to the pleadings specially the averments made in paragraphs 14 and 15 in conjunction with the other paragraphs and

the fact that that prohibitive cost which should have been normally borne by the owner such defect could be cured, in our opinion, the learned Judge was not in error in holding that there was no case of mutual mistake of such a type as to quality of thing contracted for which could have avoided the parent contract which contained in the arbitration clause. It is true that in doing so the learned Judge has incidentally referred to certain conduct of the parties and perhaps it is also true that in an application under S. 34 of the Arbitration Act, the court should confine itself to the pleadings, but the pleadings must be construed in the background of the totality of the facts and circumstances of the case as apparent from the pleadings, admitted documents and admitted conduct of the parties. Having viewed from that point of view in the light of the principles as referred to in the several decisions and authorities which we have set out hereinbefore in our opinion the learned Judge was not in error in holding that there was no mutual mistake whereby the contract could be avoided. If that is so, then apart from the question of illegality, which we would presently deal with, the other points raised were disputes under the contract or claims under the contract and as such arbitrable. In this connection the pleadings indicated that the plaintiff itself has proceeded on an alternative basis, that the plaintiff has suffered damages for the defects in the machinery and that goes to show that the matters agitated by the plaintiff were matters under the contract and not about the matters as to the existence of the contract. It was submitted that the plaintiff had pleaded certain latent defects and the plaintiff had also pleaded that the plaintiff proceeded on certain basis and as such the plaintiff should be given an opportunity at the trial of the suit to prove the allegations made in this respect and these allegations should not have been summarily rejected. It is true that the learned Judge at places has used language to indicate that the case of the plaintiff was untrue. It may not have been quite appropriate to do so because whether there were such defects which entitled the plaintiff to claim damages or compensation from the owner for defective supply or for the defects in the trawlers, would be matter which should have been best left to the arbit-

trators and should not have been prejudged but for our present purpose we must hold that the averments made in the pleadings in the background of the facts and circumstances of the case and the admitted documents do not make out a case of such a mutual mistake as to the quality of the thing contracted for which affected the assent of the parties. If that is so, then it could not be said that even if these defects were there, these defects would not make the contract a contract for a thing for which the parties did not bargain. As there is no case of fraudulent misrepresentation there is no scope of any allegation of mutual mistake or mistake of the plaintiff. The case is not a case for breach of warranty. In that view of the matter, we are of the opinion that the learned Judge was right in so far as he held that the matters were arbitrable apart from the question of illegality of the contract. Before we conclude, we have to observe that the learned advocate for the owner Mr. Bhabra has submitted before the learned trial Judge that the events pleaded in paragraph 15 of the plaint referred to mistake on account of future events. It was submitted that this was a wrong reading upon which the learned Judge proceeded because what was pleaded was that latent defects were made patent or became apparent in subsequent times. It was not a case of mistake as to future events. It is possible that a latent defect might become apparent subsequently and in such a case it could not be said that it was a pleading of mistake as to future events. But in this case we need not proceed on that basis. We have taken the pleadings in the totality and have considered the basis of the pleadings in paragraphs 14 and 15 of the plaint and we are of the opinion that there was no case of any pleading of mutual mistake of such a nature as to quality which could legitimately be said to have affected the assent of the parties to the formation of the contract.

8. The next aspect of the matter that was urged before us and urged before the learned trial Judge that the contract was illegal in view of the provisions of the conditions of licence as contained in Appendix 31 of the Hand Book referred to. Now Clause 5 of Appendix 31 deals with the conditions regarding use and disposal we have set out hereinbefore.

Now, in this case the learned trial Judge has held that chartering out of a vessel was not contemplated in the expression 'sold or disposed or utilised'. Therefore, Appendix 31 would not be applicable and in view of Clause 8 he was further of the opinion that it applied to raw materials used for the manufacturing purpose and also for transfer, mortgage and sale etc, of the plants and machinery. It is not necessary in the facts of this case for our purpose to decide this controversy. By letter dated 17th of August, 1977 as appearing at page 34 issued by the controller such permission for chartering out of the vessel was indeed given. We have set out the conditions. It was submitted that grant of such permission was illegal and in any case the subsequent modification of the agreement as pleaded here was without permission. We are unable to agree. It is significant in this aspect to bear in mind that condition No. 1 of the Code of Export Conditions attached to the import licence of the owner in the instant case which we have set out hereinbefore, imposes certain obligations and those obligations had been fulfilled by the owner in this case. One of the obligations imposed was that the proprietor of the licensee should give a personal guarantee to the effect that the value of the export of fish and fish products during the period of 7 years from the date of acquisition of the trawlers would not be less than Rs. 47,10,000/-. The owner before the date of entering in the charterparty agreement had already fulfilled that obligation. He had exported goods not less than Rs. 47,10,000/-. The conditions, further, imposed that the licensee should become a member of the marine products of the export council and there should be certain other obligations. Now, these obligations had been fulfilled, on the other hand, reliance was placed on these conditions on behalf of the appellant to highlight the submission that these obligations along with the other conditions which we have set out hereinbefore indicated that the permission to import these trawlers and the licence to import the trawlers was granted for actual user by the licensee and not for hiring out and/or chartering out vessels in the manner purported to be done. In other words, the licence was actual user's licence. We are unable to accept. The very conditions which indicated that it could not be dealt in such

manner except without the permission of the Chief Controller and prohibition of certain sale or transfer in certain contingencies indicated that there was no absolute bar as such but it could be only done with the permission. Admittedly in this case in the original charterparty agreement there was permission by the letter or communication dated 17th of August, 1977 and the subsequent modification in our opinion, were not such which affected in view of the fact that the owner of the license had fulfilled the obligations imposed upon him in the manner indicated, before the entering into the agreement and therefore there has been no non-compliance with the provisions of the Control Act. We are, therefore, unable to agree with the appellant that in the charterparty agreement or the modification thereof there was such illegality which made the contract void. The finding of the learned Judge that the contract was not illegal as such therefore meets with our concurrence.

9. In aid of the proposition that the contract was illegal our attention was drawn to the provisions of Import and Export Control Act, 1947 after its amendment as a result of the decision of the Supreme Court which made breach of the condition of licence leviable to penalty and as such the contract in this case according to the appellant is illegal. Our attention was in this connection drawn to the observations of the Supreme Court in the case of Mannalal v. Kedar Nath, AIR 1977 SC 536 where the Chief Justice Ray observed that negative, prohibitory and exclusive words were indicated of the legislative intent when the statute was mandatory. Anything done in breach of it would therefore, it was submitted be illegal. Though we respectfully agree with the principle enunciated but in the facts and circumstances of the case this principle will have no application. Several other authorities were referred to about the illegality of the contract by the learned trial Judge. In the view we have taken it is not necessary to deal with those authorities.

10. Another aspect argued before us which was not argued before the learned trial Judge was that even if we hold that the matters which are the subject matter of this suit are arbitrable we should exercise our discretion against

staying the suit, because it was submitted, that if the parties were now relegated to arbitration the claim before the arbitrators might now become barred by laws of limitation. In this connection our attention was drawn to the provisions of sub-sec. (3) of S. 37 of the Arbitration Act and it was contended that an arbitration should be deemed to have commenced when one party to the arbitration agreement served on the other party a notice requiring the appointment of an arbitrator or where the arbitration agreement provided that the reference should be to the person named or designated in the agreement requiring that the difference would be submitted to the persons so named or designated. Therefore, on the one hand it was urged that the claim would become barred by limitation if the matters were now referred to arbitration and on the other hand it was submitted that it would not be so barred. In order to appreciate this controversy it would be necessary to bear in mind certain dates. The alleged discovery of mistake upon the basis of which or the cause of action upon the basis of which this suit had been filed is alleged to have arisen in August, 1978. The suit in question was filed in Sept. 1978. After filing of the suit the application under S. 34 was filed and a stay of the proceedings of the suit was granted pending the disposal of the said application. The judgment of the learned trial Judge granting the stay and allowing the application under S. 34 was delivered on the 11th of February, 1981. Thereupon, an application was moved in the Division Bench for grant of interim stay of the said order and the stay had continued until disposal of this appeal. The appeal was filed on the 27th of March, 1981. On behalf of the respondent it was contended that in any event there was no question of the arbitration proceedings being barred in this case because there was a stay and on this ground under apart from Section 14 of the Limitation Act, the principle of which would be applicable to the proceedings in arbitration, no question of limitation would arise, it was, further, contended that in any event even up to the date of the judgment of the learned trial Judge, according to the plaintiff/appellant the claim in the arbitration proceedings had not become barred. If thereafter, they

chose to proceed in this suit and not referred their claim to arbitration then it was the plaintiff's choice and it would not be fair, according to the respondent, to seek the discretion in their favour on that ground. The main question which has to be borne in mind on this aspect is whether the claim would become barred by limitation or not. In this connection our attention was drawn to some of the decisions which have dealt with this question and it would be necessary to refer to the same. In the case of *Union of India v. P. K. Agarwalla* (1971) 75 Cal WN 767 the Division Bench of this Court consisting of Mr. Justice Sankar Prasad Mitra, as the learned Chief Justice then was, and Mr. Justice Sisir Kumar Mukerjee had occasion to consider this question. There the contract contained an arbitration agreement. It was held by the Division Bench that in so far as claim was ex-contractu the claim was clearly within the ambit of the arbitration clause. In so far as claim under S. 70 of the Contract Act, the transactions out of which the claim arose were entered into by reason of the contract and were referable to the contract. In any event there was sufficiently close connection in that case, according to the Division Bench, between the claims under S. 70 of the Contract Act and the transactions covered by the contract to bring the claim within the arbitration clause. Merely by pleading that the claim arose under the quantum meruit or under S. 70 of the Contract Act, a party could not avoid arbitration. The other question which the Court dealt with we are not concerned in this case and we need not refer to this aspect. It was, further, held by the Division Bench that S. 14 of the Limitation Act was applicable to arbitration. In the context of the arbitration proceedings initiated after a suit had been stayed under Section 34 of the Arbitration Act, the section should be construed to mean that in computing the period of limitation in proceedings before an arbitrator the time during which the plaintiff had been prosecuting with due diligence another civil proceeding whether in a court of first instance or in a court of appeal against the defendant should be excluded, where the proceeding was founded upon the same cause of action and was prosecuted in good faith in a court which from defect of jurisdiction or other cause of like nature was unable to

entertain. It was, further observed that readiness and willingness to make an application was by itself not evidence of readiness and willingness to do all things necessary for the proper conduct of the arbitration, far less of the readiness and willingness to do so at the time when the proceedings commenced. To hold that whenever an application was made under S. 34 the Court might presume that the defendant was ready and willing to do all things necessary to the conduct of arbitration at the time when the proceedings commenced, an inference which would make the provisions of S. 34 superfluous and meaningless. Mr. Justice Mukherjea expressed the view that a suit which was stayed under S. 34 of the Arbitration Act was a suit which the Court was unable to entertain not from defect of jurisdiction but from 'a cause of like nature'. The jurisdiction of the Court was not ousted by arbitration agreement but the Court by reason of the arbitration agreement declined to exercise jurisdiction. If Section 14 of the Limitation Act applied to arbitration the question whether a claim before the arbitrator was barred or was likely to be barred could not be a relevant consideration in exercising discretion under S. 34 of the Arbitration Act, 1940. In a proper case time spent in prosecuting the suit would be excluded and it would be for the arbitrator to decide whether such time ought to be excluded under S. 14 of the Limitation Act just as would be for the arbitrator to decide whether the claim was barred by limitation. A party before the arbitrator was therefore placed in the same position as regards the defence of limitation as he would be before a court of law. Mr. Justice Sankar Prasad Mitra, as His Lordship then was, did not quite express any opinion on this aspect of the matter but observed that the possibility of a claim being barred by limitation before an arbitrator, was not ordinarily a relevant consideration in exercising the discretion of the court under S. 34 of the Arbitration Act specially in view of S. 37 (1) of the Act but there may be cases in which the Court might have to consider this factor as well and take that into consideration. Mr. Justice S. K. Mukherjea referred to the decision of Mr. Justice A. N. Sen as His Lordship then was in the case of *Shalimar Paints Ltd. v. Omprakash*, AIR 1967 Cal 372. The learned Judge after relying on cer-

tain precedents had expressed the view that it could not be contended that it would be a principle of law, that whenever there was any possibility of the claim being barred the Court should refuse to exercise its discretion to stay the suit, but the possibility of a claim being barred if referred to arbitration on stay of the suit was a relevant and material consideration in exercising the discretion conferred on the Court under S. 34 of the Arbitration Act. Whether such possibility amounted to a sufficient reason for refusing to stay the suit was a question depending upon the facts of each case. Upon these, Mr. Justice S. P. Mitra as His Lordship then was construed the two decisions of the Judicial Committee in the case of *Ramduitt Ramkissen v. E. D. Sassoon & Co.*, AIR 1929 PC 103 and came to the conclusion that S. 14 of the Limitation Act was applicable to arbitration and expressed his view. Thereafter Mr. Justice S. P. Mitra expressed his view in the manner indicated before. The question again cropped up before this Court in the case of *Steel Plant Pvt. Ltd. v. Swastika Alloy Steel Ltd.*, AIR 1978 Cal 386. There the Division Bench consisting of Chief Justice Sankar Prasad Mitra and Mr. Justice Sudhamay Basu expressed the view that the principle regarding grant of stay of proceedings was that without actually taking a step in the proceedings a party wanting a stay had to apply promptly and if he did not that was a ground on which discretion to grant the stay would be exercised against him. The Court also expressed the view that the Court was not obliged to grant stay merely because the parties agreed to submit their disputes under a contract to arbitration. Equitable consideration such as the possibility of claim being barred by limitation might certainly weigh with the Court in exercising the discretion. Grant of stay was entirely a matter of discretion which might be exercised judicially. No inflexible rules could be laid down to govern exercise of such discretion. At the same time when the discretion had been so exercised it should not be readily interfered with. The fact that the appellate Court would have taken a different view would not by itself justify the appellate court to interfere with the discretion of the trial court. The Court also observed that the party desiring stay of proceedings must show that he was and still is

ready and willing to do everything necessary for the conduct of the arbitration since the dispute arose and that he should have applied for stay with all promptitude. It is true that mere delay in proceeding with the arbitration was not necessarily a bar to a stay being granted on the application of a party guilty of delay but it could not be said that the question of delay could not be a consideration for exercise of discretion in the matter of stay. But if the applicant seeking stay of proceedings was found to be not ready and willing to submit the dispute to arbitration and heavy amount was involved in the dispute, the stay of suit was rightly rejected. The Court considered the judgment of the Division Bench in the case to which we have just referred. Mr. Justice Sudhamay Basu referred to the observation of Mr. Justice S. K. Mukherjea that the possibility of the claim being barred by limitation was not a relevant consideration. Mr. Justice Basu in that case had agreed with the views expressed by Chief Justice Chagla in the case of *Purushottam Das v. Impex (India) Ltd.* reported in AIR 1954 Bom 309. Mr. Justice Sudhamay Basu was of the view that the observations of Mr. Justice Mukherjea were obiter and were not shared by the other learned Judge of the Division Bench. Mr. Justice Basu further held that Mr. Justice Mukherjea should not be construed to have expressed any view which is a departure from law as laid down in several decisions to which the learned Judge referred. Apparently Chief Justice S. P. Mitra agreed with this view.

11. In this connection, our attention was also drawn to certain observations of the Full Bench of the Lahore High Court in the case of *Bhai Jai Kishen Singh v. Peoples Bank of Northern India*, AIR 1944 Lah 136 where the insolvency petition by the petitioner was dismissed on the ground that the act of insolvency alleged to have been committed by the debtor did not fall within S. 6 of the Provincial Insolvency Act. Therefore, the time in prosecuting the petition, according to the Court, could not be excluded in computing the period of limitation for a subsequent execution petition by the creditor against the debtor firstly because the reliefs in the insolvency petition and the execution application could not be said to be the same and secondly because the insolven-

cy petition could not be said to have been dismissed by the insolvency Court as a result of its inability to entertain for "defect of jurisdiction or any other cause of a like nature". The Full Bench of the Lahore High Court, further, observed that the words "or other cause of like nature" in S. 14 of the Limitation Act must be read so as to convey the possibility of something ejusdem generis or analogous with the preceding words relating to the defect of jurisdiction. If these words were read along with the expression "is unable to entertain" they would denote that the defect must be of such character so as to make it impossible for a Court to entertain the suit or application either in its inception or at all events as to prevent it from 'deciding it on merit. It was not possible to give an exhaustive list of defects that these words might be taken to cover. But they were such as have got to be decided before the merits of the case could be gone into and they did not necessitate an examination of the merits of the case which might fall within the purview of these words. If on the other hand, the Court had to go into the merits before the case can be dismissed the defect would not come within the ambit of these words. Illustrations of such defects which were covered by the words "or other cause of like nature" in S. 14 might be found in cases where a suit had failed because it was brought without proper leave or because no notice under S. 80 of the Civil P. C. was given or because of non-production of the Collector's certificate required by S. 6 of the Pension Act. These would go to show that although the Court had jurisdiction to decide them, it was unable to entertain them on account of technical defect and it was not possible for the Court to proceed and consider it on their merits. It would follow that if a plaint or a petition did not disclose cause of action it would have to be rejected but the time spent in its prosecution could not be excluded under S. 14. Thus if on the facts the relief asked for by a plaintiff or a petitioner was found by the Courts to have been misconceived either because it was not warranted by the facts mentioned therein or because the facts stated in the plaint or the petition did not disclose a good and complete cause of action and the plaint or petition was consequently dismissed or rejected, the provisions contained in

S. 14 could not be of any help. Our attention was also drawn to the observations of the Supreme Court in the case of *S. T. Commissioner, U. P. v. Parson Tools & Plants, Kanpur*, AIR 1975 SC 1039 where in the context of a particular statute viz., Sales Tax Act which provided for a particular period of limitation for certain proceedings, and as it was not provided, according to the Supreme Court, that the principles of Section 14 of Limitation Act would be applicable to those Tribunals these principles of these provisions would not be applicable. The Supreme Court further observed that if the legislature in a special statute prescribed a certain period of limitation for filing a particular application thereunder and provided in clear terms that such period on sufficient cause being shown, might be extended to the maximum only up to a specified time limit and no further, then the tribunal concerned had no jurisdiction to treat within the period of limitation an application filed before it beyond such maximum time limit specified in the statute by excluding the time spent in prosecuting in good faith and with due diligence any prior proceeding on the analogy of S. 14 (2) of the Limitation Act. Where the legislature clearly declared its intent in the scheme and language of a statute, it was the duty of the Court to give effect to the same without scanning its wisdom or policy and without engrafting, adding or implying anything which was not congenial to or consistent with such expressed intent of the law-giver, more so if the statute was a taxing statute. Reliance was also placed on certain observations of the Supreme Court in the case of *Gurdit Singh v. Munsha Singh*, AIR 1977 SC 640 where the Supreme Court after setting out the terms of S. 14 observed at page 648 as follows:—

"16. It would be noticed that three important conditions have to be satisfied before the section can be pressed into service. These three conditions are — (1) that the plaintiff must have prosecuted the earlier civil proceedings with due diligence; (2) the former proceeding must have been prosecuted in good faith in a court which from defect of jurisdiction or other cause of a like nature was unable to entertain it and (3) the earlier proceeding and the later proceeding must be based on the same cause of action,

17. Now the words "or other cause of a like nature" which follow the words "defect of jurisdiction" in the above quoted provision are very important. Their scope has to be determined according to the rule of *ejusdem generis*. According to that rule, they take their colour from the preceding words "defect of jurisdiction" which means that the defect must have been of an analogous character barring the court from entertaining the previous suit. A Full Bench of the Lahore High court consisting of Harries C. J., Abdur Rahman, J. and Mahajan, J. (as he then was) expressed a similar view in *Bhai Jai Kishan Singh v. People Bank of Northern India*, (AIR 1944 Lah 136) (FB) (*supra*).

18. In the instant cases, it is not denied by the plaintiffs that the Court which tried the previous suits was not precluded from entertaining them because of any defect of jurisdiction. We have, therefore, only to see whether the said court was unable to entertain the former suits on account of any defect of an analogous character. Even a most liberal approach to the question does not impel us to hold that the court trying the earlier suits was unable to entertain them on any ground analogous to the defect of jurisdiction. In *Dwarkanath v. Atul Chandra*, ILR 46 Cal 870 : (AIR 1919 Cal 381) where the court trying the previous suit had refused to entertain a claim for rent because it was premature, it was held that in a subsequent suit for the aforesaid rent, the plaintiff could not rely upon the provisions of S. 14 (1) of the Limitation Act and say that the time did not run against him while those proceedings were being prosecuted. Again in *Pattabhiramayya v. Narayan Rao*, (AIR 1960 Andh Pra 625) it was held that the fact that the previous suit was dismissed as the plaintiff had no cause of action was not a ground which was covered by Section 14 (1). Thus it could not be held that the court which tried the previous suits but eventually threw them out as premature suffered from inability or incapacity to entertain the suits on the ground of lack of jurisdiction or any other defect of the like character. Accordingly the exclusion of the period from Dec. 18, 1945 to Aug. 3, 1951 sought by the appellants cannot be legitimately allowed to them while computing the period of limitation."

12. In this case the parties could not go on with the suit because in appropriate cases under the well established legal principles the Courts bind the parties to their bargain when they have made lawful agreement for arbitration. They are not allowed to proceed in a Court of law. Therefore, in a sense they have no jurisdiction to proceed. So taking a proper view of the provision of the section on the basis of ejusdem generis, the suit did not suffer from lack of jurisdiction as such but is not competent to be proceeded because of reasons analogous to that. In our opinion, therefore, provision of S. 14 of the Limitation Act would be attracted and we find in this case that there already has been reference to the arbitration before any period of limitation in terms of the arbitration agreement though that reference was made by the respondent namely, the owner of the trawlers. The preference of the claims by the parties or the concurrence or application to that appointment or application to the Court or preference of counter claim by the present appellant could not thereafter take place because of the order of injunction issued by this Court. That order of injunction still continues. We must however make a note of the statement made by Mr. Bhabra on behalf of the respondent that his client would not take the plea of limitation before the arbitrators in the arbitration proceedings. That statement of the respondent No. 1 is hereby recorded. In that view of the matter, in our opinion, in the facts and in the circumstances of the case and in view of the principles embodied in S. 14 of the Limitation Act there is no ground for not exercising our discretion in favour of the respondent under S. 34 of the Arbitration Act on the plea that claim of the appellant might now become barred before the arbitration proceedings. Whether however, in the arbitration the appellant will succeed on this point would depend upon what view the arbitrator or the arbitrators would take about the conduct of the appellant. We however make it quite clear that we are not expressing our concurrence in any observations made by the learned trial Judge which might indicate that in filing this suit or in prosecuting the same up to this stage the appellant was not bona fide or had acted improperly or not diligently.

13. For the reasons aforesaid we do not find any ground for not exercising the discretion granting the stay under S. 34 of the Arbitration Act which the learned Judge thought it proper and has exercised his discretion on proper grounds.

14. In the premises, this appeal fails and is accordingly dismissed. The costs of this appeal will be cost in the arbitration proceedings.

15. Interim order that was then during the pendency of the appeal will continue for a fortnight.

C. K. BANERJI, J.:— I agree.

Appeal dismissed.

AIR 1982 CALCUTTA 461

ANIL K. SEN AND S. N. SANYAL, JJ.

Union of India, Petitioner v. M/s. Manton Company Ltd., Opposite Party.

Civil Order No. 158 of 1982, D/- 28-5-1982.

(A) Public Premises (Eviction of Unauthorised Occupants) Act (40 of 1971), S. 2 (2) (g) — Unauthorised occupation of public premises — Person in occupation of premises, property of Union of India, from before Union became owner thereof by purchase — Termination of occupant's tenancy by notice to quit — He becomes person in unauthorised occupation of premises. (Para 9)

(B) Public Premises (Eviction of Unauthorised Occupants) Act (40 of 1971), Ss. 2 (2) (g) and 4 (1) — Eviction proceedings under S. 4 (1) — Challenge to proceedings — High Court upholding initiation of proceedings and remanding case for decision on merits — Decision in another proceeding as to another occupant in same houses as being not in unauthorised occupation — Issue in instant proceeding as to nature of occupation not foreclosed.

Where a person started a writ proceeding challenging the proceeding as initiated on a show cause notice under S. 4 (1) on the ground that he was in unauthorised occupation and the High Court upholding the initiation of such proceeding directed its adjudication on its merits, that order made inter partes would be equally binding upon the parties to that writ proceeding and only because in a separate proceeding not inter partes the High Court had upheld the claim of a third party who was in occu-

pation of another part of the same house to be a person not in unauthorised occupation, that decision could not override the express directions contained in the decision inter partes. Consequently, it could not be urged that the issue as to whether the party challenging the proceeding was in unauthorised occupation, was foreclosed. (Para 14)

(C) Public Premises (Eviction of Unauthorised Occupants) Act (40 of 1971), S. 4 (1) — Show cause notice under — Inadvertent error therein as to date of determination of tenancy — Determination of tenancy is not vitiated.

Where in the show cause notice under S. 4 (1) it was expressly and clearly stated that the tenancy in favour of the occupant in respect of the public premises was duly determined on the expiry of the last day of May 1964 by a notice dated 22-4-1964 issued on behalf of the President of India and it was further stated that the occupant was directed to quit and vacate the public premises by the end of May 1964 but he having failed and neglected to do so became a person in authorised occupation of the public premises, an unfortunate mis-print towards the end in the show-cause notice that "As aforesaid your tenancy stands determined with effect from 1-9-1963" would not vitiate either notice to quit or the proceedings. The notice must be read as a whole and as matter of fact the very sentence quoted hereinbefore begins with the words "as aforesaid" thereby referring to what had been said earlier. What had been said earlier states very clearly that the occupant became a person in unauthorised occupation on the determination of tenancy in their favour on the expiry of the month of May 1964, when he failed and neglected to deliver vacant possession of the public premises. As such such error in show cause notice would have nothing to do with the validity of the determination of the tenancy and would not either affect the proceeding for eviction under the provisions of the Act. (Para 16)

Cases Referred : Chronological Paras

AIR 1981 SC 670	7, 8, 9
(1981) F.M.A. No. 760 of 1973, D/- 10-8-1981 (Cal), Rajput Singh v. Union of India	6, 8, 9, 10, 12, 14
AIR 1976 Cal 333	5
AIR 1973 SC 66	6, 7, 9
(1973) C. R. No. 4627(W) of 1970, D/- 31-7-1973 (Cal)	5

AIR 1972 SC 2205	5
AIR 1968 Cal 560	3
AIR 1967 SC 1581	3

Q. E. Kabir, for Petitioner; Bankim Chandra Dutta, S. P. Roy Chowdhury and Uma Prosad Mukherjee, for Opposite Party.

ANIL K. SEN, J.:— This is an application under Art. 227 of the Constitution at the instance of Union of India (hereinafter referred to as the petitioner) and it arises out of a proceeding for eviction under Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (hereinafter referred to as the said Act of 1971).

2. On September 19, 1963, the petitioner purchased premises Nos. 13, 13/1, 13/2 and 13/3, Old Court House Street and Nos. 1, 2 and 2/1, Mangoe Lane, Calcutta. The opposite party herein M/s. Manton Company Ltd. (hereinafter referred to as the opposite party) who was a tenant in occupation of premises Nos. 1, 2 and 2/1, Mangoe Lane and portions of premises Nos. 13, 13/1, 13/2 and 13/3, Old Court House Street, since before such purchase by the petitioner became a tenant under the petitioner on attornment.

3. By a notice to quit dated April 22, 1964, the petitioner determined the tenancy in favour of the opposite party with the expiry of the month of May 1964 and called upon the opposite party to quit, vacate and deliver peaceful possession of the premises in their occupation. The opposite party having failed to comply with the notice, the petitioner on June 10, 1964, started a proceeding for eviction under the provisions of Public Premises (Eviction of Unauthorised Occupants) Act, 1958. The opposite party challenged the said proceeding in a writ petition which ultimately succeeded when that Act of 1958 was struck down on the ground that its provisions were violative of Art. 14 of the Constitution. It was so held on the authority of the Supreme Court decision in the case of Northern India Caterer v. State of Punjab, AIR 1967 SC 1581. The judgment of this court is reported in AIR 1968 Cal 560.

4. In the meantime, the Act of 1958 was amended by Act XXXIII of 1968 for the purpose of removing the offending elements in that Act. After such amendment a fresh proceeding for eviction was initiated against the opposite party on June 25, 1970, by issue of a fresh show cause

notice under S. 4 (1) of the Act of 1958 so amended. The Act of 1958 having been repealed thereafter by the said Act of 1971 (that is, Public Premises (Eviction of Unauthorised Occupants) Act, 1971) the proceeding so initiated was continued as one initiated under the said Act of 1971 in view of the provision of S. 20 of the said Act of 1971.

5. The validity of such a proceeding was challenged again by the opposite party in a writ petition in this court which was registered as C. R. 4627 (W) of 1970 on several grounds including the ground that the Act is ultra vires the Constitution, that the proceeding as initiated is without jurisdiction and that the opposite party not being in unauthorised occupation no proceeding under the provisions of the said Act of 1971, could have been validly initiated against them. That Rule came up for hearing before a learned single Judge of this court who by his order dated July 31, 1973, discharged the Rule by upholding the validity of the Act and the initiation of the proceeding thereunder relying primarily upon the later Supreme Court decision in the case of Hari Singh v. Military Estates Officer, Delhi, AIR 1972 SC 2205. The learned single Judge having held that the Estates Officer having jurisdiction to initiate the proceeding under S. 5 (1) of the said Act of 1971, left the question whether the opposite party is in unauthorised occupation or not to be decided by the Estates Officer in the proceeding so initiated. The opposite party preferred an appeal being F. M. A. 756 of 1973 under clause 15 of the Letters Patent but that appeal having failed, the decision of the learned single Judge was affirmed on Sept. 10, 1975. The judgment in the appeal is reported in AIR 1976 Cal 333.

6. After all these proceedings in this court when the interim injunctions were vacated and the proceeding initiated under the provisions of the said Act of 1971 was remanded for disposal on its merits, the Estates Officer served due notices upon the opposite party. They, however, did not appear and on the materials produced by the petitioner the Estates Officer by his order dated Mar. 18, 1976, held the opposite party to be in unauthorised occupation of the disputed premises and directed their eviction under S. 5 (1) of the said Act of 1971. The opposite party preferred an

appeal under Sec. 9 of the said Act of 1971 against that order before the learned Chief Judge, City Civil Court, Calcutta, which was Miscellaneous Case No. 1 of 1976. The learned Chief Judge has allowed the said appeal and has set aside the order of eviction passed by the Estates Officer by an order dated Sept. 10, 1981. Relying upon the decision of the Supreme Court in the case of Rajkumar Divendar Singh v. State of Punjab, AIR 1973 SC 66 and on an unreported Bench decision of this court in the case of Rajput Singh v. Union of India (F. M. A. 760 of 1973 disposed of on 10-8-1981), the learned Chief Judge held that since the opposite party was a tenant in occupation of the disputed premises from before it became public premises by purchase by Union of India, their occupation of the disputed premises does not come within the mischief of the said Act of 1971, and as such, no proceeding thereunder as initiated could have been validly initiated. According to the learned Chief Judge if the opposite party is to be evicted it must be so done by a suit and not by a proceeding under the provisions of the said Act of 1971. The learned Chief Judge incidentally further held that the order of the Estates Officer is not based on any finding that the opposite party is in unauthorised occupation and he further held that when the show cause notice issued on June 25, 1970, purported to terminate the tenancy since Sept. 1, 1963, that is even prior to the purchase by Union of India there could be no valid determination of the tenancy. The order of the Estates Officer having been thus set aside, the petitioner has now moved this court with an application under Article 227 of the Constitution referred to hereinbefore.

7. Mr. Kabir appearing in support of this application has substantially raised two points. In the first place it has been contended by Mr. Kabir that this court in the writ proceeding having upheld the validity of the proceeding as initiated on the show cause notice under S. 4 (1) of the said Act of 1971, it was not open to the learned Chief Judge to hold that no proceeding under the said Act of 1971 could have been validly initiated on such ground as has been assigned by the learned Chief Judge. Secondly it has been contended by Mr. Kabir that even after the decision of the Supreme Court in the case of Jain Ink Manufac-

turing Company v. L. I. C. of India, AIR 1981 SC 670 in which the Supreme Court had explained and distinguished its earlier decision in the case of Rajkumar Divendar Singh (supra), the learned Chief Judge could not have held that only because the opposite party was a pre-existing tenant in occupation, they cannot be in unauthorised occupation even though the authority for the occupation in their favour had been duly determined by a notice to quit. Mr. Kabir has further contended that the Estates Officer recorded his finding that the opposite party is in unauthorised occupation in the very first part of the order itself which has been overlooked by the learned Chief Judge and he has further contended that read as a whole the notice establishes clearly that the tenancy was determined with the expiry of May 1964, and the date September 1, 1963, in the last portion of the notice is clearly and apparently a misprint which does neither affect the notice nor render it ambiguous in any manner.

8. All the points raised by Mr. Kabir have been contested by Mr. Dutt who appears to support the order impugned on behalf of the opposite party. Strong reliance is placed by Mr. Dutt on the unreported Bench decision of this court in F.M.A. 760 of 1973 referred to and relied on by the learned Chief Judge in contending that even if erroneous the said decision forecloses the material issue as to whether the opposite party is in unauthorised occupation of the disputed premises or not. According to Mr. Dutt in that decision when this court had held a sub-tenant under the present opposite party to be a person not in unauthorised occupation notwithstanding the very same notice to quit, it must necessarily be held that the superior interest of the tenant, namely, the present opposite party cannot be that of an unauthorised occupant. According to Mr. Dutt in the absence of any independent ground a sub-tenant under a tenant who had become a person in unauthorised occupation by determination of the tenancy in his favour cannot be held to be otherwise. Mr. Dutt, however, felt much difficulty in supporting the decision of this court in the said F.M.A. 760 of 1973 and in particular the reasons given therein in support of the conclusion which was obviously rendered in total oversight of the decision of the Supreme Court in the case of Jain Ink Manufac-

turing Company (supra). According to Mr. Dutt, the petitioner not having challenged the said decision in any further appeal is now bound thereby irrespective of whether it is otherwise a correct decision or not. Mr. Dutt has next contended that the issue as to whether the opposite party is a person in unauthorised occupation or not having been left open in the writ proceeding, the decision therein based on other grounds could not have closed the issue either before the Estates Officer or before the learned Chief Judge as contended by Mr. Kabir. Lastly, it has been contended by Mr. Dutt that the notice to quit having been found to be invalid, the learned Chief Judge was right in setting aside the order of eviction passed under Sec. 5 (1) of the said Act of 1971.

9. Before we proceed to consider the other points raised by the counsel for the respective parties, let us consider how far the learned Chief Judge is correct in his view that the opposite party having come to occupy the disputed premises before the said premises were purchased by the petitioner, they cannot be said to be in unauthorised occupation thereof notwithstanding the subsequent determination of the authority for the occupation by the notice to quit. We think this question is no longer res integra in view of the Supreme Court decision in the case of Jain Ink Manufacturing Company (AIR 1981 SC 670) (supra). It is rather unfortunate that the attention of the learned Chief Judge as also that of the learned Judges of this Court who decided F.M.A. 760 of 1973 was not drawn to the said decision of the Supreme Court in the case of Jain Ink Manufacturing Company (supra). In this decision the Supreme Court was interpreting the provisions of the said Act of 1971 which is now under consideration and the Supreme Court clearly explained and distinguished their own observations in the case of Rajkumar Divendar Singh (AIR 1973 SC 66) (supra) wherein the Act under consideration was a different Act. It was pointed out that those observations were made having regard to the particular terms of the Punjab Act thereunder consideration which made entry into possession in the public premises unauthorised if it was so made otherwise than under and in pursuance of any allotment, lease or grant. Whereas in the Act now under consideration a person who occupies any

public premises without any authority for such occupation or even continues to occupy the same after such authority had been determined is said to be in unauthorised occupation in view of the definition clause S. 2 (2) (g) of the said Act of 1971. Thus there exists material difference between the provisions of the two Acts. Though the attention of the learned Chief Judge was drawn to such difference, he failed to appreciate the same and wholly misread the statute in observing that there is no material difference between these two statutes. As a matter of fact dealing with the particular statute the Supreme Court laid down that what is germane for the purpose of interpretation of S. 2 (2) (g) of the said Act of 1971 is whether or not the person concerned was in occupation of the public premises when the said Act came into force irrespective of how and when he came to occupy the same. Thus, we hold that the principal ground on which the learned Chief Judge reversed the decision of the Estates Officer is clearly misconceived and is based upon misreading of the material provision of the said Act of 1971. Such a decision, therefore, can hardly be sustained on such a ground.

10. Next we proceed to consider the other points raised before us. While Mr. Kabir relies upon the previous decision *inter partes* in the writ proceeding and contends that in view of such a decision, it was no longer open to the opposite party to claim that the impugned proceeding based on show cause notice under S. 4 (1) of the said Act was not validly initiated, Mr. Dutt contests such an objection and in his turn contends that rightly or wrongly this court in F.M.A. 760 of 1973 having held the sub-tenant not to be a person in unauthorised occupation, the tenant/opposite party can no longer be claimed to be so — the petitioner being still bound by that decision. We propose to consider these two contentions separately.

11. In the writ petition the opposite party challenged initiation of the proceeding by issue of a notice under Section 4 (1) of the said Act of 1971. Though the principal ground of attack was that the Act was ultra vires the Constitution, other grounds disputing the jurisdiction of the Estates Officer to initiate such a proceeding were also raised. At the hearing, as it now appears, the only

point urged was with regard to the constitutional validity of the Act. That point having been decided against the opposite party, this court left the issue, as to whether the opposite party was in unauthorised occupation or not, to be decided in the proceeding under the Act. According to Mr. Kabir what was left to be so decided was whether there had been a valid determination of the authority to occupy. The point that was raised before the learned Chief Judge, namely, under the definition clause the opposite party would not be a person in unauthorised occupation because they never came into occupation after the premises became public premises by purchase by the petitioner could have been taken in the writ petition and if so taken the notice under S. 4 (1) of the said Act of 1971 would have been set aside for reasons as now assigned by the learned Chief Judge. Even if such a point was not raised, according to Mr. Kabir, such a point must be deemed to have been concluded constructively by the decision in the writ petition. We have carefully considered this point of Mr. Kabir and in our view there may be some substance in such a contention but when for reasons already given we have held that there is no substance in the objection that the opposite party having come to occupy the premises prior to the same becoming public premises cannot be considered to be a person in unauthorised occupation within the meaning of the definition clause, the further point with regard to foreclosing of such an issue raised by Mr. Kabir becomes academic.

12. So far as the point raised by Mr. Dutt is concerned, it appears to us that it rests upon an inadvertent recital of fact in the judgment of this Court in F.M.A. 760 of 1973 when it was stated therein that the appellant in that appeal, Rajput Singh was a sub-tenant under the present opposite party. We called for the original records of that proceeding and it appears to us that in the writ petition moved by Rajput Singh he claimed himself to be a tenant under the vendors of the petitioner and, as such, after the purchase under the petitioner and not under the present opposite party. To quote the first paragraph of the writ petition of the said Rajput Singh he asserted:

"At all material times your petitioner has been in occupation in respect of a

portion of premises No. 13, Old Court House Street, Calcutta under respondent No. 1 (Union of India) at a monthly rental of Rs. 300 payable according to English calendar for the purpose of carrying on business there. Originally your petitioner was a tenant under Messrs. Osler Properties Limited, the predecessor-in-interest of the present landlord, the Union of India."

His further case in the writ petition was that while the tenancies of other tenants were determined by notice issued in July 1963, so far as he is concerned, he did not receive any such notice so that there was no determination of his authority to occupy the premises in his occupation.

13. Hence, the basic foundation for the contention of Mr. Dutt is lost because the appellant in that appeal having claimed rights independent of the present opposite party even if he had been adjudged to be a person not in unauthorised occupation, that would not stand in the way of adjudging on merits the issue as to whether the opposite party is in such unauthorised occupation or not, more so when in the decision *inter partes* this Court directed the Estates Officer to decide that issue.

14. That apart, in the facts and circumstances we are unable to hold that the decision in that case which is not *inter partes* and which was rendered *ex parte* against the petitioner as respondent to that appeal would foreclose the issue raised in the present proceeding. It must be remembered that the present opposite party started a writ proceeding challenging the proceeding as initiated on a show cause notice under S. 4 (1) of the said Act of 1971. That application failed up to the appellate stage and this court upholding the initiation of such proceeding directed its adjudication on its merits. Such an order made *inter partes* is equally binding upon the parties to that writ proceeding and only because in a separate proceeding not *inter partes* this court had upheld the claim of a third party who is in occupation of another part of the same house to be a person not in unauthorised occupation, that decision cannot override the express directions contained in the decision *inter partes*.

Moreover, in F. M. A. 760 of 1973, the respondent Union of India had not appeared and the court did not even incidentally go into the question whether

the present opposite party was a person in unauthorised occupation or not. An argument built upon an inadvertent observation that the appellant therein was a sub-tenant under the present opposite-party can hardly be supported. Hence, we find no substance in the point raised by Mr. Dutt in this regard.

15. Before we conclude we must deal with the other two reasons assigned by the learned Chief Judge in support of his order. In the first place, he has observed that the Estates Officer had not recorded any finding that the opposite party is in unauthorised occupation of the disputed premises. Having read the order of the Estates Officer carefully we are unable to sustain such a criticism of the said order. As a matter of fact, the order starts on the following terms: "Whereas I, the undersigned, am satisfied for the reasons recorded below that Messrs. Manton & Company Limited are in unauthorised occupation of the premises specified in the Schedule below." Then he records the reasons and in the ultimate paragraph incorporates his order for eviction. Dealing with the reasons he considers the notice dated April 22, 1964, by which the tenancy in favour of the opposite party was determined with the expiry of May 1964. Such being the order of the Estates Officer it would not be fair to say that he had failed to record a finding that the opposite party is in unauthorised occupation of the public premises.

16. So far as the validity of the notice determining the tenancy is concerned, it would appear from the notice on record dated April 22, 1964, that the tenancy was duly determined by such a notice with effect from the expiry of the month of May, 1964. Service of such a notice and sufficiency thereof is not disputed. As a matter of fact, the opposite party did not appear to contest the proceeding either. On the notice to quit itself we find no defect. The defect referred to by the learned Chief Judge is in the show cause notice issued under S. 4 (1) but that defect in our opinion does not affect the proceeding in any manner. In this show cause notice it has been expressly and clearly stated that the tenancy in favour of the opposite party in respect of the disputed premises was duly determined on the expiry of the last day of May 1964 by a notice dated

22-4-64 issued on behalf of the President of India, by the Deputy Director of Estates and Ex-Officio Under Secretary to the Government of India, Ministry of W.H. & R., Directorate of Estates, New Delhi. It was further stated that the opposite party was directed to quit and vacate the public premises by the end of May, 1964 but he having failed and neglected to do so became a person in unauthorised occupation of the public premises. Having said all these clearly in the earlier part of the show cause notice there has been an unfortunate mis-print towards the end when it was said "As aforesaid your tenancy stands determined with effect from 1-9-63." It is obvious that instead of writing 1-6-64 there had been an inadvertent error. In our view, however, the notice must be read as a whole and as a matter of fact the very sentence quoted hereinbefore begins with the words 'as aforesaid' thereby referring to what had been said earlier. What had been said earlier we have referred to hereinbefore and there it had been stated very clearly that the opposite party became a person in unauthorised occupation on the determination of tenancy in their favour on the expiry of the month of May, 1964, when he failed and neglected to deliver vacant possession of the public premises. This error in our view has nothing to do with the validity of the determination of the tenancy and does not either affect the proceeding for eviction under the provisions of the said Act of 1971.

17. For reasons aforesaid, we are of the opinion that the order of the learned Chief Judge based primarily upon misconception of the legal position and misinterpretation of the material provision of the statute has resulted in material failure of justice when a proceeding for eviction initiated in the year 1964 culminating in an order for eviction dated March 18, 1976, had been set at naught by the order of the learned Chief Judge impugned in the present application under Article 227 of the Constitution.

18. This application, therefore, succeeds on contest and the impugned appellate order dated Sept. 10, 1981, passed by the learned Chief Judge, City Civil Court, Calcutta, being set aside the order of the Estates Officer dated March 18, 1976, is restored.

19. As prayed for by Mr. Roychowdhary on behalf of opposite party, let

operation of this order remain stayed for a period of three months from date,

S. N. SANYAL, J.:— I agree.

Order accordingly.

AIR 1982 CALCUTTA 467

M. M. DUTT AND MONOJ KUMAR
MUKHERJEE, JJ.

The West Bengal Board of Secondary Education and others, Appellants v. Sm. Basana Rani Ghosh and others, Respondents.

F.M.A.T. Nos. 812 and 955 of 1982, D/- 14-5-1982.

(A) Constitution of India, Art. 226 — Education — Locus standi — Revision of syllabus for History prescribed for VIIIth Class — Guardians of students can challenge it.

Where syllabus of history for VIIIth Class is changed, the guardians of students cannot be said to have no locus standi to challenge the revised syllabus. The guardians are, admittedly, interested in the education of children. If, according to them, the revised history syllabus for Class VIII is allowed to be taught, it will affect the education of the students of Class VIII so far as the subject of history is concerned. As they are interested in the education of the boys and girls reading in Class VIII, they have locus standi to seek interference of the High Court by a Writ Petition. When the interest of a community is affected by any action of the Government or a statutory authority, any member of the community may complain against that action by the presentation of a Writ Petition in the High Court. It may be that such a member may not be personally affected or his personal right is not infringed. But that will be no ground to throw away the Writ Petition. AIR 1981 SC 298, Foll. (Para 8)

(B) Constitution of India, Art. 226 — Locus standi — Revision of syllabus of History for VIIIth class — Headmasters' Association sending its representatives on the Syllabus Committee revising syllabus — Writ Petition by Association challenging revised syllabus as violative of fundamental right under Art. 19 (1) (a) and some provisions of W. B. Secondary Education Act — Competent — There being no estoppel against statute, Association cannot be said to be estopped

FZ/GZ/C754/82/SNV

from challenging revised syllabus. (Evidence Act (1872), S. 115). (Para 9)

(C) W. B. Board of Secondary Education Act (5 of 1963), Ss. 19A and 27 (as amended by Amendment Act of 1979) — Revised syllabus of History for VIIIth class framed after amendment of Act — Procedure prescribed under Ss. 19A and 27 not followed — Syllabus is illegal — Cannot be enforced.

The revised history syllabus prescribed for Class VIII is illegal inasmuch as it has been made without following the legal procedure prescribed by amended Ss. 19A and 27. Such a syllabus cannot be prescribed and the educational institutions cannot be directed to follow the syllabus. However, as some schools have prescribed books on history written in accordance with the revised syllabus, and some schools are following books written under the old syllabus, it was directed that so long as the history syllabus for Class VIII is not prepared in accordance with the provisions of the West Bengal Board of Secondary Education Act, 1963, as amended by the said Amendment Act of 1979, the Board shall not prescribe or insist on the teaching of books written on the basis of the impugned revised syllabus for Class VIII, and it was further directed that the schools which have prescribed the books on history for Class VIII written in accordance with the revised syllabus will be entitled to teach such books for year in question and the schools which are teaching books on history for Class VIII written on the basis of the old syllabus will be entitled to teach the same for the said year. (Paras 10, 14)

Clause (g) of sub-sec. (3) of S. 19A provides that it shall be the duty of the Executive Committee to provide by bye-laws after considering the recommendation, if any, of the Syllabus Committee, the syllabus, the courses of studies to be followed and books to be studied in recognised Institutions and for examinations instituted by the Board in accordance with such regulations as may be made by the Board. Clause (c) of Section 27 (2) casts a duty upon the Board to make regulations in respect of matters referred to in clauses (c), (d), (e) and (g) of sub-sec. (3) of S. 19A. Sub-sec. (4) of S. 27, inter alia, provides that no regulation shall be valid unless it is approved by the State Government, and the State Government may, in according such approval, make such additions,

alterations and modifications therein as it thinks fit. Thus it is apparent that the Board has to make the regulations, inter alia, in respect of matters referred to in clause (g) of sub-sec. (3) of S. 19A. After the regulations are made by the Board the same will have to be approved by the State Government. So long as the regulations are not approved by the State Government, no steps can be taken by the Board. After the approval of the regulations by the State Government, the Board has to frame bye-laws, prepare syllabus, lay down the courses of studies to be followed, books to be studied in recognised institutions and for holding examinations in accordance with the approved regulations. S. 19A has been introduced in the Act by the Amendment Act of 1979 and the provision of S. 27 has also been amended by the said Amendment Act. As after the amendment of the parent Act, no regulations have been framed by the Board, nor any bye-laws have been prepared and yet, the Board proceeded to set up a Syllabus Advisory Committee which prescribed the syllabus on history for Class VIII, the history syllabus for Class VIII which has been prepared by the Board is violative of the provision of clause (g) of S. 19A read with the provision of clause (c) of S. 27 (2). Further, the revised syllabus cannot be claimed to be valid on the ground that as old regulations have been followed, S. 25 of W. B. General Clauses Act is attracted. That provision is inapplicable as old regulations are inconsistent with the provisions of Ss. 27 (2) (c) and 19A (3) (g) as amended by the Amendment Act of 1979. (Paras 10 and 13)

Cases Referred: Chronological Paras

AIR 1981 SC 298: 1980 Lab IC 1325	8
AIR 1979 SC 888	11, 14
AIR 1978 SC 597	7

Somnath Chatterjee, Suproakash Banerjee, Arun Prokash Sirkar and Mrs. Mitali Chakraborty, (in FMAT No. 812 of 1982) and Malay Kr. Basu with A. N. Banerjee (in FMAT No. 955 of 1982), for Appellants; S. K. Acharya, Advocate General with Arun Prokash Chatterjee and Santi Das for State of West Bengal in FMAT Nos. 812 and 955 of 1982; Ajit Kr. Panja with Nirmal Kumar Manna and S. N. Garai, for Respondents in FMAT Nos. 812 and 955 of 1982.

M. M. DUTT, J.:— This appeal has been preferred by the West Bengal

Board of Secondary Education, its President and Secretary against the judgment of a learned single Judge of this Court. By the said judgment, the learned Judge made absolute the Rule Nisi issued on the application of the respondents Nos. 1, 2 and 3 under Article 226 of the Constitution of India.

2. The respondents Nos. 1 and 3 are the guardians of two students of Class VIII and the respondent No. 2 is the West Bengal Headmaster Association. In the Writ Petition, the said respondents who were the Writ Petitioners, challenged the validity of the revised history syllabus for Class VIII prescribed by the West Bengal Board of Secondary Education. The case of the Writ Petitioners is that in the State of West Bengal, there are two types of schools, namely, one under the Central Board of Education, New Delhi, and the other under the West Bengal Board of Secondary Education. The syllabi of the two groups of schools are different, but both of them are in conformity with the syllabus as framed by the National Council of Educational Research and Training, hereinafter referred to as NCERT, an autonomous body under the Ministry of Education, Government of India, New Delhi. The complaint of the Writ Petitioners, in short, is that there has been serious departure in the revised history syllabus for Class VIII from the syllabus that was in force immediately before the revised syllabus. In the revised syllabus, there is no specific mention of any Indian leader—social, religious, literary, scientific or political—whereas names of Marx, Engles, Mao, Sun Yatsen, Chiang, eleven leaders of intellectual renaissance, three leaders of renaissance in Arts, six leaders of renaissance in Science, ten navigators of Europe and three leaders of reformation movement in Europe have been specifically mentioned in the syllabus. The main grievance of the Writ Petitioners is that different phases of freedom movement in India have been covered by only 10 pages out of 135 pages, whereas Bolshevik revolution has occupied 5 pages, Chinese revolution 5 pages and revolution in South East Asia 3 pages. It is alleged that the students who will pass from the Board under the revised syllabus, particularly in history, may be lost in track in Central educational system and may develop separate outlook affecting national integration and national solidarity.

It is contended by them that the revised history syllabus for Class VIII has not been framed in accordance with the provision of S. 27 (2) (c) of the West Bengal Board of Secondary Education Act, 1963, as amended by the West Bengal Secondary Education (Amendment) Act, 1979 read with the provision of clause (g) of sub-sec. (3) of S. 19A incorporated in the Act by the said amendment Act. The further challenge to the validity of the revised history syllabus is that it is ultra vires Art. 19 (1) (a) read with Art. 51A (b) of the Constitution of India.

3. The Rule Nisi was opposed by the appellants and also by the State of West Bengal. An application was filed by the West Bengal Publishers' Association for being added as a party respondent in the Writ Petition. It appears from the record that the said application was not disposed of by the learned Judge. The West Bengal Publishers' Association has also filed an appeal against the judgment of the learned Judge.

4. In the affidavit-in-opposition of the appellants, which has been affirmed on Feb. 13, 1982 by Sri Nirmal Sinha, Secretary of the West Bengal Board of Secondary Education, it has been averred that the Writ Petitioners, who are the respondents Nos. 1 to 3 in this appeal, have no locus standi to maintain an application under Art. 226 of the Constitution. The case of the appellants is that in order to bring about a national consensus in the field of education through an academic advisory organisation, the Ministry of Education and Social Welfare set up a body called NCERT on Sept. 1, 1961 under the Societies Registration Act, 1860. The NCERT is wholly financed by the Government of India, one of its main objects being to assist and advise the Ministry of Education and Social Welfare in the implementation of its policies and major programmes in the field of education, particularly school education. The NCERT drew up curriculum for the tenure schools and prepared syllabi for Classes VI to VIII and Classes IX to X based on national consensus. The new syllabi were drawn up by high level editorial boards in different school subjects consisting of educationists of repute from different parts of the country and it was hoped that the new syllabi would serve as an effective instrument for initiating the desired educational changes.

5. The Board, in order to keep pace with the changing pattern of Secondary Education, particularly to acquaint the students with the history of mankind appointed an expert committee and a Syllabus Advisory Committee to draw up a new syllabus for Class VIII keeping in view the particular guidelines of the NCERT. The expert committee consisted of 4 educationists/historians of repute for the purpose of drawing up a new syllabus in history for Classes VI to X including Class VIII. The draft syllabus was scrutinized by the Syllabus Advisory Committee consisting of the said four educationists and 2 representatives of each of the 9 Secondary Teachers' Organizations including the representatives of the West Bengal Headmasters' Association. One of the two representatives of the W. B. Headmasters' Association, Sri Bibhas Chandra Mitra, is a co-author of the history text-book for Class VIII written according to the new syllabus. The new syllabus was adopted and approved by the Board and a circular dated July 29, 1981 was issued in that regard.

6. The further case of the appellants as sought to be made out in the affidavit-in-opposition is that as regards the names of Marx, Engels, Mao, Sun Yat-sen, Chiang and other luminaries, it was thought necessary to indicate the said names in the syllabus in connection with the study of other countries to show how important historical personalities have shaped the destinies of nations to which they belonged, just as our national leaders moulded our destinies. It has been stated that the history of Indian freedom movement will be studied in details in Classes IX and X. The syllabus was drawn up and notified by the Board on April 30 and July 29, 1981, to all concerned after a prior intimation about the introduction of the new syllabus in history for Class VIII. The text-books on history prepared by different authors in accordance with the new syllabus have been submitted and the same have been distributed for sale. Most of the students of Class VIII have already purchased such text-books. It is contended that the Writ Petition is not maintainable at the instance of the West Bengal Headmasters' Association which has participated in the preparation of the new syllabus.

7. The learned Judge, after considering the facts and circumstances of the

case has come to the finding that the new history syllabus for Class VIII is illegal inasmuch as it has not been prepared in accordance with the provision of S. 27 (2) (c) read with the provision of S. 19A (3) (g) of the West Bengal Board of Secondary Education Act, 1963 as amended by the said Amendment Act of 1979. In considering the question as to whether the revised syllabus is also violative of Article 19 (1) (a) of the Constitution, the learned Judge has taken notice of the report of the Kothari Commission published by NCERT in 1966. The learned Judge has proceeded on the basis that according to the said report there is a drop-out of 40% of students every year at the end of Class VIII. The learned Judge is of the view that these 40% of students would be deprived of any knowledge about the history of India, particularly the freedom movement and the national leaders connected therewith. Reliance has been placed by the learned Judge on the decision of the Supreme Court in *Maneka Gandhi v. Union of India*, AIR 1978 SC 597. In that case, it has been observed by Bhagwati J. that even if a right is not specifically mentioned in Art. 19 (1) it may still be a fundamental right covered by some clauses in that Article, if it is an integral part of the named fundamental right or partakes of the same basic nature and character of that fundamental right. Relying on the said observation, the learned Judge has taken the view that Art. 19 (1) (a) includes within its reach the right of freedom of thought which, in his opinion, is an integral part of the aforesaid right and partakes of the same basic nature and character. It has been observed by the learned Judge that in a democratic State as that of ours, it is necessary that the pupils who would be the future citizens, should be imparted education in such a manner that they become well conversant with the social, political and religious movements and developments in India, its freedom struggle and its national leaders. In other words, the syllabus should be so devised that the pupils of Class VIII should be well acquainted with the history of India, its freedom movement and its national leaders, who were responsible for bringing in social and political changes in the country which, ultimately, led to the achievement of the freedom of India. In that view of the matter, it has been held by the learned Judge

that the new syllabus is violative of Art. 19 (1) (a) of the Constitution. He has, however, overruled the contention of the Writ Petitioners that the new syllabus is also violative of Art. 51A (b) which provides that it shall be the duty of every citizen of India to cherish and follow noble ideas which inspired our national struggle for freedom. In view of his finding that the revised history syllabus is illegal as it has not been prepared in accordance with the provisions of the West Bengal Board of Secondary Education Act, 1963 as amended by the said Amendment Act of 1979, and that the same is also violative of Art. 19 (1) (a) of the Constitution, the learned Judge has made the Rule Nisi absolute. A writ in the nature of Mandamus has been directed to be issued commanding the appellants to forbear from giving any effect to the impugned syllabus. A writ in the nature of Certiorari quashing the impugned syllabus has also been directed to be issued. Hence, this appeal by the West Bengal Board of Secondary Education, its President and Secretary.

8. At the outset, Mr. Somnath Chatterjee, learned counsel appearing on behalf of the appellants challenges the locus standi of the writ petitioners to maintain the writ petition. It is submitted by him that the writ petitioners have no legal right to challenge the validity of the revised history syllabus for Class VIII. It has been already pointed out that the writ petitioners consist of two guardians of students reading in Class VIII and the West Bengal Headmasters' Association. It is true that no legal right of the writ petitioners has been infringed or sought to be infringed by the impugned revised history syllabus. But that will not be the proper test for considering the maintainability of the writ petition at their instance. The writ petitioners are, admittedly, interested in the education of children. According to them, if the revised history syllabus for Class VIII is allowed to be taught, it will affect the education of the students of Class VIII so far as the subject of history is concerned. As they are interested in the education of the boys and girls reading in Class VIII, we are of the view that they have locus standi to seek interference of this Court by a writ petition. When the interest of a community is affected by any action of the Government or a statutory authority, any mem-

ber of the community may complain against that action by the presentation of a writ petition in this Court. It may be that such a member may not be personally affected or his personal right is not infringed. But that will be no ground to throw away the writ petition. It has been observed by the Supreme Court in *Akhil Bharatiya Soshit Karmachari Sangh v. Union of India*, AIR 1981 SC 298 that our current processual jurisprudence is broad-based and people-oriented, and envisions access to justice through 'class actions', 'public interest litigations', and 'representative proceedings'. We are, therefore, unable to accept the contention of the appellants regarding the locus standi of the writ petitioners to maintain an application under Art. 226 of the Constitution against the impugned history syllabus.

9. The next contention made on behalf of the appellants is that in any event the West Bengal Headmasters' Association having sent their representatives on the Syllabus Committee and having taken part in laying down the history syllabus for Class VIII without any demur, the said Association is estopped from challenging the propriety or the validity of the revised history syllabus. Even assuming that the West Bengal Headmasters' Association is so estopped as contended on behalf of the appellants, yet the writ petition will not be defeated inasmuch as besides the said Association there are two other writ petitioners. Moreover, the challenge of the writ petitioners to the legality of the revised history syllabus is that it has infringed the fundamental right of citizens guaranteed under Art. 19 (1) (a) of the Constitution, and that it is also violative of some provisions of the West Bengal Secondary Education Act, 1963 as amended by the said Amendment Act, 1979. It is now a well settled principle of law that there cannot be any estoppel against statutes. Considered from that point of view, we do not find any merit in the contention of the appellants based on the ground of estoppel.

10. Now we may deal with the question whether the revised history syllabus has been framed in accordance with the provisions of the West Bengal Secondary Education Act, 1963, as amended by the Amendment Act of 1979. It has been urged on behalf of the

writ petitioners, that in preparing the impugned syllabus, the appellants have not followed the procedure laid down in clause (g) of sub-sec. (3) of S. 19A read with clause (c) of sub-sec. (2) of S. 27 of the Act. Clause (g) of sub-sec. (3) of S. 19A provides that it shall be the duty of the Executive Committee to provide by bye-laws after considering the recommendation, if any, of the Syllabus Committee, the syllabus, the courses of studies to be followed and books to be studied in recognized institutions and for examinations instituted by the Board in accordance with such regulations as may be made by the Board. Clause (c) of S. 27 (2) casts a duty upon the Board to make regulations in respect of matters referred to in clauses (c), (d), (e) and (g) of sub-sec. (3) of S. 19A. Sub-sec. (4) of S. 27, inter alia, provides that no regulation shall be valid unless it is approved by the State Government, and the State Government may, in according such approval, make such additions, alterations and modifications therein as it thinks fit. Thus it appears that the Board has to make the regulations, inter alia, in respect of matters referred to in clause (g) of sub-sec. (3) of S. 19A. After the regulations are made by the Board the same will have to be approved by the State Government. So long as the regulations are not approved by the State Government, no steps can be taken by the Board. After the approval of the regulations by the State Government, the Board has to frame bye-laws, prepare syllabus; lay down the courses of studies to be followed, books to be studied in recognized institutions and for holding examinations in accordance with the approved regulations. Section 19A has been introduced in the Act by the Amendment Act of 1979 and the provision of S. 27 has also been amended by the said Amendment Act. It is not disputed that after the amendment of the parent Act, no regulations have been framed by the Board, nor any bye-laws have been prepared. But the Board proceeded to set up a Syllabus Advisory Committee which prescribed the syllabus on history for Class VIII. There can, therefore, be no doubt that the history syllabus for Class VIII which has been prepared by the Board is violative of the provisions of clause (g) of S. 19A read with the provision of clause (c) of S. 27 (2). In other words, in preparing the history syllabus for Class VIII, the

Board has not followed the mandatory provisions of law as contained in the West Bengal Board of Secondary Education Act, 1963, as amended by the said Amendment Act of 1979. The impugned history syllabus prescribed for Class VIII is, therefore, illegal inasmuch as it has been made without following the legal procedure. Such a syllabus cannot be prescribed and the educational institutions cannot be directed to follow the syllabus.

11. It is, however, brought to our notice that several books have been written by 171 authors in accordance with the revised history syllabus. It is submitted by Mr. Malay Kumar Basu, learned counsel appearing on behalf of the West Bengal Publishers' Association, that if the syllabus is struck down, the publishers would suffer great hardship. Mr. Chatterjee has also brought to our notice that some schools have prescribed books written in accordance with the revised history syllabus, and that, as a matter of fact, such books are being taught. We are also told that in some schools books written in accordance with the old syllabus have been prescribed and are being taught. In this situation, it has been submitted on behalf of the appellants that the Board will take steps to regularise the matter and legalize the history syllabus for Class VIII in accordance with the provisions of the Act, as amended. It is, however, submitted on behalf of the appellants that so long as that is not done, the books written in accordance with the impugned revised syllabus should be allowed to be taught by different schools under the Board. In this connection, Mr. Chatterjee has placed reliance on the said decision of the Supreme Court in *State of Madhya Pradesh v. Ram Ragubir Prasad Agarwal* (AIR 1979 SC 888). In that case, the syllabus for "Rapid Reading" was published on June 30, 1978, while the text-books were prescribed in Oct. 1977 in violation of the provisions of Ss. 3 and 4 of the Madhya Pradesh Act 13 of 1973. It was directed by the Supreme Court that the State Government should take a fresh decision under Ss. 4 and 5 of the said Act. Thereafter, Krishna Iyer, J. who delivered the judgment of the Court, observed as follows (at p. 897):—

"These directions take care of the future. But what about the current academic year? To change horses mid-stream

may be disastrous. Throughout the better part of the year except for around a month, Government text-books have been in use. The examinations are impending. To harass the young alumni by putting them through fresh books of the respondent (though in circulation last year) is an avoidable infliction. Therefore, for the nonce, Government books for 'Rapid Reading' will continue in this year's classes. We direct so."

12. Relying on the above observation of Krishna Iyer, J., it is contended that as the books have already been published in accordance with the syllabus and, as some schools have prescribed such books, the new syllabus should not be disturbed. In other words, the books which have been written in accordance with new syllabus should be allowed to be taught and, in the meantime, the Board will remove the irregularities, if any, by complying with the procedure prescribed by law.

13. It has been already noticed that the impugned syllabus has been prepared without conforming to the provisions of the Act as amended by the Amendment Act of 1979. In the case before the Supreme Court, there was only one violation, that is to say, the book on 'Rapid Reading' was published before the publication of the syllabus. The said book was followed in different schools and, in view of the fact that the examination was to take place after one month, the Supreme Court did not interfere for that year. In the instant case, however, the provisions of the Act as amended have not at all been complied with. Mr. Chatterjee submits that in preparing the syllabus, the old regulations have been followed and that, in view of S. 25 of the Bengal General Clauses Act, it was permissible to do so. In our opinion, the old regulations cannot be followed. Under the old regulations, it was the Board that was to prescribe, modify or revise the syllabus after considering the recommendations of the Syllabus Committee. Under the amended S. 27 (2) (c), the Board has to make regulations, *inter alia*, in respect of matters under cl. (g) of sub-sec. (3) of S. 19A which casts a duty on the Executive Committee of the Board to provide by bye-laws, after considering the recommendations, if any, of the Syllabus Committee, the syllabus etc. So, the syllabus has to be prepared by the Executive Committee and not by the Board and that too in accordance

with bye-laws. Thus the old regulations are inconsistent with the provisions of Ss. 27 (2) (c) and 19A (3) (g) of the Act, as amended by the said Amendment Act of 1979. In our opinion, therefore, S. 25 of the Bengal General Clauses Act is inapplicable and the old regulations made under the unamended provision of S. 27 (2) (c) did not continue to be in force.

14. At the same time, we find that some schools have prescribed books on history written in accordance with the revised syllabus, and some schools are following books written under the old syllabus. After considering these facts and, in view of the decision of the Supreme Court in *State of Madhya Pradesh v. Ram Ragubir Agarwal*, (AIR 1979 SC 888) (*supra*), we modify the judgment of the learned Judge and direct that so long as the history syllabus for Class VIII is not prepared in accordance with the provisions of the West Bengal Board of Secondary Education Act, 1963, as amended by the said Amendment Act of 1979, the Board shall not prescribe or insist on the teaching of books written on the basis of impugned revised syllabus for Class VIII. We direct that the Board shall prepare the history syllabus for Class VIII in accordance with the provisions of the Act by Oct., 1982. It is further directed that the schools which have prescribed the books on history for Class VIII written in accordance with the impugned revised syllabus will be entitled to teach such books for this year. Similarly, the schools which are teaching books on history for Class VIII written on the basis of the old syllabus will be entitled to teach the same for this year.

15. In view of our finding that the revised history syllabus is illegal inasmuch as it has been made without following the legal procedure and in view of our direction to the Board for the preparation of the history syllabus for Class VIII in accordance with the provisions of the West Bengal Board of Secondary Education Act, 1963 by Oct., 1982, we do not think that we are called upon to embark upon the question as to whether the impugned syllabus offends against the provisions of Art. 19 (1) (a) of the Constitution. The question as to constitutional validity of the syllabus will arise only when the syllabus has been prepared in accordance with the procedure prescribed by the Act. In

the circumstances, we keep the question open.

16. It may be recorded that Mr. Arun Prakash Chatterjee, learned Senior Standing Counsel, appearing on behalf of the State of West Bengal has adopted the arguments of Mr. Somnath Chatterjee, learned counsel for the appellants.

17. The appeal is disposed of as above. There will, however, be no order for costs.

18. The appeal which has been filed by the West Bengal Publishers' Association is also disposed of by this judgment without any order for costs.

MONOJ KUMAR MUKHERJEE, J. :—
I agree.

Order accordingly.

AIR 1982 CALCUTTA 474

**CHITTATOSH MOOKERJEE AND
RAMKRISHNA SHARMA, JJ.**

Sankar Prosad Paul Chowdhury, Appellant v. Madhabi Paul Chowdhury, Respondent.

A. F. O. D. No. 334 of 1979, D/- 27-4-1981.*

(A) Hindu Marriage Act (25 of 1955), S. 13 — Petition by husband for divorce on ground of wife's cruelty — Husband not examining members of his family — Adverse presumption can be drawn against petitioner. (Evidence Act (1872), S. 114 Illus (g)).

The court ought to draw an adverse presumption against the petitioner husband for non-examination of the members of his family who were described as witnesses to be alleged acts of cruelty and insult by his wife. (Para 6)

(B) Hindu Marriage Act (25 of 1955), S. 13 (1) (i) (a) — Expression 'cruelty' — Failure or inability on part of spouse to effectuate sexual intercourse amounts to cruelty.

The expression 'cruelty' within the meaning of S. 13 (1) (i) (a) of the Act is not confined to causing physical acts of cruelty but include mental cruelty. Persistent failure or inability on the part of a spouse to effectuate sexual intercourse without any reasonable cause

may amount to cruelty. But in the instant case the petitioner husband has failed to prove by cogent evidence that there was such refusal or inability on the part of the respondent wife to have intercourse with him. Therefore, the Court was right in dismissing the petition under S. 13 (1) of the Act. (Para 8)

(C) Hindu Marriage Act (25 of 1955), Ss. 21 and 13 (1) — Civil P. C. (1908), O. 6, R. 17 — Petition by husband for divorce on grounds of cruelty — Allegation that there was persistent refusal by wife to have sexual intercourse with him — Amendment of petition sought to incorporate plea of physical deformity or defect in wife — Amendment cannot be allowed.

It is settled law that when the parties had already got full opportunities to adduce evidence, the court of first instance had given ample opportunity to the parties to adduce their evidence, an unsuccessful party cannot be permitted to adduce further evidence to the appellate court to strengthen his case which had not been accepted by the trial court. In the trial court in the instant case the petitioner founded his case of cruelty against the respondent on the ground that she had refused to have sexual intercourse with him and that on several occasions she had assaulted him. So long as the finding of the trial court stands that she did not refuse to have sexual intercourse with her husband the appellant, it is no longer necessary to consider whether her alleged refusal was due to congenital deformity or defect of her sexual organs or because of other reasons. In other words, by praying for inserting a para in his petition the petitioner husband is really endeavouring to get rid of the adverse finding that there had been no persistent refusal by her to have sexual intercourse with the appellant. The petitioner had never alleged in the trial court that sexual intercourse with the respondent was either impossible or most painful. (Para 13)

All proceedings under the Act are regulated by Civil P. C. in view of Section 21 of the Act. It is true that the Court under O. 6, R. 17 of the Code has a wide discretion to grant amendments of pleadings in order to do complete justice between the parties and also to shorten the course of litigation. Such discretion of the court under O. 6, R. 17 is judicially exercised. Amendments of the pleadings at any stage may be al-

*Against decree of P. C. Sen. Addl. Dist. J. of Zilla 24 Parganas, Alipore, D/- 14-7-1978.

lowed which are necessary for determining the questions in controversy between the parties. Further, for the purpose of granting or refusing prayers for amendments of pleadings made by a party, the court is required to consider whether or not, if such amendment is allowed, same would cause any injustice to the other party which cannot be sufficiently compensated by awarding costs.

(Para 9)

The parties to the case have already adduced evidence in full before the trial court which has pronounced its judgment. By praying for amendment of his petition, the appellant is now attempting to adduce evidence about the alleged physical deformity or defect of the respondent wife. The appellant has not otherwise made out any cause for adducing such additional evidence. The petitioner husband cannot be allowed at such belated stage to amend his petition in order to make a new case about the alleged physical deformity or defect of the respondent which was not even consistent with his case in the trial court. Such amendment, therefore, is not only unnecessary for determining the questions in controversy but also if the amendment is granted the same would cause serious prejudice and injustice to the respondent.

(Paras 11, 12)

(D) Hindu Marriage Act (25 of 1955), S. 13 — Civil P. C. (5 of 1908), O. 23, R. 1 — Petition for divorce by husband — Allegation that there was persistent refusal by wife for sexual intercourse — Court finding against him — Application for withdrawal of petition and filing fresh petition on grounds of physical deformity in wife — Held, withdrawal cannot be granted as he cannot be allowed to get rid of adverse findings upon issues made by Court below.

(Para 13)

Cases Referred : Chronological Paras (1958) 2 All ER 744 : (1958) 1 WLR 894 : 102 SJ 599, Nelson v. Nelson and Slinger 9

Surathi Mohan Sanyal, for Appellant.

CHITTATOSH MOOKERJEE, J.:— On April, 1976 the appellant husband had filed a petition in the Court of the learned District Judge, Alipore under S. 10 of the Hindu Marriage Act praying for a decree for judicial separation on the ground that the respondent wife had treated him with cruelty and that she had deserted him. After the Marriage

Laws (Amendment) Act, 1976 was enacted, the appellant husband applied in the trial court for amendment of his petition, inter alia, by substituting in place of the prayer for judicial separation a prayer for decree for dissolution of marriage under S. 13 (1) of the Hindu Marriage Act. The trial court had allowed the said prayer for amendment. The respondent wife had contested the said suit, inter alia, denying the allegations of cruelty and desertion made by her husband.

2. The learned Additional District Judge, 7th Court, Alipore dismissed the said suit. Thereafter, the plaintiff husband has filed the present appeal.

3. On 10th April, 1981 the appellant petitioner filed an application in this Court praying that he may be permitted to amend his original petition for divorce by inserting para 14 (a). The respondent wife has opposed the appellant's prayer for amendment of the petition.

4. Mr. Ranjit Kumar Banerjee, learned advocate for the appellant, has made three fold submissions before us. His first submission is, that, for determining and the real questions in controversy between the parties, the appellant, even, at this appellate stage, ought to be allowed to amend his petition. According to Mr. Banerjee, such amendment of the petition if allowed is not likely to cause any prejudice to the respondent wife and she might be sufficiently compensated by awarding costs in her favour. Alternatively, Mr. Banerjee has submitted that in the event this court is unwilling to allow the aforesaid application for amendment of the appellant's petition for divorce, the appellant may be permitted to withdraw his said petition under S. 13 of the Hindu Marriage Act. Lastly, Mr. Banerjee has submitted that in his judgment under appeal the learned Additional District Judge has not recorded necessary findings for determining the issues framed in the case.

5. Before we consider whether at this stage the appellant husband ought to be allowed to amend his petition under Sec. 13, we may proceed to set out the questions which were in controversy between them in the trial court. As previously stated, the plaintiff husband had originally prayed for a decree for judicial separation on the ground of cruelty and desertion and subsequently his said

petition was altered into one under Section 13 (1) of the Hindu Marriage Act. The plaintiff husband in his said petition had stated that on 17th Feb., 1973 the marriage between him and the respondent was solemnised according to Hindu rites. His case was that in spite of her protest only once on 17th of March, 1973 he had cohabited with her. According to the appellant, she had conceived. The appellant further stated that from the day of the Boubhat he had realised that the respondent was mentally irritant by nature and was suffering from complexes. The appellant further stated that in early part of May, 1973 the respondent had undergone abortion on the medical advice of her cousin, Dr. Sudhamoy Seth of Chandarnagar. The appellant also alleged that he had become a victim of physical cruelty and violence as the respondent often inflicted blows and slaps on him. She had also threatened to commit suicide. On 20th May, 1975 he had desired to have sexual intercourse but she had rejected his advances and had begun to shout. She had also inflicted blows on him in the presence of the members of his family. She had allegedly expressed her desire to go to her parents' house. On 23rd June, 1975 the respondent had again picked up quarrel with him, and on 24th June, 1975 she went away to her parents' house with all her ornaments and articles. At the trial the petitioner husband deposed in order to prove his aforesaid allegations against his wife, the respondent herein. He also examined his sister as PW 2, who in her cross-examination denied that she had ever suggested to the respondent to get herself examined by a gynaecologist or that the respondent had shown her a medical certificate that she was physically fit.

6. The learned Additional District Judge found that admittedly the respondent went to Chandarnagar on 24th June, 1975 and since then had been residing there. On 8th April, 1976, the appellant filed the present case. Therefore, undisputedly the petitioner neither averred nor proved that the respondent wife had deserted him for a continuous period of not less than two years immediately preceding the presentation of his petition. In fact, the learned advocate for the appellant did not urge before us the said ground of desertion by the respondent wife. The learned Additional Dis-

trict Judge in his judgment has recorded that the petitioner husband had alleged cruelty on the part of the respondent wife on the following three grounds : (a) abusing and beating the husband, (b) her refusal to have sexual intercourse, and (c) carrying out abortion. In our view, the learned Additional District Judge rightly refused to believe that the plaintiff husband had failed to satisfactorily prove his said allegations of cruelty against his wife. Although he had averred in his petition that the respondent wife had inflicted fist blows on him in the presence of the members of his family and that she did not live with him in the same room in spite of the request of the members of the petitioner's family, the petitioner husband did not examine any member of his family to corroborate the said allegations. The court ought to draw an adverse presumption against the petitioner husband for such non-examination of the members of his family who were described as witnesses to said alleged acts of cruelty and insult by his wife. On the other hand, even after 24th of June, 1975 when the petitioner was no longer residing in the petitioner's house, Kunjaswar Paul Chowdhury, father of the petitioner, had written a post-card dated 1st July, 1975 (Ext. 1A) to Gopinath Seth, the father of the respondent. The father of the petitioner had expressed his sorrow for departure of Bouma (the respondent) and stated that especially his wife (the mother of the petitioner) was very anxious. Kunjaswar Babu had further written that they were praying to God for giving happiness and peace to Bouma (the respondent) and also that good sense may prevail upon Sankar (the petitioner). Kunjaswar Babu in the post-script had acknowledged receipt of a letter from the respondent and had promised to write to her. The very contents of the said post-card written by Kunjaswar Paul Chowdhury (Exts. 1A) would disprove the allegation of the petitioner that after abusing and beating him on 24th June, 1975 she had left saying that she would never return. There is also no evidence that the petitioner in fact had tried to bring her back as claimed by him. On the other hand, copies of the two letters written by her to her father-in-law (i.e. the father of the petitioner) (Exts. A2 and A3) indicated that she was very keen to return to her father-in-law's place. She begged

forgiveness and requested that arrangements may be made to take her back. We refuse to believe the evidence of the petitioner that in fact originals of these letters were not sent under registered post. Kunjaswar Babu, the father of the petitioner, has not come forward to deny the receipt of the said two letters or to corroborate other allegations of his son.

7. We also agree with the learned Additional District Judge that the petitioner has failed to prove that after the respondent had conceived she had voluntary abortion. No reason was suggested by the petitioner why the respondent would desire to have abortion. Same was most unnatural and improbable. There was no reliable evidence that the respondent had at all conceived or that she had abortion.

8. Mr. Banerjee, learned advocate for the appellant correctly submitted that 'cruelty' within the meaning of cl. (i) (a) of sub-sec. (1) of S. 13 of the Hindu Marriage Act was not confined to causing physical acts of cruelty but included mental cruelty. Persistent failure or inability on the part of a spouse to effectuate sexual intercourse without any reasonable cause may amount to cruelty. But the appellant husband has failed to prove by cogent evidence that there was such refusal or inability on the part of the respondent to have intercourse with him. We have already pointed out that the petitioner husband himself alleged that immediately after the marriage, once he had intercourse with his wife. His case was that thereafter she had persistently refused to have further intercourse with him. On 17th Feb., 1973 the marriage of the petitioner and the respondent took place. It is not believable that after 17th of March, 1973 the respondent started sleeping in a separate bed. None amongst the members of the petitioner husband's family came to corroborate the said allegations of the petitioner. Although in June, 1973 the petitioner and the respondent had visited Nainital and used to sleep in the same room, it is utterly improbable that they did not have any intercourse. We have already stated that there is also no corroboration of the petitioner's case regarding the incidents which happened before the respondent went away to her father's house on 24th June, 1975. There is much more probability in the case of the respondent that on 24th June, 1975 she did not go back alone to her father's

house at Chandarnagore but she was escorted either by the petitioner or some other member of his family. We have already pointed out that the father of the petitioner in his post-card (Ext. A1) addressed to the respondent wife did not make any accusation against the respondent. On the other hand, he had expressed sorrow for leaving of his Bouma (the respondent). The trial Court has rightly found that the petitioner has failed to prove that the respondent wife had all along refused to have sexual intercourse with him. Accordingly, we hold that the court below rightly answered the issues framed by it in favour of the respondent and had correctly dismissed the appellant's petition under S. 13 (1) of the Hindu Marriage Act.

9. In our view, the appellant husband has not made out any case for allowing him to belatedly amend his petition by inserting therein allegations of physical deformity or defect of sexual organs of the respondent wife. All proceedings under the Hindu Marriage Act, 1955 are regulated as far as may be by the Civil Procedure Code, 1908 (vide S. 21 of the Hindu Marriage Act). It is true that the Court under O. 6, R. 17 of the Code has a wide discretion to grant amendments of pleadings in order to do complete justice between the parties and also to shorten the course of litigation. Such discretion of the court under O. 6, R. 17 is judicially exercised. Amendments of the pleadings at any stage may be allowed which are necessary for determining the questions in controversy between the parties. Further, for the purpose of granting or refusing prayers for amendment of pleadings made by a party, the court is required to consider whether or not, if such amendment is allowed, same would cause any injustice to the other party which cannot be sufficiently compensated by awarding costs. Mr. Banerjee, learned advocate for the appellant, has drawn our attention to pages 367 to 374 of Rayden on Divorce (12th Edition). The learned author has, inter alia, discussed the methods to be adopted for adding charges after a matrimonial petition has been filed. Mr. Banerjee has also placed before us the decision of the Court of Appeal in *Nelson v. Nelson & Slinger*, (1958) 2 All ER 744: (1958) 1 WLR 894, which has been mentioned at page 369 of Rayden on Divorce (12th Edition). The Court of Appeal had, inter alia, held that in England

there was at present no practice in Divorce Division which would prevent the court from applying ordinary rules as to amendment of pleadings which were made applicable generally speaking to matrimonial cause by Rule 82 of the Matrimonial Causes Rules, 1957. It may be similarly noted that under S. 21 of the Hindu Marriage Act the provisions of the Civil Procedure Code as far as may have been made applicable to proceedings under the said Act. The Court of Appeal in *Nelson v. Nelson & Slinger* (supra), also recognised that in the exercise of its discretion the court has jurisdiction to allow an amendment of a petition grounded on cruelty by adding further charges of cruelty if it was thought right and proper so to do in the interest of justice.

10. But, in our view, in the interest of justice the amendment prayed for by the appellant ought not to be granted. The parties to this case have already adduced evidence in full before the trial court which has pronounced its judgment. By praying for amendment of his petition, the appellant is now attempting to adduce evidence about the alleged physical deformity or defect of the respondent wife. The appellant has not otherwise made out any case for adducing such additional evidence. It is settled law that when the parties had already got full opportunities to adduce evidence, the court of first instance had given ample opportunity to the parties to adduce their evidence, an unsuccessful party cannot be permitted to adduce further evidence to the appellate court to strengthen his case which had not been accepted by the trial court. In the trial court the petitioner founded his case of cruelty against the respondent on the ground that she had refused to have sexual intercourse with him and that on several occasions she had assaulted him. We have already concurred with the trial court's findings that both the said allegations had not been established. So long as the finding of the trial court stands that she did not refuse to have sexual intercourse with her husband, the appellant, it is no longer necessary to consider whether her alleged refusal was due to congenital deformity or defect of her sexual organs or because of other reasons. In other words, by praying for inserting para. 14 (a) in his petition the petitioner husband is really endeavouring to get rid of the said adverse

finding that there had been no persistent refusal by her to have sexual intercourse with the appellant. The petitioner had never alleged in the trial court that sexual intercourse with the respondent was either impossible or most painful. Although he claimed that after marriage and before 17th March, 1973 at least on one occasion the parties had intercourse, he did not further allege that the same was extremely painful to either of the parties. Therefore, for the purpose of adjudicating the points in controversy it is not at all necessary to determine whether she had any congenital deformity or defect of her sexual organs.

11. Although the petitioner husband neither averred nor proved any such congenital deformity or defect of the respondent, in her written statement, the respondent had pleaded that after 24th June, 1975 she went to the house of the petitioner's sister at Naihati and she was told that the charge against her was that she was incompetent to cohabit and the petitioner husband had asked the respondent to get herself medically examined. She had further claimed that she got herself medically examined by a gynaecologist, who gave her a certificate. The respondent in her examination-in-chief had also mentioned about the said fact of medical examination and had stated about the certificate granted by a doctor who examined her. The said certificate was marked 'X' for identification. Presumably, because the doctor who gave the certificate was not examined, the certificate was not marked as an exhibit. The petitioner did not cross-examine her with reference to her said claim of medical examination. No suggestion was given to her that she suffered from any physical deformity or defect. When, the petitioner himself in his evidence did not state that the respondent suffered from any such deformity or defect, it was not necessary for the respondent to cross-examine him with reference to the said question of medical examination. The sister of the petitioner P.W. 2, denied in her cross-examination that she had ever suggested that she should be medically examined. She also denied that a medical certificate was shown to her. Thus, in spite of the challenge thrown by the respondent that she was medically fit to have sexual intercourse, the petitioner husband did not attempt to prove the con-

trary. We find no reason why the petitioner at this belated stage should be allowed to amend his petition in order to make a new case about the alleged physical deformity or defect of the respondent which was not even consistent with his case in the trial court.

12. Mr. Banerjee, learned advocate for the appellant, tried to submit before us that the said fact of her physical deformity or defect came to be known to the petitioner from the medical certificate filed by the respondent in the trial court. At this stage, we are considering whether the amendment of the petition under Section 13 ought to be allowed, we cannot enter into the truth or falsehood of the allegations now sought to be introduced by the appellant. The contents of the certificate marked 'X' for identification were never proved. Therefore, the appellant is not entitled to make any submission about the fact of the said medical certificate. It would be most unjust to allow the petitioner to amend his petition so that the respondent may be required to submit to a medical examination and the appellant can substantiate his new case of respondent's physical deformity or defect. Such amendment, therefore, is not only unnecessary for determining the questions in controversy but also if the amendment is granted the same would cause serious prejudice and injustice to the respondent. For the foregoing reasons, we reject the application for amendment made by the appellant.

13. The appellant has not made out any case for granting him leave to withdraw his petition under S. 13 of the Hindu Marriage Act. He has not alleged that there is any formal defect in his petition or that there was any other sufficient ground for allowing the petitioner to institute a fresh petition for the subject matter of his claim. The trial court has already determined the issues. Therefore, by obtaining withdrawal of his petition the appellant cannot be allowed to get rid of the adverse findings upon the issues made by the court below.

14. For the foregoing reasons, we dismiss this appeal. We also reject the application for amendment of the petition filed by the appellant. There will be no order as to costs.

R. K. SHARMA, J.:— I agree.
Appeal dismissed.

AIR 1982 CALCUTTA 479

ANIL K. SEN AND B. C.
CHAKRABARTI, JJ.

Corporation of Calcutta, Petitioner v.
East India Commercial Company Pvt.
Ltd., Opposite Party.

C. R. Nos. 2657-63 of 1980, D/- 21-4-1982.

Calcutta Municipal Act (33 of 1951), S. 168 — Assessment of annual value of building let out to tenant — Fair rent not fixed by Controller under West Bengal Premises Tenancy Act, 1956 — Assessment of annual value can be made on basis of contractual rent paid by tenant. (West Bengal Premises Tenancy Act (12 of 1956), S. 8 (1) (d).)

The West Bengal Premises Tenancy Act, 1956 not only recognises the contractual rent but makes it obligatory for the tenant to pay such rent until the fair rent is fixed. This positive nature of the statutory provision equates the contractual rent with the fair rent as estimated by the statute. The statute did so because it contemplated that where the landlord and the tenant abide by the contractual rent and do not go for fixation by the Controller they do so because the contractual rent bears a reasonable approximation to the fair rent envisaged by the statute. That being the position there would be no bar on the assessing authority to assess the annual value with reference to such contractual rent as is being paid without any objection by the tenant to the landlord. On the scheme of the present W. B. Premises Tenancy Act in a case where the rent had not been fixed by the Controller the contractual rent as paid by the tenant cannot be said to furnish no foundation for assessment of rent reasonably payable by a hypothetical tenant. Such being the position, it must be held that the court below was not right in its conclusion that the law as it stands is to the effect that even in a case where the landlord is realising contractual rents from the tenants no fair rent being assessed under the statute, for the purpose of assessing the annual value the assessing authority cannot base his assessment on such contractual rent but has to follow the principles laid down in the W. B. Premises Tenancy Act for determining the fair rent, ILR (1975) 2 Cal 309, AIR 1957 Cal 230 and (1969) 73 Cal

WN 961, Followed; AIR 1980 SC 541, AIR 1962 SC 151, AIR 1970 SC 1417, AIR 1971 SC 353 and AIR 1981 SC 1729, Distinguished. (Para 21)

Cases Referred: Chronological Paras

AIR 1981 SC 1729: 1981 Tax LR 146	21
AIR 1980 SC 541	8, 16, 18, 21
ILR (1975) 2 Cal 309	5, 17
AIR 1971 SC 353	17, 17A
AIR 1970 SC 1417	14, 16
(1969) 73 Cal WN 961: ILR (1970) 1 Cal 628	6, 17
AIR 1968 SC 441	15
AIR 1963 SC 1742	9
AIR 1962 SC 151	11, 14, 16, 18
AIR 1958 Cal 261	13
AIR 1957 Cal 230: 60 Cal WN 153	6
(1922) 2 AC 93: 91 LJ KB 449: 127 LT 99, Metropolitan Borough of Poplar v. Roberts	11

Pradip Kumar Ghosh and Subrata Basu, for Petitioner; Ranjit Kumar Banerjee, A. Mitra and Milava Mitra, for Opposite Party.

ANIL K. SEN, J.:— These 7 Rules, obtained by the Corporation of Calcutta on as many as 7 revisional applications, raise a fundamental question as to the mode of assessment of annual value under Section 168 of the Calcutta Municipal Act, 1951 (hereafter referred to as the said Act) in respect of buildings which are actually let out to tenants on rent agreed but not fixed by the Controller under the Rent Restriction Act. Such a question arose before the learned Chief Judge, Court of Small Causes, Calcutta, in 7 municipal appeals now pending before him though at an interlocutory stage and the said question having been decided against the Corporation of Calcutta by the learned Chief Judge by an order dt. June 30, 1980, the Corporation of Calcutta has now challenged that order in these revisional applications. Both the parties now before us have waived all objections to our deciding the issue at this stage on a revisional application and have invited as to decide on review of the position in law, the correct method to be adopted for assessment of the annual value of buildings so let out to tenants and thus shorten the litigation. The question raised is as to whether the Corporation can assess the annual value of a building which has been let out to tenants having regard to the contractual rent payable therefor when the standard rent of such a building had not been fixed by the Controller

in accordance with the provisions of the West Bengal Premises Tenancy Act, 1956.

2. We may refer to the facts of one of the appeals, namely, Municipal Appeal No. 182 of 1972 out of which these rules arise to appreciate how the dispute now brought over to us did arise. The respondent before us raised a multi-storeyed building at premises No. 20, Abdul Hamid Street previously known as British India Street, Calcutta. The building was so raised after the year 1956. By a notice dt. Oct. 10, 1966, issued under S. 180 of the said Act, the Corporation proposed to assess the annual value of the said building to the extent then constructed at Rs. 63,365 with effect from 3rd quarter of 1966-67 until a fresh valuation was made. The respondent preferred an objection u/s. 181 of the said Act and the Special Officer II in disposing of the said objection reduced the valuation to Rs. 49,368. Being aggrieved by the order of the said officer, the respondent preferred an appeal before the Court of Small Causes, Calcutta, which was registered as Municipal Appeal No. 182 of 1972.

3. On May 31, 1974, the respondent filed a petition in the said appeal praying for permission to examine an expert valuer as a witness to prove the cost of construction of the said premises. Such a prayer was made on the plea that for the purpose of assessing the annual value of the disputed premises under S. 168 of the said Act, fair rent thereof should be determined on the basis of actual cost of construction of the building and the market value of the land as envisaged by S. 8 (i) (d) of the W. B. Premises Tenancy Act, 1956, since the building had been constructed after the year 1956.

4. Such a prayer made on behalf of the respondent was strongly opposed by the Corporation on the ground that when undisputedly the premises had been wholly let out, the rent at which the premises might reasonably be expected to let can be determined on the basis of the rent actually realised and as such there is no necessity of adducing any evidence with regard to the cost of construction of the building or the market value of the land for the purpose of determining the annual value under Section 168 of the said Act. The Corporation took the stand that the rent of the premises at the time of assessment being determinable with reference

to the actual rent realised and such rent not being tainted by any extraneous consideration, it was not necessary to determine the fair rent in terms of the W. B. Premises Tenancy Act, 1956, for the purpose of assessing the annual valuation, the agreed rent should be accepted to approximate the fair rent as envisaged by the Premises Tenancy Act.

5. The learned Chief Judge by his order dt. June 7, 1974 upheld the objection raised by the Corporation and overruled the prayer on behalf of the respondent in view of a Bench decision of this court in the case of Corporation of Calcutta v. Basanta Investment Corporation, ILR (1975) 2 Cal 309 where A. C. Gupta, J. (as his Lordship then was) observed:—

"As the premises were actually let out, no question arises in this case as to what rent a hypothetical tenant would be willing to pay for the premises. Reference to S. 8 (i) (d) of the West Bengal Premises Tenancy Act made by the learned Judge of the court below in this context seems to be irrelevant. The court below appears to have overlooked the provisions of S. 4 of the said Act that in case where fair rent of the premises has not been fixed, the tenant must pay to the landlord the rent agreed upon."

6. It may be pointed out at this stage that special leave petition bearing No. 1256 of 1974 (Civil) for a further appeal to the Supreme Court against the above Bench decision was dismissed by the Supreme Court on Feb. 7, 1975. That apart, the view expressed in the above Bench decision was the consistent view expressed by this court all along. Reference may be made to the Bench decisions in the cases of Corporation of Calcutta v. Union Jute Mill Company Limited, (1956) 60 Cal WN 153: (AIR 1957 Cal 230) and James Finlay Company Ltd. v. Corporation of Calcutta, (1969) 73 Cal WN 961. In the latter decision P. N. Mukherji, A.C.J., observed:

"With regard to this last contention it may at once be stated that, in the absence of any other material relevant on the point, the actual rent may well be a good index of the hypothetical fair rent. From that point of view making of the instant assessment on the basis or in the light of actual rent cannot be objected to."

7. The respondent challenged the said order passed by the learned Chief Judge on the earlier occasion in a revisional application which was registered as C. R. No. 2360 of 1974 but this court refused to interfere in exercise of its revisional jurisdiction without going into the question of correctness or otherwise of the said decision of the learned Chief Judge.

8. In that background when the said appeal was still pending before the learned Chief Judge and the other 6 appeals were directed to be heard analogously, the respondent renewed his prayer for permission to examine an expert valuer on grounds similar to those made out in his earlier application dt. May 31, 1974, and sought for adjournment of the hearing of the appeal for the said purpose. Obviously the respondent was inspired to do so again in view of a later decision of the Supreme Court in the case of Dewan Daulatrai Kapoor v. New Delhi Municipal Committee, AIR 1980 SC 541. The learned Chief Judge by the order now impugned before us, has this time allowed the prayer made by the respondent. He held: "That the law as stands today is clearly to the effect that even in the present case where the landlord is realising actual rent from the tenants, for the purpose of assessing annual value, the assessing authority must have to follow the principles laid down in the W. B. Premises Tenancy Act for determining the fair rent." In that view, the learned Chief Judge recalled the order dt. June 7, 1974, passed by his predecessor and allowed the respondent's prayer for examining an expert valuer for the purpose of determining the fair rent of the building in accordance with the provisions of S. 8 (i) (d) of the W. B. Premises Tenancy Act, 1956. Feeling aggrieved, the Corporation has now moved this court strongly disputing the correctness of the view taken by the learned Chief Judge and the order passed thereon. The respondent appearing to contest these revisional applications, on the other hand, has supported the view taken by the learned Chief Judge. According to the respondent when the W. B. Premises Tenancy Act has fixed the fair rent payable by a tenant in respect of any premises covered by the said Act, a hypothetical tenant cannot reasonably be expected

to pay anything more than the fair rent so fixed by the statute; hence irrespective of what actual rent is being realised from tenants the annual value should be assessed only on the basis of the fair rent because S. 168 (1) of the said Act enjoins assessment of annual value not with reference to the actual rent but with reference to the rent at which the premises might reasonably be expected to let. As we have indicated hereinbefore, both the parties now before us have agreed that the issue raised is a fundamental one and should in the interest of both be decided by this court at this stage so that either of the parties may not be relegated to the position of raising this issue later while preferring an appeal against the final order.

9. In deciding the issue thus raised before us it would first be necessary to recall certain basic principles which are well settled by now. It was pointed out by the Supreme Court in the case of Patel Gordhandas Hargovindas v. Municipal Corporation, Ahmedabad, AIR 1963 SC 1742 that the term 'rate' had always the meaning of a tax on the annual value or rateable value of lands or buildings and not on their capital value. The methods adopted for the purpose of determining such annual or rateable value are usually threefold, namely, (1) actual rent fetched by land or building where it is actually let, (2) where it is not let, rent based on hypothetical tenancy particularly in the case of buildings and (3) where either of these two methods is not available by valuation basis on capital value from which annual value has to be found by applying a suitable percentage. In India Municipal Acts in authorising municipal authorities to impose a tax by way of rates on lands and buildings really authorise such authorities to levy a tax on the annual or rateable value of such land and building but not on the capital value. Such is the provision in S. 165 of the said Act. Most of these Acts again have adopted the second and third method referred to hereinbefore for the purpose of assessing the annual or the rateable value. The Act now under consideration, that is, the said Act, has adopted such a method and this is quite explicit on the terms of S. 168 (1) (2) and (3) which may conveniently be set out as hereunder:

"168. Amount of consolidated rate, how to be fixed.— (1) For the purpose

of assessment to the consolidated rate the annual value of any land or building shall be deemed to be the gross annual rent at which the land or building might at the time of assessment be reasonably expected to let from year to year, less, in the case of a building, an allowance of ten per cent. for the cost of repairs and for all other expenses necessary to maintain the building in a state to command such gross rent:

(Provided that in respect of any land or building the rent of which has been fixed under the provisions of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 or the West Bengal Premises Tenancy Act, 1956 (West Bengal Act XVII of 1950, West Bengal Act XII of 1956) the annual value thereof shall not exceed the annual amount of the rent so fixed.)

(2) If the gross annual rent of the land not ordinarily let cannot be easily estimated, the gross annual rent of the land for the purpose of sub-section (1) shall be deemed to be five per cent. of the estimated present value of the land.

(3) If the gross annual rent of a building not ordinarily let cannot be easily estimated, the gross annual rent of the building for the purpose of sub-sec. (1) shall be deemed to be five per cent. of the value of the building obtained by adding the estimated cost of erecting the building at the time of assessment less a reasonable amount to be deducted on account of depreciation, if any, to the estimated present market value of the land valued with the buildings as part of the same premises."

10. It would, however, be useful to remember that in an ordinary situation adoption of the second method does not rule out the application of the first because if the rent actually paid is the result of a fair bargain between the landlord and the tenant and is not affected by any extraneous consideration, that would be the safest index of what a hypothetical tenant would reasonably be expected to pay by way of rent for the land or the building. The position, however, is changed if a statute intervenes and either supersedes the bargain or materially limits the same. Thus if a rent restriction statute operating on the field derecognises the contractual rent and supersedes the same by statutorily fixing the rent payable for such land or building, the contractual rent cannot obviously be the index of rent

reasonably expected to be payable by a hypothetical tenant. As pointed out by the Supreme Court where statutory limitation of rent circumscribes the scope of bargain, the hypothetical rent cannot exceed the limit.

11. In the case of *Corporation of Calcutta v. Padma Debi*, AIR 1962 SC 151, the Supreme Court was considering an assessment under S. 127 (a) of the Calcutta Municipal Act, 1923, terms whereof are materially comparable to those in S. 168 (1) of the said Act, without, however, the proviso now added to sub-section (1) of S. 168. In that case the rent of the premises under assessment had been fixed by the Controller under the provisions of the W. B. Premises Rent Control (Temporary Provisions) Act, 1950 and yet the assessing authorities of the Corporation in making the assessment of annual value refused to accept the position that such value must not be fixed at a figure higher than the rent fixed by the Controller. On an appeal the Small Cause Court and this Court too upheld the objection of the assessee and held that in view of the provisions of W. B. Premises Rent Control (Temporary Provisions) Act, 1950, the annual value must be assessed with reference to the rent fixed by the Controller. The Supreme Court in upholding the view of this court pointed out that when under the Calcutta Municipal Act, it is the letting value of the land or building to the owner-landlord which has been made the criterion for determining the annual value and when under the Rent Act, the landlord can realise no rent other than the rent fixed by the Controller, such rent must furnish the basis for the valuation. Referring to the terms of S. 127 (a) of Calcutta Municipal Act, 1923, the Supreme Court observed that when assessment has to be made with reference to the gross annual rent at which the land or the building might at the time of assessment reasonably be expected to let, it would be incongruous to consider fixation of rent beyond the limits fixed by the penal legislation as reasonable. The Supreme Court approved the following observation of Atkin, L. J., namely, (at p. 154 of AIR) "If no higher rent than the standard rent and statutory increases is enforceable as a matter of common sense that seems to be the limit of the rent a tenant can be reasonably expected to give", quoted and relied on by Lord Carson in his dis-

senting judgment in the case of *Metro-politan Borough of Poplar v. Roberts* (1922) 2 AC 93.

12. To appreciate the true effect of this decision of the Supreme Court one must take note of the material provisions of the W. B. Premises Rent Control (Temporary Provisions) Act, 1950. That Act was a temporary statute, the object whereof was to make better provision for the control of rents of premises in Calcutta and other municipal areas. Section 2 (10) defined standard rent to mean (a) the standard rent determined in accordance with the provision of Sch. A and (b) where the rent has been fixed under S. 9, the rent so fixed; or at which it would have been fixed if the application were made under the said section. Schedule A statutorily fixed the standard rent by allowing specified percentages of increase under different circumstances prescribed thereunder to the basic rent which again was defined to mean the rent fixed under the previous rent restriction laws and where it had not been so fixed the rent as prevailing on the 1st day of Dec. 1941. Section 9 provided for fixation of standard rent by the Controller with reference to Schedule A where applicable together with certain increases sanctioned under circumstances prescribed. This section further provided that where Sch. A is not applicable though the premises were in existence since prior to Dec. 1941, the standard rent should be fixed in accordance with Sch. A taking the rent which would have been reasonably payable for the premises if let on the 1st day of Dec. 1941 as the basic rent for the premises. In case of newly constructed buildings S. 9 further provided that the standard rent payable for one year shall be fixed at a rate equal to 6% of the actual cost of construction as determined by the Controller added to the market price as on 31st Dec. 1946, of the land included in the premises or to the market price of the said land as on the date of completion of the construction whichever is less. Having thus statutorily fixed the standard rent, S. 3 of the Act provided that any amount in excess of the standard rent of any premises shall be irrecoverable notwithstanding any agreement to the contrary. Sec. 17 (1) further provided that such portion of the rent as exceeds the standard rent determined according to the provisions

of this Act shall be irrecoverable from the month of the tenancy next after the month in which the Act comes into force whether the said rent was fixed by agreement or by proceeding under the W. B. Premises Rent Control (Temporary Provisions) Act, 1948. Section 7 provided that where any sum has been paid or deposited on or after the date of commencement of the Act on account of rent which is by reason of the provisions of this Act irrecoverable shall be ordered to be refunded by the Controller on an application being made to him. Furthermore, Sec. 33 (1) (a) of the Act made it penal for the landlord to receive directly or indirectly any sum on account of rent of any premises in addition to the standard rent. These were the provisions relating to rent realisable from the tenants and were in addition to S. 4 of the Act which prohibited realisation of any selami or premium in consideration of the grant, renewal or continuance of any tenancy.

13. These provisions make it clear that the rent restriction statute then operating on the field did not recognise the contractual rent at all and on the other hand having statutorily fixed the rent payable by a tenant to the landlord made it penal for the landlord to realise anything more than the rent so fixed by the statute. Section 3 and S. 17 (1) in express terms rendered irrecoverable that part of the contractual rent which exceeded the standard rent. As held by Bachawat, J. (as His Lordship then was) in the case of Broja Behari Sen v. Ved Prakash, AIR 1958 Cal 261, in contemplation of law the standard rent and the portion of the contractual rent which was not legally recoverable had notional existence as from 30-3-1950 before the standard rent was actually determined by the Rent Controller. In reality, therefore, the statute superseded the contractual rent and imposed the rent fixed by the statute and it is only in the light of such statutory provisions that the Supreme Court held in Padma Debi's case that the annual value has to be determined with reference to nothing else than the standard rent prescribed by the statute, the landlord and the tenant not having any right to determine the rent by mutual bargain.

14. The principles enunciated in the case of Padma Debi (AIR 1962 SC 151) was reaffirmed by the Supreme Court in the case of Corporation of Calcutta

v. Life Insurance Corporation, AIR 1970 SC 1417 where however, the assessment was being made under S. 168 (1) of the Calcutta Municipal Act, 1951, now under consideration. In reaffirming the principle earlier laid down the Supreme Court overruled the contention of Corporation of Calcutta that addition of the proviso to sub-sec. (1) of S. 168 of the said Act changed the legal position and limited application of standard rent only to cases where such a rent had been fixed by the Controller. The Supreme Court held that by addition of the proviso the meaning of the expression gross rent at which the land or the building might reasonably be expected to let is not altered. Hence, the principle earlier laid down in the case of Padma Debi having regard to those terms and having regard to the provisions of the Rent Restriction Act operating on the field was reaffirmed. We must, however, remember that in this case also the rent restriction statute operating on the field was the W. B. Premises Rent Control (Temporary Provisions) Act, 1950, that is the same Act which was the subject matter of consideration in Padma Debi's case and the material provisions whereof we have referred to hereinbefore.

15. In the case of Moti Chand v. Bombay Municipal Corporation, AIR 1968 SC 441 (para 5), the Supreme Court held that though the owner of a building cannot charge rent in excess of what is fixed by the rent restriction statute, if such a building because of any special advantage attached to it is likely to fetch some amount in addition to rent, the hypothetical tenant is to take into consideration such extra income and would be prepared to pay over and above the actual rent something in respect of such additional advantage and as such that income comes into consideration in assessing the annual value under the parallel provision of S. 154 (1) of the Bombay Municipal Corporation Act, 1888. This decision establishes the position that it is not the inflexible rule that the annual value must invariably be restricted to the rent as determined by the rent restriction statute irrespective of any other consideration.

16. In both the cases of Padma Debi (AIR 1962 SC 151) and the Life Insurance Corporation (AIR 1970 SC 1417) referred to hereinbefore Supreme Court was affirming the decision of this court and upholding the view expressed by

this court in the light of the provisions of the W. B. Premises Rent Control (Temporary Provisions) Act, 1950. It is only because that Act statutorily fixed the rent and superseded the contractual rent that this court held that the assessing authorities cannot go beyond the limits of the statute and make the assessment on the rent realised from sub-tenants or on their own assessment of what the rent payable would be. It is quite obvious that it was so held because the Rent Act of 1950 not only superseded the contractual rent but made realisation of anything more than the standard rent incapable of and penal under the statute.

17. Notwithstanding the view so expressed in those two cases this court again in case of assessment made after 1956, when the W. B. Premises Tenancy Act, 1956, came into effect, consistently held that where fair rent has not been fixed by the Controller under the provisions of the Act of 1956, assessment of annual value can be made having regard to the contractual rent as paid by the tenant. It was so held in the case of *James Finlay Company Limited* (1969-73 Cal WN 961) and *Basanta Investment Corporation* (ILR (1975) 2 Cal 309) referred to hereinbefore and the last of the aforesaid decisions was approved by the Supreme Court when the special leave petition for a further appeal to the Supreme Court against that decision was dismissed. In our considered opinion, this court held as such not on oversight of the principles enunciated in the earlier decisions but because of the material change introduced by the W. B. Premises Tenancy Act, 1956. Section 2 cl. (c) of the 1956 Act defines fair rent to mean fair rent referred to in S. 8 or where the fair rent has been increased under S. 9 such increased rent or where the fair rent has been revised under S. 11, such revised rent. Section 8 no doubt statutorily fixes what the fair rent would be and S. 9 permits certain increases to the fair rent on grounds specified. But S. 5 unlike the Act of 1950, prohibits realisation of only any premium or other consideration for the grant, renewal or continuance of a tenancy but not any rent in excess of fair rent as estimated by the statute. But what is more important by way of change is the revised terms of S. 4 thereof, material part whereof may be set out hereunder :

"4. Excess over fair rent to be irrecoverable,

(1) A tenant shall subject to the provisions of this Act pay to the landlord :
(a) in cases where fair rent has been fixed for any premises such rent;

(b) in other cases the rents agreed upon until fair rent is fixed.

(3) any sum in excess of fair rent referred to in sub-sec. (1) shall not be recoverable by the landlord."

Unlike the provisions of S. 3 and 17 (1) of 1950 Act, there is no statutory prohibition against realisation of rent in excess of notional fair rent where such rent had not been fixed by the Controller. Moreover under the new scheme the legislature not only withdrew the statutory prohibition against realisation of any rent other than the fair rent as estimated by the statute but imposed an obligation on the tenant to pay the agreed rent if the fair rent had not been fixed. The reason for introducing such a change was perhaps the fact that rent restriction laws having already been in operation for more than 8 years, the legislature thought that where the landlord and the tenant abide by the rent agreed between them and do not go for fixation by the Controller they do so because the agreed rent bears a reasonable approximation to the fair rent as envisaged by the Act otherwise either of them would have gone on for fixation. Obviously in view of such a change introduced by the statute in a manner recognising the agreed rent to be the fair substitute for the fair rent as estimated by the statute, this court in cases of assessment after the year 1956, upheld the assessment of annual value made on the basis of the agreed rent in cases where the fair rent had not been fixed. Now the only question that arises for our consideration in these Rules is as to whether this view stands overruled by the two subsequent decisions of the Supreme Court in the case of *Guntur Municipal Council v. Guntur Town Rate Payers' Association*, AIR 1971 SC 353 and *Devan Daulat Rai Kapoor v. New Delhi Municipal Committee*, AIR 1980 SC 541 as seems to be the view taken by the learned Judge in the court below.

17-A. In the case of *Guntur Municipal Council* what was being challenged was the general revision made by the Municipality in the year 1960 by increasing

the rental value of buildings to more than the rental value which prevailed on the dates provided in the Rent Control Act in force prior to 1960. Obviously the municipality was totally ignoring the provisions of the Rent Control Act, in making the assessment and a question was raised on behalf of the Rate Payers' Association as to whether such a procedure was in accordance with law or not. All the courts below upheld the objection so raised on behalf of the Rate Payers' Association and the said decision was upheld by the Supreme Court. Incidentally, it was sought to be argued before the Supreme Court that S. 82 (2) of the Madras Municipalities Act, which is comparable to S. 168 now under consideration, made a distinction between buildings, the fair rent of which has been actually fixed by the Controller and those in respect of which no rent had been fixed. Such a contention was overruled by the Supreme Court when it was held that under S. 82 (2) Municipality is not free to assess any arbitrary annual value but such valuation must take into account the measure of fair rent as determined by the statute whether such determination is incorporated in a fixation made by the Controller or not. Apart from the material difference between the provisions of Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960, and those of the W. B. Premises Tenancy Act, now under consideration to which reference would be made hereinafter, in the Guntur case, the Supreme Court was not called upon to consider the correctness of an assessment based on agreed rent where the parties abide by such rent and have not gone on for fixation by the Controller and when the statute imposed no prohibition to the realisation of such rent.

18. The point in the aforesaid perspective, however, came up for consideration before the Supreme Court in the case of *Devan Daulat Rai Kapoor v. New Delhi Municipal Committee* (AIR 1980 SC 541) (supra). There individual assessments made on the basis of contractual rent where the standard rent had not been fixed by the Controller were challenged. Such assessment was upheld by the Delhi High Court but was set aside by the Supreme Court. There it was held by the Supreme Court that even in case of a building in respect of which no standard rent had been fixed within the

period of limitation prescribed by the statute and the tenant's right to apply for fixation of standard rent is barred with the result that the landlord is lawfully entitled to continue to receive the contractual rent, the annual value must be limited to the measure of standard rent determinable under the statute and not on the basis of the higher rent actually received even under those circumstances by the landlord from the tenant. No landlord can reasonably expect to receive from a hypothetical tenant anything more than what is determined by the Act and this would be so equally whether the building has been let out to a tenant who has lost his right of fixation of the standard rent or the building is self-occupied by the owner. The assessing authority would in either case have to arrive at its own figure of the standard rent by applying the principles laid down in the Delhi Rent Control Act, 1958, for determination of standard rent and determine the annual value of the building on the basis of such figure of standard rent. The Supreme Court thought that to be the legitimate extension of the principle initially laid down in *Padma Debi's case* (AIR 1962 SC 151) which was reaffirmed in the case of *Life Insurance Corporation*.

19. In our view it would be necessary to refer to the material provisions of the Delhi Rent Control Act, 1958, and the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960, in the light of the provisions whereof the Supreme Court held that the measure of rent as prescribed by the statutes must prevail over the contractual rent for furnishing the basis for assessment of the annual value. Section 2 (k) of the Delhi Rent Control Act, 1958, defines standard rent in relation to any premises to mean the standard rent referred to in S. 6 or where the standard rent has been increased under S. 7, such increased rent. This definition clause is similar to the one in the W. B. Premises Tenancy Act, 1956. Section 6 of the Delhi Act, like S. 8 of the W. B. Premises Tenancy Act, statutorily fixes the standard rent. Section 7 permits certain increases. But Ss. 4 and 5 of the Delhi Act are materially different from the corresponding provisions of the W. B. Act. Section 4 provides in express terms that subject to one exception (not relevant for our present purposes) no ten-

ant shall notwithstanding any agreement to the contrary be liable to pay to his landlord for the occupation of any premises any amount in excess of the standard rent of the premises unless such amount is a lawful increase of the standard rent in accordance with the provisions of this Act. Sub-sec. (2) of S. 4 goes on to provide that any agreement for payment of rent in excess of standard rent shall be construed as if it were an agreement for the payment of the standard rent only. Sub-sec. (1) of S. 5 prohibits any person from claiming or receiving any rent in excess of standard rent notwithstanding any agreement to the contrary and sub-sec. (2) thereof incorporates such a prohibition against realisation of any premium or other consideration for grant, renewal or continuance of a tenancy. The Delhi Act incorporates a new innovation when in S. 12 it provides for limitation for filing an application to the Controller for fixation of rent under S. 9. This Act unlike the W. B. Act does not recognise the contractual rent and in substance supercedes the same by the standard rent fixed by the statute. That follows from the provisions of Ss. 4 and 5 (1) of the Delhi Rent Control Act. It may be that in an individual case the right to have the standard rent fixed by the Controller may be lost to an existing tenant by the limitation prescribed by the statute as a result whereof it may not be unlawful for the landlord to realise the contractual rent from that tenant but that is not important because the statute does not recognise the contractual rent in any manner and when the assessment of the annual value has to be made not on the basis of rent paid but on what would be reasonably expected to be payable by a hypothetical tenant, it was pointed out by the Supreme Court that the hypothetical tenant cannot reasonably be expected to pay anything more than what is determinable under the statute because the limitation will never operate as against him.

20. The provisions of A. P. Buildings (Lease, Rent and Eviction) Control Act, 1960, are a little different from the Delhi Act. But this Act too bears a material difference from the W. B. Act now under consideration by us. In the A. P. Act, there is no definition clause but S. 4 provides that the Controller shall fix the fair rent having regard to

the considerations set out in the section itself together with certain permissible increases. Sec. 5 provides for increases to fair rent once fixed. Sub-sec. (1) of S. 7 imposes a prohibition on the landlord prohibiting him from claiming, receiving or stipulating for payment anything in excess of the fair rent where fair rent has been fixed and sub-sec. (2) of that section imposes such a prohibition on the landlord prohibiting him from claiming, receiving or stipulating for payment of any amount in excess of the agreed rent where the fair rent had not been fixed. This statute unlike the W. B. Act does not recognise the contractual rent though it does not make such rent irrecoverable until the fair rent is fixed.

21. We have referred to the material provisions of the W. B. Premises Tenancy Act, 1956, now under consideration. The change that was introduced in that Act from the previous Rent Restriction Acts has got an important bearing which in our view makes all the difference. Unlike the Delhi Act or the A. P. Act, the Act now under consideration by us not only recognises the contractual rent but makes it obligatory for the tenant to pay such rent until the fair rent is fixed. This positive nature of the statutory provision equates the contractual rent with the fair rent as estimated by the statute. It would bear repetition to say that the statute did so because it contemplated that where the landlord and the tenant abide by the contractual rent and do not go for fixation by the Controller they do so because the contractual rent bears a reasonable approximation to the fair rent envisaged by the statute. Such being the difference in the scheme of the W. B. Act from the scheme of the Acts under consideration by the Supreme Court in the above two cases, we feel inclined to hold that the principles enunciated by the Supreme Court in the later two cases particularly, in the case of *Devan Daulat Rai Kapoor* (AIR 1980 SC 541) (*supra*) can have no application to a case like the one now under consideration. For the very same reason the still later decision of the Supreme Court in the case of *Mrs. Shiela Kaushish v. I. T. Commissioner, Delhi*, AIR 1981 SC 1729 is distinguishable from the present case. Here the Rent Act itself having recognised the contractual rent and having made it payable by the tenant on the basis that

such rent bears fair approximation to the measure of rent prescribed by the statute there would be no bar on the assessing authority to assess the annual value with reference to such contractual rent as is being paid without any objection by the tenant to the landlord. On the scheme of the present W. B. Act in a case where the rent had not been fixed by the Controller the contractual rent as paid by the tenant cannot be said to furnish no foundation for assessment of rent reasonably payable by a hypothetical tenant. Such being the position, we are unable to hold that the learned Judge in the court below was right in his conclusion that the law as it stands is to the effect that even in a case where the landlord is realising contractual rents from the tenants no fair rent being assessed under the statute, for the purpose of assessing the annual value the assessing authority cannot base his assessment on such contractual rent but has to follow the principles laid down in the W. B. Premises Tenancy Act for determining the fair rent. On the view we take the impugned order made on a misapprehension of the legal position and as such in illegal exercise of jurisdiction should be set aside as otherwise the parties are bound to suffer serious prejudice. In the result, Rules are made absolute and we set aside the impugned order and reject the assessee's application for permission to examine an expert to prove the cost of construction with a view to fix the fair rent with reference to S. 8 (1)(d) of the W. B. Premises Tenancy Act, 1956. Parties do bear their respective costs in this Rule.

22. Certificate under Art. 133 (1) of the Constitution is prayed for and the same is refused on the ground that this is not a final order.

23. There will be stay of the operation of the order for a period of one month from date, as prayed for.

B. C. CHAKRABARTI, J.:— I agree.
Order accordingly.

AIR 1982 CALCUTTA 488

P. K. BANERJEE AND B. N. MAITRA, JJ.

Md. Yunus, Appellant v. Nabi Hossain,
Respondent.

F. A. Nos. 414-16 of 1979, D/- 1-4-1982.

DZ/EZ/B806/82/CWM

(A) Civil P. C. (5 of 1908), O. 9, R. 13 — Suit to set aside an ex parte decree on ground of fraud — Factors to be proved.

In order to set aside an ex parte decree, the alleged fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the real facts of the case, and obtaining that decree by that contrivance. In the absence of fraud, a suit does not lie to set aside an ex parte decree merely on the ground of non-service of summons. A prior judgment cannot be set aside on a mere general allegation of fraud or collusion. It must be shown how, when, where and in what way the fraud was committed. The falsity of claim, perjured evidence, false representation of facts by themselves are not sufficient to set aside any decree in the absence of fraud preventing the plaintiff from placing his case before the Court. In order to maintain such suit, the plaintiff has to prove two things, viz., fraudulent suppression of summons and also that the claim of that suit was false. The falsity of the claim may be considered along with non-service of the summons as supplying the motive for and leading to the legitimate inference of fraudulent suppression. Case law discussed. (Para 13)

(B) Civil P. C. (5 of 1908), O. 6, R. 2 — Pleadings and evidence — Evidence cannot be allowed to be led by a point not made out in the plaint.

(Para 19)

(C) Evidence Act (1 of 1872), S. 3 — Evidence — Appreciation — Damaging statements cannot be got rid of merely by stating that they were slips of tongue. (Para 11)

Cases Referred: Chronological Paras

AIR 1980 SC 727	18
(1980) 84 Cal WN 221	19
AIR 1965 SC 712: 1965 (1) Cri LJ 636:	
1963 All LJ 882	10
AIR 1960 Cal 309	13
AIR 1958 SC 255	19
AIR 1957 SC 49: 1956 SCA 1139	18
AIR 1957 Cal 242: 61 Cal WN 207	13
(1950) 54 Cal WN 186	11
AIR 1941 Cal 215: 44 Cal WN 849	13
AIR 1940 Cal 489: 44 Cal WN 912	13
AIR 1940 Cal 536: 44 Cal WN 999	13
AIR 1930 PC 57 (1)	19
AIR 1917 Mad 630 (FB)	7
(1914) 18 Cal WN 681: ILR 41 Cal 990	13,
	18

(1912) 39 Ind App 1: ILR 39 Cal 232
(PC) 7

(1910) 14 Cal WN 507: ILR 37 Cal 197 13

(1867) 3 Ch 203: 18 LT 134: 16 WR 441,
Patch v. Ward. 13, 17

Sudhis Das Gupta, Arun Chatterjee and Bijan Mazumdar, for Appellant; M. N. Ghose, A. Sahu, G. Kaur and P. Singh, for Respondent.

B. N. MAITRA, J.:— Title Suits Nos. 577 and 578 of 1976 and 258 of 1978 were heard together. The main dispute relates to the case set up by plaintiff in Title Suit No. 258 of 1978. He has alleged that the disputed property at premises No. 65, Mechuabazar Street, which was subsequently numbered as 155, Keshab Chandra Sen Street, belonged to one Sk. Munna as a tenant. He erected structures thereon. By a kobala dated 8-11-1917, he sold that property to Md. Hossain and Ali Hossain, who are sons of one Sk. Abdul. Sk. Amir was Abdul's elder brother and had no issue. He brought up the plaintiff as his foster son. By a registered sale deed executed on the 26th July, 1924, Md. Hossain transferred his 8 annas share in the property to his brother, Ali Hossain. Then by a registered conveyance dated 25th Mar., 1926, Ali Hossain transferred that property to the plaintiff. The latter had great respect for Ali Hossain. That property was occupied by Sk. Amir, Sk. Abdul and the members of their family including the plaintiff. On his request, Ali Hossain used to look after that property. The rent receipts and documents in respect of their property remained in the name of Ali Hossain and the plaintiff kept his original title deed with him. He was engaged as a seaman on board a merchant ship and had to remain away from Calcutta for years together. So he forgot about his title deeds, documents and also with respect to his title to the property in question. The members of his family used to occupy one room in the structure standing on the disputed property. He was on board a ship up to 31-10-1976 and again from the 5th Feb., 1977, to 16th Dec., 1977. On the 22nd Dec., 1977, he returned to Calcutta and came to know that while he was on board a ship on the 25th July, 1977, Md. Yunus, defendant No. 1, (plaintiff of Title Suits Nos. 577 and 578 of 1976) forcibly took possession of that room, which had been in the occupation of the members of his family. He had consultation with his lawyers. He came to know that Md. Yunus claimed to have purchased the

property in question described in the schedule 'A' to the plaint from defendants Nos. 3 to 5 by two different kobalas. But in fact no title accrued to Md. Yunus on the basis of those two documents. It further appeared that Md. Yunus instituted Title Suit No. 2323 of 1976 in the City Civil Court for recovery of khas possession of the premises described in Schedule 'B' to the plaint on the ground that the plaintiff was a licensee thereof. A fraudulent ex parte decree was obtained. Then Md. Yunus obtained khas possession of that room. Ali Hossain expired on the 30th Aug., 1970, leaving behind his widow (defendant No. 5) and son (defendant No. 2). The latter gifted his share in the property to his two sons, defendants Nos. 3 and 4. In fact, the plaintiff is the owner of that structure on the footing of the purchase by the aforesaid document dated 25th Mar., 1926, and Ali Hossain had no interest therein. His name is Md. Ali alias Sk. Jiaur Rasul. He is entitled to recover possession of that property. He has asked for a declaration that he is the owner of the structure of the disputed premises described in Schedule 'A' to the plaint, for a further declaration that the documents executed by defendants Nos. 3 to 5 in favour of Md. Yunus is not valid and not binding on him and also for a declaration that such ex parte decree is void and not binding on him. He has further asked for a permanent injunction to restrain Md. Yunus from disturbing his possession in the premises in question. He has prayed for recovery of khas possession with respect to the property described in the Sch. 'B' to the plaint and prayed for recovery of mesne profits.

2. Defendant No. 1, Md. Yunus, filed a written statement denying the plaintiff's allegations. His defence is that the suit is not maintainable; it is barred by estoppel and res judicata. Ali Hossain became the sole owner of the disputed property on the footing of the purchase made by him from his brother, Md. Hossain, by a kobala executed on the 26th July, 1924. Ali Hossain used to collect rent from the tenants of their property, had his name recorded in the landlord's office and in the Corporation of Calcutta as a thika tenant. In March, 1958, Md. Ali filed Partition Suit No. 403 of 1958 in the original side of the Calcutta High Court against Ali Hossain and others praying for a declaration that he had fractional share in the disputed property, for partition and for

taking accounts. The suit was contested by Ali Hossain and it was dismissed. An order was passed that the plaintiff would be given liberty to file a fresh suit within a fortnight on the same cause of action on payment of Rs. 100/- as costs. After Ali Hossain's death, his only son, Zahirul Haque, gifted his share to his two sons, Serajul Haque and Manjural Haque (defendants Nos. 3 and 4). By a kobala executed on the 7th July, 1975, defendants Nos. 3 and 4 sold their 14 annas share in the disputed property to Md. Yunus. Ali Hossain's widow, Shakuran Bibi, sold her remaining two annas share in that property to Md. Yunus by a kobala executed on the 14th July, 1975. Thereby, he became the sole owner of that thika tenancy and of the property in question. His name was mutated in the landlord's office and also in the Corporation of Calcutta. He took possession of the property and collected rent from the tenants. Nabi Hossain (defendant in Title Suit No. 577 of 1976) and Aktar Hossain (defendant in Title Suit No. 577 of 1976) were licensees, who were in occupation of portions of the disputed property. Their licenses were duly revoked by him and thus, he instituted Title Suits Nos. 577 and 578 of 1976 against them, prayed for declaration of title, ejectment and injunction. The ex parte decree was rightly passed. Md. Ali had instituted Title Suit No. 130 of 1977 praying for a declaration that the disputed property was their joint property. He contested that suit. Then Md. Ali was permitted to withdraw that suit with liberty to sue afresh and costs were awarded.

3. Subsequently, Md. Yunus amended the plaint of Suits Nos. 577 and 578 of 1976.

4. Nabi Hossain and Aktar Hossain filed written statements and supported the case made out by the plaintiff in Title Suit No. 258 of 1978.

5. The learned Judge of the City Civil Court accepted the plaintiff's version, stated that the question of maintainability was not pleaded, dismissed Title Suits Nos. 577 and 578 of 1976 and decreed Title Suit No. 258 of 1978. He granted the prayers for declaration and injunction. Regarding the property of the Sch. 'B' an order was passed that the provisions of S. 144 of the Civil P. C. would provide for relief. Hence these three appeals by Md. Yunus.

6. It has been contended on behalf of the appellant that Md. Ali had no alias

and he was not known as Sk. Ziaur Rasul. His real name is Md. Ali. The kobala, Ext. 1, executed by Ali Hossain in favour of Sk. Rasul, son of Sk. Amir, on the 25th March, 1926, is a sham and fictitious document and it was never acted upon. Ali Hossain, who was the real owner of the property, possessed the same all along. The alleged ex parte decree was correctly passed. There was no suppression of summons. The suit is not maintainable and court will grant a decree in favour of the appellant in the aforesaid Title Suits Nos. 577 and 578 of 1976.

7. The learned Advocate appearing on behalf of the respondent Md. Ali referred to the well-known case of *Mir Serwar Jan* in (1912) 39 Ind App 1 (PC) and the Full Bench case of *Raghava v. Sri Nivasa* in AIR 1917 Mad 630. It has been contended that the document in favour of a minor is not void. In 1926, when a genuine disputed kobala, Ext. 1, was executed by Ali Hossain in favour of the plaintiff, he was only six years old. He was brought up by his uncle, Sk. Amir, who had no issue of his own. He was his foster son. The alleged ex parte decree was not rightly passed. The court omitted to consider the questions whether the claim of that Title Suit No. 2323 of 1976 was false and if any person of the name of Sk. Ziaur Rasul was in existence and because of these two defects, the case may be sent back on remand.

8. The other two appeals were not contested.

9. The first question for consideration is whether Md. Ali was also known as Sk. Ziaur Rasul. It has been contended for Md. Ali that on this, there is evidence of P. W. 1, Sakurennessa, P. W. 2, Sam-sunessa, who is his sister, and P. W. 3, Md. Ali, who is the plaintiff himself. The court cannot reject their testimony, specially when one of the D. Ws., namely, D. W. 9, Nabi Hossain, has stated in his chief that Ziaur Rasul is known as Md. Ali.

10. P. W. 1, Sakurennessa, is the plaintiff's alleged cousin and she cannot see. She pretended to identify Md. Ali in the court only by his voice. But her evidence is a mistaken one because she has stated that the man whom she was identifying in the court on the basis of his voice was Ziaur Hossain. Of course, there is a decision of the Supreme Court in a criminal case that identification by voice, when a person is not familiar with

him, is risky, vide the case of Kirpal Singh v. State of U. P. in AIR 1965 SC 712 at page 714. There is a clear lacuna in her evidence because she has nowhere stated that she is or was acquainted with Ziaur Rasul or Ziaur Hossain or Md. Ali. Then comes the evidence of P. W. 2, Samsunnessa. She is none but Md. Ali's own sister. She has stated that she lives at Gaya in Bihar and after receiving the summons, she came down to Calcutta, where she had been staying with the plaintiff. She also is an interested witness. P. W. 3, Md. Ali, being the plaintiff himself is highly interested in supporting his case. The plaintiff's own case is that he was a seaman. P. W. 4, Deb-dutta Paul, is an assistant of Shipping Master's office, Calcutta. He brought a duplicate copy of the certificate of Continuous Certificate of Discharge in favour of Md. Ali and also brought the service record, Ext. 2, of one Md. Ali and not of Sk. Ziaur. It is common case that the service record, Ext. 2, relates to the plaintiff's service on board a merchant ship. But that document nowhere gives any inkling that he was also known as Sk. Ziaur Rasul. The last witness on the plaintiff's side is P. W. 5, Abdul Wahad, who is also the record sorter of that office. He only proved his service record, Ext. 2. He does not utter a word that Md. Ali or anybody else was also known as Sk. Ziaur Rasul. D. W. 9, Nabi, is the defendant in Yunus's title suit No. 577 of 1976 and his interested evidence on this is disbelieved.

11. Plaintiff has stated that his name was never mutated in the Corporation of Calcutta and he never signed his name as Ziaur Rasul because he was widely known as Md. Ali. Harries, C. J., has stated in the case reported in (1950) 54 Cal WN 186 at page 187 that damaging statements cannot be got rid of merely by stating that they were slips of tongue. He has made further damaging statements by saying that he is the owner of a ration card, where his name has been written as Md. Ali, he has been enrolled as a voter in the name of Md. Ali and he also filed a suit in the Hon'ble High Court in 1953 and ultimately, he did not proceed with that suit in 1961. It will appear from the copy of the order of the High Court dated 13-9-1961, Ext. E/1, that Md. Ali's suit was dismissed. There also, the name of Sk. Ziaur Rasul does not appear. There is no provision in Muhamaddan Law for adoption. In

such circumstances, we disbelieve the plaintiff's version on this and hold that the real name of the plaintiff is Md. Ali and he was never known as Ziaur Rasul.

12. It will be pertinent to point that in the plaint, it was not stated that when that kobala, Ext. 1, executed in 1926, he was a minor and that kobala was wrongly taken in his name as a major. It will appear from that kobala that Sk. Ziaur Rasul, vendee of that kobala, was described as a shopkeeper. He cannot be permitted to make out a case outside his pleading. One fails to understand how a boy of six years could then be a shopkeeper. P. W. 3, Md. Ali, has stated in his evidence that in 1920, he was born.

13. Now, the important question arises whether the decree passed in Title Suit No. 2323 of 1976 was rightly passed. Let us first discuss the law on this. The leading English case on this is of Patch v. Ward in (1867) 3 Ch 203. Sir John Rolfe has stated in that case that in order to set aside an ex parte decree, the alleged fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the real facts of the case, and obtaining that decree by that contrivance. This decision was followed by this Court in the case of Durga Gati v. Taherullah in (1940) 44 Cal WN 849: (AIR 1941 Cal 215). It will be sufficient to refer to the cases of Narsingh v. Rafikn in (1910) 14 Cal WN 507 and of Romesh in (1940) 44 Cal WN 999 at page 1001: (AIR 1940 Cal 536) to show that in the absence of fraud, a suit does not lie to set aside an ex parte decree merely on the ground of non-service of summons. In the case of Atul v. East Bengal Commercial Bank Ltd. in AIR 1960 Cal 309, it has been stated that mere non-service of summons is not enough to set aside an ex parte decree because if there was mere non-service of summons, that will be the subject matter to be decided under Order 9, Rule 13 of the Civil P. C. It will appear from the observations of Jenkins, C. J., in the case of Nanda Kumar v. Ram in (1914) 18 Cal WN 681 at p. 688 that a prior judgment cannot be set aside on a mere general allegation of fraud or collusion. It must be shown how, when, where and in what way the fraud was committed. It will appear from the cases of Durga Gati (supra) and

of Romesh (Supra) that falsity of claim, perjured evidence, false representation of facts by themselves are not sufficient to set aside any decree in the absence of fraud preventing the plaintiff from placing his case before the Court. In the Bench case of *Girish v. Kala Chand* in (1957) 61 Cal WN 207: (AIR 1957 Cal 242), it has been stated that in order to maintain such suit, the plaintiff has to prove two things, viz., fraudulent suppression of summons and also that the claim of that suit was false. In the case of *Kunja Behari v. Krishnadhan* in (1940) 44 Cal WN 912: (AIR 1940 Cal 489), it has been observed that falsity of the claim may be considered along with non-service of the summons as supplying the motive for and leading to the legitimate inference of fraudulent suppression. Let it be seen if these tests have been satisfied in this case.

14. Firstly about the question whether the summons of that suit was served. It will appear from the order-sheet of that suit, Ext. 3, that summons was duly served on Md. Ali on 14-1-1977 and accepted by the court. Then the court passed the ex parte decree in question declaring that the plaintiff of that suit. (Md. Yunus) was the original owner of the disputed premises and he would recover khas possession of the disputed premises and obtain an injunction. The plaint and his service records, Ext. 2, show that Md. Ali was on board a ship up to 31-10-1976, and again from 5-2-1977, i. e., he was not on sea in January, 1977.

15. The Process Server, D. W. 5, Tarak Banerjee, has said that he went to serve the summons. The present plaintiff was identified by D. W. Yunus and on such identification, he served summons on Md. Ali, who refused to accept the same. So, he served it by hanging. There is a presumption that the official work was properly performed. There is nothing on the record to rebut such presumption of fact. We accept this evidence and find that the process of that suit was duly served on Md. Ali and it was not fraudulently suppressed.

16. There is no evidence or finding how, when, where and in what way the alleged fraud was committed.

17. Then about the next item whether the claim of that suit was false. There is no pleading or proof on this important point. Hence the suit filed

on the ground of non-service of the process does not lie. The question of maintainability of the suit was pleaded. Still the learned Judge observed that there was no such pleading. The absence of any pleading or proof that the claim of that Title Suit No. 2323 of 1976 was fraudulently obtained by putting forward a false claim, is sufficient for the disposal of the suit No. 258 of 1978. The alleged fraud does not satisfy the test laid down in the aforesaid cases of *Patch v. Ward* (1867-3 Ch 203) (supra) and *Nanda Kumar v. Ram* (1914-18 Cal WN 681) (supra). Nevertheless, we shall discuss the other points also for the sake of competence.

18. Then about the next point whether the disputed kobala, Ext. 1 of 1926 was acted upon. There are two classes of benami transactions, one is a real transfer, in which title is intended to be conveyed for consideration and the other class of cases is incorrectly called benami because it is a sham transaction and the transferor retains title. In the first class of cases the question is who paid consideration and in the second one, the question is, if any consideration was paid. This was stated by Venkatrama Ayyar, J., in the case of *Shree Meenakshi Mills* in 1956 SCA 1139: (AIR 1957 SC 49) and by Venkataramiah, J., in the case of *Bhim v. Kan Singh* in AIR 1980 SC 727.

19. The case in the plaint was that Ali Hossain used to manage Md. Ali's affairs. But P. W. 3 Md. Ali says that so long as his mother was alive till 1948, she managed the affairs and after her death, he entrusted Ali Hossain with such management. Evidence cannot be allowed to be led on a point not made out in the plaint, vide the cases in AIR 1930 PC 57 (1); (AIR 1958 SC 255) and *WBPC Bank v. S. Ghosh* in (1980) 84 Cal WN 221.

20. It will appear from the evidence of the plaintiff, P. W. 3, Md. Ali, that Ali Hossain used to realize rent from the tenants of the suit property from 1924 till his death and he used to pay the ground rent to the landlord. The learned Advocate appearing on behalf of the appellant has drawn our attention to the certified copy of the extract of the cash book of the landlord's sherista, Ext. N, and also to landlord's portion of the rent receipts, Ext. L, to show that

rent was realized regarding the disputed premises at 155, Keshab Chandra Sen Street, in the name of Ali Hossain from October, 1974, to June, 1975. The next certified copy of the extract of the cash book of the landlord's sherista is Ext. N/1, and the corresponding receipt of the landlord is Ext. C. They will show that from July, 1975, rent regarding that property was realised from Md. Yunus till December, 1975. That shows that for all practical purposes, Ali Hossain was the owner of that property. He exercised possession as such till his death which occurred in 1970 and even after his death, there was no mutation, as rent was realised in his name up to June, 1975. There is another important aspect of the case because a very strange statement was made by the plaintiff, P. W. 3, Md. Ali that for the first time, a copy of that title deed of 1926 was obtained by his sister in 1977 and thus, he came to know of the real facts. This also is a pointer that the claim is not a bona fide one, he has no title to the disputed property and the aforesaid kotala, Ext. 1, is a sham and fictitious transaction, which was never acted upon. We hold accordingly.

21. According to the provisions of Section 13 (a) of the Evidence Act, if interest in a property is recognised by a transaction by a civil court, the same has evidentiary value. In the aforesaid ex parte decree of Title Suit No. 2323 of 1976, Ext. 3, Md. Yunus's title to the disputed property was declared by a court of competent jurisdiction. An order of eviction of the present plaintiff and an injunction as well was passed. The same is relevant under Section 13 (a) against defendants in title suits Nos. 577 and 578 of 1976. We have already held that such decree was properly passed. That decree is thus conclusive and binding on Md. Ali. It is, therefore, held that the present plaintiff has no title to the disputed property and that Md. Yunus has alone title thereto.

22. Now, the short question remains to be decided whether Nabi Hossain and Aktar Hossain are Yunus's licensees. It has been pointed out on behalf of the appellant that even D. W. 9., Nabi, has admitted in his evidence that they were allowed to live in the disputed property. It has also been pointed out that notices of revocation were issued by the plaintiff's lawyer revoking that license, vide Exts. J. and J/1. That is sufficient for

the purpose of revoking such licence. D. W. 2, Yunus, has stated that Nabi Hossain and Aktar Hossain were his licensees and their licenses were revoked. His evidence is believed. We, therefore, find that Nabi Hossain and Sk. Amir and Sk. Yunus were licensees and both the suits will be decreed. No remand is called for to give a chance to plaintiff to patch up his weak points.

23. Appeals Nos. 414, 415 and 416 of 1979 be allowed. The judgments and decrees appealed against are hereby set aside. Title Suit No. 258 of 1978 is dismissed. Title Suit No. 577 of 1976 be decreed. It is hereby declared that plaintiff has title to the disputed property. He do evict the defendant from the premises in question and do get a decree for permanent injunction against defendant not to alienate the disputed property. Title Suit No. 578 of 1976 is also decreed. Plaintiff's title to the disputed property is hereby declared. He do evict the defendant. The latter is permanently restrained from transferring the disputed property.

24. There will be no order as to costs.

25. All interim orders are vacated. The deposits made in this Court by the appellant in respect of the rent realized may be withdrawn by him.

BANERJEE, J:— I agree.

Orders Accordingly.

AIR 1982 CALCUTTA 493

Mrs. PADMA KHASTGIR, J.

Ranjit Kumar Jain, Plaintiff v. Kamal Kumar Chowdhury and another, Defendants.

Suit No. 89 of 1975, D/-22-2-1982.

(A) Hindu Law — Adoption — Ceremonies — Jains — Ceremony of giving and taking is essential even amongst Jains — Proof — Onus.

Although according to Jains the adoption is merely a temporal arrangement having no spiritual object but even then the only essential ceremony for the validity of the adoption is of giving and taking the adopted son. A mere recital in the deed itself that such a ceremony had taken place in the absence of either oral or documentary evidence to that effect is not sufficient. Case law discussed.

(Paras 9, 10)

There is no doubt that the burden of proving satisfactorily that he was given

EZ/FZ/C241/82/LGC

by his natural father and received by his adoptive father is on the adoptive son. In the absence of direct evidence much value had to be attached to the fact that the alleged adopted son without controversy succeeded to his adoptive father's estate and enjoyed till his death and that the documents during his life and after his death were framed upon the basis of adoption. The instant case is not a case of ancient transaction inasmuch as the adoption had taken place according to the plaintiff in the year 1956 and his mother who was still alive at the time of hearing of the suit had been a witness to the document by putting her signature thereon. Moreover according to the plaintiff others who were also present at such ceremony, out of them at least one would be called by the plaintiff to corroborate his oral testimony, but ultimately the plaintiff did not examine his mother nor the gentleman named by him to support and/or corroborate his oral testimony. Thus the plaintiff failed to give any evidence whatsoever and state as to that ceremony having taken place in his examination-in-chief. On cross-examination also he failed to substantiate that such ceremony had taken place. He did not call any independent witness to prove that such ceremony had taken place. Under those circumstances on the mere recital in the deed itself, no presumption could be drawn in view of serious challenge being thrown by the defendants. Therefore it was held that the plaintiff had failed to prove adoption as pleaded in the plaint. (Case law discussed).

(Para 10)

(B) Evidence Act (1 of 1872), S. 65 (a) and (c) — Secondary evidence — Certified copy of registered document — Plaintiff relying on registered deed of settlement and contending that the document had been destroyed by defendants — No specific denial of such an allegation — In the circumstances of case certified copy of deed was relied upon.

The plaintiff in the instant case had relied on the deed of settlement. If the plaintiff had the original with him he would have been the first person to produce the original before the Court. It had been contended by the plaintiff in the plaint that the said document had been destroyed by the defendants. There was no specific denial of such an allegation. Inasmuch as the defendants were relying on a will executed by the settlor

it was to their interest that the original deed of settlement would not see the light of the day. Under these circumstances relying on the certified copy of the deed of settlement and other oral evidence it was held that a valid deed of settlement was executed as pleaded in the plaint.

(Para 13)

(C) Succession Act (39 of 1925), Sections 227, 218 — Grant of probate — Probate granted in respect of a will — Deed of settlement was also executed by the executant of will — Effect of probate.

Till the probate is revoked and/or set aside and till the question of authority of the executant of the will to execute a will in respect of a property which was the subject-matter of the said settlement in question is validly and properly decided in a properly constituted suit the said probate is binding.

(Para 13)

Cases Referred: Chronological Paras

AIR 1975 Cal 381	13
AIR 1974 Orissa 199	13
AIR 1970 SC 1286	10
AIR 1963 Punj 208	13
AIR 1961 SC 1378	10
AIR 1960 Cal 494	13
AIR 1956 Bom 555	13
AIR 1954 Mad 486	13
AIR 1954 Raj 17	10
AIR 1936 PC 15	13
AIR 1931 PC 109	10
(1880) ILR 6 Cal 382	10

P. K. Roy, for Plaintiff; Amiya Nath Bose, for Defendants.

ORDER:— The present suit had been filed by Ranjit Kumar Jain against Kamal Kumar Chowdhury and Ratan Kumar Chowdhury for a declaration that the Registered Indenture of Settlement dated February 14, 1971 executed by Radha Debi (also known as Radha Rani Debi) since deceased, was valid and subsisting, for a declaration that the plaintiff being the sole Trustee of the said Trust was exclusively entitled to administer the premises No. 14/4, Sudhir Chatterjee Street, Calcutta as a Trust property, possession of the said premises and also for a declaration that the Will's dated 9th July, 1974 and 15th July, 1974, claimed to have been executed by the said Radha Rani Debi, since deceased, have no effect or bearing on the said premises. Under those circumstances, the defendants were not entitled to ad-

minister the said premises as executors under those Wills and for other consequential reliefs.

2. The plaintiff's case was that the plaintiff was the natural born son of one Budhmull Jain (also known as Budhmull Nahata), since deceased. On or about January 30, 1956, the plaintiff was adopted by his maternal grandfather, Shew Karan Jain (Kathotia) (also known as Shew Raj Singh). The said adoption of the plaintiff was duly recorded in a Registered Deed of Adoption executed by the said adoptive father of the plaintiff. According to the plaintiff, Shew Karan had left behind no other sons—either natural born or adopted except the plaintiff.

3. One Radha Rani Debi (also known as Musst. Radha Debi) since deceased was in the exclusive keeping of the said adoptive father of the plaintiff and was seized and possessed of the premises No. 14/4, Sudhir Chatterjee Street, Calcutta. Under a duly registered Indenture of Settlement executed by the said Radha Rani Debi on the 14th February, 1971, the said Radha Rani Debi since deceased settled the premises No. 14/4, Sudhir Chatterjee Street, Calcutta upon Trust upon various terms and conditions more fully contained in the Indenture of Settlement full particulars whereof will appear from the original Deed of Settlement dated 14th February, 1971. The salient terms and conditions of the said Settlement were that the settlor herself would become the first Trustee of the said Trust and she duly granted transfer of the assets and conveyed the said premises to the Trustee. On the date of the retirement of the said trustee and in such capacity the adoptive father of the plaintiff was to become the Trustee and failing him, his eldest son would be the Trustee of the said Trust property and thereupon the said premises shall vest in him. Shew Karan Jain, the adoptive father of the plaintiff, died on 18th December, 1972 and Radha Debi died on 17th July, 1974. According to the plaintiff, the said Trust was acted upon by the Settlor Trustee herself inasmuch as she realised rents, issues and profits of the said premises till her death. Shortly prior to the death of the Settlor Trustee, the defendants entered into the said premises. It was the case of the plaintiff, as pleaded in the Plaint, that the defendant No. 1 was contending to be sole executor of a Will dated 15th July,

1974, claimed to have been executed by Radha Rani Debi, whereas his son, the defendant No. 2 contended that he was the sole executor of another Will executed by Radha Rani Debi on 9th July, 1974. According to the plaintiff, the defendants had been wrongfully contending that the premises had been disposed of by Radha Rani Debi during her lifetime under those two Wills. However, it was the case of the plaintiff that the Settlor, Radha Rani Debi had no power or authority to revoke the said Trust and dispose of the property under the Will inasmuch as the said Deed of Trust and/or Settlement was executed by her, duly registered and acted upon by and between the parties. Inasmuch as it was an irrevocable Deed of Settlement, it was not within the power of Radha Rani Debi after the execution of the document to dispose of the property, which formed a part of the said settlement by her Will.

4. It was further contended in paragraph 5 of the Plaint by the plaintiff that the defendants had removed and/or destroyed the original Indenture of Settlement, which was in the possession and custody of the Settlor Trustee during her lifetime. Inasmuch as the defendants were interested in denying the said Indenture of Trust created by the settlor, the plaintiff being apprehensive of the invasion of the defendants to the rights of the plaintiff for the enjoyment of the said premises as a sole Trustee and the beneficiary of the said Deed of Settlement, had been compelled to file this suit for necessary reliefs. In some of the suits filed by the Settlor during her lifetime and still pending before other Courts, the defendant No. 1, according to the plaintiff, had wrongfully and surreptitiously got himself submitted in the place of the deceased, on the strength of the Will dated 15th July, 1974. Since the filing of this suit, the said Will, however, had been proved and probate had been granted in favour of the defendant No. 1.

5. The defendant No. 2 Ratan Kumar Chowdhury did not appear and contest this suit. However, written statement had been filed on behalf of both the defendants wherein it had been stated that the plaintiff was not the natural born son of Budhmull Jain or Budhmull Nahata and in fact, the defendants denied and disputed the factum and validity of the adoption that had been mentioned in

the plaint. They also denied the factum and validity of the Deed of Adoption. They denied that apart from the plaintiff, Shew Karan did not have any other son, inasmuch as, according to the defendants, Shew Karan Jain had more than one son. In paragraph 3 of the Written Statement it had been stated that Radha Rani Debi was the sole and absolute owner of the premises No. 14/4, Sudhir Chatterjee Street, Calcutta. Inasmuch as she was the mistress of Shew Karan Jain for a number of years during his lifetime, the purported indenture of Settlement was caused to be executed inasmuch as Radha Rani Debi did not execute any Indenture of Settlement out of her free will and volition, inasmuch as she did not have the knowledge or understanding or appraisal of the contents of the Deed of Settlement. It had further been contended that the said Deed of Settlement was never intended to be acted upon, nor in fact, it was acted upon by the parties. The defendants denied that the plaintiff was the eldest son of Shew Karan Jain or that he acquired any right, title or interest in respect of the premises No. 14/4, Sudhir Chatterjee Street, Calcutta either on the strength of the Deed of Trust or otherwise. Radha Rani Debi was the sole and absolute owner of the said premises till 17th July, 1974, when she died, during her lifetime she exercised due control over the said premises and also exercised her right of ownership in respect of the said property.

6. It was the positive case of the defendants, as made out in the Written Statement, that she during her lifetime never acted as a Trustee but she treated the property as her own. It had been further contended in the Written Statement that the defendants came to know from Radha Rani Debi during her lifetime that apart from executing a power of attorney in favour of Shew Karan Jain, in order to enable him to manage her properties and affairs and also to look after and conduct litigations on her behalf, she had never executed any other document in favour of Shew Karan Jain or in respect of the said property. It was contended by the defendants that the signature on the said Deed of Trust was fraudulently procured by Shew Karan Jain, after making her believe that she was executing a power of attorney in favour of Shew Karan Jain who made her to put her signature on the said Deed of Trust, which never came into effect. Under

those circumstances, according to the defendants, the said Deed of Trust was vitiated by fraud. It was not binding on Radharani Debi. Radha Rani Debi by her last Will and Statement executed by her on the 15th July, 1974 bequeathed her property in favour of the defendant No. 1 and also appointed him as the executor, under the said Will. The defendant No. 1 had duly applied for probate of the said Will and in fact, the probate had been granted to him on 14th August, 1981. Prior to execution of the said Will on 15th July, 1974, Radha Rani Debi on 9th July, 1974, executed the Will which was a registered one but she revoked the said prior Will by execution of the Will and Testament dated 15th July, 1974. It was the case of the defendants in the Written Statement that Radha Rani Debi was an illiterate lady. She could barely sign her name only with great difficulty. Under those circumstances, the defendants in their Written Statement had stated that the plaintiff had no cause of action. The suit was misconceived and was not maintainable by the plaintiff. Under those circumstances, they prayed for dismissal of the suit.

7. The following issues were raised and settled at the trial:

Issues

1. (a) Was the plaintiff, in fact, adopted by Shew Karan Jain as his son as alleged in para 1 of the Plaint?

(b) Was the said alleged adoption valid in law?

2. Is there any valid Deed of Settlement by Radha Rani Debi dated the 14th Feb., 1971, as alleged in paras. 2 and 3 of the Plaint?

3. (a) Was the Will dated 15th July, 1974 probated, as alleged in para 6 of the amended Written Statement?

(b) If so, what was the effect thereof?

4. To what relief, if any, is the plaintiff entitled?

8. So far as issue No. 1 is concerned, it had been contended by the learned lawyer Mr. Amiya Nath Bose, appearing on behalf of the defendant No. 1, first of all that the deed of adoption had not been properly proved by Ranjit K. Jain, Secondly he submitted that the fact of adoption had not been proved by the plaintiff and thirdly it was the case of the defendant No. 1 that the adoption of Ranjit K. Jain, the daughter's son by Shew Karan Kathodia was invalid in the eye of law inasmuch as such adoption

was not permitted in the regenerate class of Hindus. Shew Karan Kathodia was a Hindu and was vaishya by caste, under these circumstances he contended that the adoption was not valid in the eye of law. So far the oral evidence of Ranjit K. Jain on the deed of adoption was that his grandfather Shew Karan Jain in the year 1966 adopted him and a registered deed of adoption was made on 30th Jan., 1956. He admitted that he was not acquainted with all the signatures on the document but he could only prove the signatures of his mother, Lakshmi Bai and that of Shew Karan Kathodia. The other signatures of the witnesses as also of the others being in Vernacular Language it was difficult for him to identify them. The said deed of adoption was registered at the office of the Sub-Register Ladmu, Rajasthan on 30th Jan., 1956. He was specifically asked in question 17th in examination-in-Chief to the effect "what was the custom that was being referred to in the said deed of adoption." However, his answer was that for the purpose of taking adoption there was a system of taking adoption in their community which had been referred to. When he was specifically asked about the custom his answer was that the custom was "Godpatra". His evidence was that Shew Karan Kathodia was a Jain. Ranjit K. Jain gave his name as Ranjit K. Jain alias Ranjit K. Kathodia. In question 248 the learned cross-examining counsel suggested to Ranjit K. Jain that "there was no ceremony of adoption". In answer to that Ranjit K. Jain stated that there was a ceremony of adoption and about 30 to 40 relatives were there. "A function was arranged and all the people who attended there were given food and all those things, as was customary in our society". When he was specifically asked whether he was prepared to call the persons whom he stated to be present during such adoption his answer was 'yes' and when he was asked to give out the names of such persons he gave the name of one as "Golpat Ram Bothra". According to his evidence excepting his mother all other gentlemen present there were dead as far as he was aware. Under the circumstances it appeared that save and except proving the two signatures on the said deed of adoption Ranjit K. Jain the plaintiff herein could neither prove the document nor the other signatures on the said document. Inasmuch as Ranjit K. Jain

had nothing to do with the preparation or creation of the said document nor could he enlighten as to the ceremony that had taken place under those circumstances strictly speaking apart from the signatures of his mother and that of his grandfather nothing else on the document could be proved by him. So far the factual part of adoption was concerned his evidence was scanty inasmuch as, although he had spoken of a custom prevalent amongst his community and according to him such custom and/or ceremony was performed inasmuch as the "Godpatra" was created and 30 to 40 people were entertained at such ceremony but in spite of giving opportunities during cross-examination he failed to enlighten this Court as to whether in fact the giving and taking ceremony which was essential to such act of adoption had been complied with and/or performed or not. He did not come out in his Examination-in-Chief with such fact nor even when given an opportunity in cross-examination did he assert that such ceremony had taken place. Although he agreed to call other witnesses to the ceremony, he failed to do so. It was his positive evidence that his mother, was alive and who was a signatory to the said document and had all the knowledge of such adoption, in spite of that, the plaintiff chose not to call her as a witness and in spite of a challenge being thrown to such fact of adoption. It had also been brought out in cross-examination that some of vital signatures of Shew Karan Kathodia had been penned through in ink in the said Deed of adoption. Under those circumstances the defendant No. 1 contended that the plaintiff was relying on a cancelled document for the purpose of establishing the fact of adoption. At the beginning the plaintiff contended that originally the signatures were intact but subsequently they had been penned through while the document was in the custody of the Court. However when an opportunity was given to the plaintiff to lodge necessary complaint before the appropriate authority if that was his case, he declined to do so instead he called an interpreter and/or a translator of this Court to give evidence that in some parts of Rajasthan it was a prevalent practice of putting a vertical as also a horizontal line on a document where the signature of the executant would be taken but from the document itself it would appear that not all such signatories of Shew Karan

Kathodia had been put on such horizontal and/or vertical lines. No other document had been produced to indicate that in fact that was the custom which was being followed in some part of Rajasthan.

9. The Hindu Adoptions and Maintenance Act, 1956 came into effect on 21st of December 1956. Under those circumstances this particular adoption having taken place in the month of January 1956 was not governed by the provisions of the said Act. Under the circumstances the provisions under the Hindu Law were applicable in the instant case. From the deed of adoption it would appear that Shewkaran Kathodia had described himself as "Son of Multamal, Caste Oswal Kathotia". He further recited in the said document that as he had no son of his own and according to his religion, one who did not have a son could not have salvation. Under those circumstances he took the eldest son of his daughter Lakshmi Devi, in adoption. He had further recited that the custom of taking in adoption and handing in adoption and other customs in the brotherhood had been fulfilled. From the said recital it would appear that Shewkaran did not describe himself as a Jain in as much as he had given his caste as Oswal Kathotia. Under those circumstances the plaintiff's evidence that the Jains were casteless and Shewkaran Kathotia was a Jain is contradictory to what has been recited in the deed itself. Gopal Chandra Sarkar Sastri's Hindu Law, 8th Edn. Page 194 observes:

"The ceremonies of giving and taking are absolutely necessary in all cases. These ceremonies must be accompanied by the actual delivery of the child; symbolical or constructive delivery by the mere parole expression or intention on the part of the giver and the taker without the presence of the boy is not sufficient nor are deeds of gifts and acceptance executed and registered in anticipation of intended adoption, nor acknowledgment sufficient by themselves to constitute legal adoption, in the absence of actual gift and acceptance accompanied by actual delivery; a formal ceremony being essential for that purpose. In a Sudra's adoption no other ceremony is necessary, giving and taking being sufficient. Among the Jains the giving and taking are essential but the religious ceremonies are not necessary; but there is no bar in their adopting in the Dattak Form."

With reference to the three regenerate casts among the Hindus, the ceremony of Dattahoma or burnt offering is said to be necessary in addition to giving and taking. Under those circumstances even amongst the Jains the ceremony of giving and taking is essential in as much as the law of the Hindus applied to the Jains.

N. R. Raghavachariar's Hindu Law, 7th Edn. Vol. 1 page 141 under Art. 134 observed:

"As regards the eligibility of the boy within the casts of the adopter, there is a rule of Sutherland that the boy to be adopted should not be the son of a woman whom the adopter could not have married in her maiden state. This rule, though formulated by Mr. Sutherland as the rule of Nandapandita, is really different from Nandapandita's rule which is that the boy to be adopted must be the son of a woman on whom the adopter could have begotten him in the Kshetraja form. Nandapandita's rule is based really on Saunake's metaphor that the adopted son is the reflexion of a son and hence disqualifies the daughter's son, the sister's son, the brother, the paternal and maternal uncles, etc., from being adopted". Under Art. 178 the same author observed:

"According to the customary law prevailing among the Jains no authority express or implied is necessary for a widow of a sonless man making an adoption to him, and the son adopted may even be a grown-up and married man. The only essential ceremony for the validity of the adoption is the giving and taking of the adopted son. The Jains differ particularly from the Brahminical Hindus in their conduct towards the dead, omitting all the obsequies after the corpse is burnt or buried. The birth of a son has no effect according to them on the future state of his progenitor and consequently, adoption is merely a temporal arrangement, having no spiritual object."

Under the circumstances although according to Jains the adoption is merely a temporal arrangement having no spiritual object but even then the only essential ceremony for the validity of the adoption is of giving and taking the adopted son.

From the recital made in the deed by the adoptive father it is indicated that he believed that as he had no son either natural or adopted, he desired to adopt a son inasmuch as according to his own religion, he could not have

salvation without a son. If in fact Shewkaran was a Jain, he could not have such belief.

10. In the case reported in AIR 1970 SC 1286, *Débi Prasad v. Tribeni Devi* it had been held that (para 8):

"That is also the view expressed in Mayne's Hindu Law wherein it is observed that the giving and receiving are absolutely necessary to the validity of an adoption; they are the operative part of the ceremony, being that part of it which transfers the boy from one family to another; but the Hindu Law does not require that there shall be any particular form so far as giving and acceptance are concerned; for a valid adoption all that the law requires is that the natural father shall be asked by the adoptive parent to give his son in adoption, and that the boy shall be handed over and taken for this purpose".

It had been observed that there was no doubt that the burden of proving satisfactorily that he was given by his natural father and received by his adoptive father was on the adoptive son. It had further been observed in that case that in the absence of direct evidence much value had to be attached to the fact that the alleged adopted son without controversy succeeded to his adoptive father's estate and enjoyed till his death and that the documents during his life and after his death were framed upon the basis of adoption. The instant case is not a case of ancient transaction inasmuch as the adoption had taken place according to the plaintiff in the year 1956 and his mother who was still alive at the time of hearing of the suit had been a witness to the document by putting her signature thereon. Moreover according to the plaintiff others who were also present at such ceremony, out of them at least one would be called by the plaintiff to corroborate his oral testimony, but ultimately the plaintiff did not examine his mother nor the gentleman named by him to support and/or corroborate his oral testimony.

In the case reported in AIR 1961 SC 1378, *Lakshman Singh Kothari v. Smt. Rup Kanwar* it had been held that (para 10):

"Under the Hindu Law, whether among the regenerate caste or among Sudras, there cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking. The object of the corporal giving and

receiving in adoption is to secure due publicity. To achieve this object it is essential to have a formal ceremony. No particular form is prescribed for the ceremony, but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him. The nature of the ceremony may vary depending upon the circumstances of each case. But a ceremony there shall be, and giving and taking shall be part of it. The exigencies of the situation arising out of diverse circumstances necessitated the introduction of the doctrine of delegation; and therefore, the parents, after exercising their volition to give and take the boy in adoption, may both or either of them delegate the physical act of handing over the boy or receiving him, as the case may be, to a third party".

In that particular case it was held that the ceremony of giving and taking which was very essential for the validity of an adoption had not taken place. In para 8 of the said judgment it was held:

"To appreciate this argument it is necessary to notice briefly the law of adoption vis-a-vis, the ceremony of "giving and taking", Gopal Chandra Sarkar Sastri in his book on Hindu Law, 8th Edn. succinctly describes the ceremony of "giving and taking" thus at p. 194:

"The ceremonies of giving and taking are absolutely necessary in all cases. These ceremonies must be accompanied by the actual delivery of the child; symbolical or constructive delivery by the mere parole expression of intention on the part of the giver and the taker without the presence of the boy is not sufficient. Nor are deeds of gift and acceptance executed and registered in anticipation of the intended adoption, nor acknowledgment, sufficient by themselves to constitute legal adoption, in the absence of actual gift and acceptance accompanied by actual delivery; a formal ceremony being essential for that purpose".

Much to the same effect it is stated in Mayne's Hindu Law, 11th Edn. at p. 237:

"The giving and receiving are absolutely necessary to the validity of an adoption. They are operative part of the ceremony, being that part of it which transfers the boy from one family into another. But the Hindu Law does not require that there shall be any particular form so far as giving and acceptance are concerned. For a valid adoption, all that the law requires is that the natural father shall be asked by the adoptive parent to

give his son in adoption, and that the boy shall be handed over and taken for this purpose".

The leading decision on this subject is that of the Judicial Committee in *Shoshinath Ghose v. Krishnasunderi Dasi* (1880) ILR 6 Cal 382. That was, like the present, a case of adoption among Sudras. There, it was contended, *inter alia*, that there was a formal adoption by giving and taking, and in the alternative it was contended that even if there had been no formal adoption as alleged, the deeds of giving and taking, executed in 1864, were sufficient to bring about the adoption and that was all that was essential in the case of Sudras. Sir J. W. Colville, speaking for the Board rejected both the contentions. He accepted the finding of the lower courts that there was no formal giving and taking and rejected the argument that the documents themselves operated as a complete giving and taking of the adoptive boy. The learned Judge observed at p. 388 thus:

"There is no decided case which shows that there can be an adoption by deed in the manner contended for; all that has been decided is that, amongst Sudras, no ceremonies are necessary in addition to the giving and taking of the child in adoption.....It would seem, therefore, that, according to Hindu usage which the Courts should accept as governing the law, the giving and taking in adoption ought to take place by the father handing over the child to the adoptive mother, and the adoptive mother declaring that she accepts the child in adoption."

That a formal ceremony of giving and taking is essential to validate the adoption has been emphasized by the Judicial Committee again in *Krishna Rao v. Sundara Siva Rao*, 58 Ind App 148: (AIR 1931 PC 109).

Under those circumstances a mere recital in the deed itself that such a ceremony had taken place in the absence of either oral or documentary evidence to that effect is not sufficient, and it was difficult to accept the case of the plaintiff. Mr. Amiya Nath Bose's submission that in any event Shewkaran Kathodia belonging to Vaishya caste of Hindus could not adopt the son of his daughter in as much as he belonged to the regenerate class of the Hindus who could not according to Hindu Law adopt a son whose mother he could not have married. Mr. P. K. Roy the learned lawyer appearing on behalf of the plaintiff cited many

cases indicating that such adoption was possible amongst the Jains who did not have any caste amongst themselves. In view of my finding that the plaintiff had failed to give sufficient evidence of the ceremony of giving and taking at the time of the adoption and in view of my finding that the plaintiff had also failed to prove the deed of adoption properly in as much as he could only prove the signature of the executant as also his mother, Under those circumstances it appeared that the plaintiff had failed to prove the actual ceremony of adoption which is also required in the case of Jains. Under those circumstances the question whether Shewkaran Kathodia belonged to the regenerate class or could adopt his daughter's son need not be considered. Mulla on Hindu Law 14th Edn. under Art. 613 observed:

"It is too late in the day to contend that Jains are not included in the term 'Hindus'. The Jains are governed by all the incidents relating to the Hindu joint family, as was very recently held by the Supreme Court. The ordinary Hindu Law is to be applied to Jains, in the absence of proof of special customs and usages varying that law. Those customs and usages must be proved by evidence, as other special customs and usages varying the general law should be proved, and in the absence of proof the ordinary law must prevail. There is, however, nothing to limit the scope of the inquiry to the particular locality in which the persons setting up the custom reside. Judicial decisions recognising the existence of a disputed custom among the Jains of one place are relevant as evidence of the existence of the same custom amongst the Jains of another place, unless it is shown that the customs are different; and oral evidence of the same kind is equally admissible. (a) Where, however a custom is negatived by a Judicial decision in one place, e. g. Madras, the fact that among Jains in the other States such a custom has been upheld by Courts does not warrant a general presumption of the prevalence of the custom in the Madras State".

Under Article 622 it had been observed that a daughter's son may be adopted among the Agarwala Bania of the Sarogi Sect. In the instant case there had been no evidence tendered on behalf of the plaintiff proving such custom prevalent amongst the community, to which he belonged.

In the case reported in AIR 1954 Raj 17 it had been held that in Marwar, where the deed itself mentioned that the boy had been given and received in adoption and nothing was shown whereby it could be inferred that the physical act could not take place as mentioned in the deed, a presumption did arise that the recital in the deed had been complied with good sense but on the basis of when a person does take the transfer of sending for a scribe and executing the document and getting it registered there in nothing to prevent him from performing the actual physical act of giving and taking. (sic) But if any party to the litigation proves circumstances which would show that the physical act of giving and taking could not have been performed as recited in the deed of adoption then it would be for the party setting up the adoption to prove by positive evidence that the physical act of giving and taking had taken place. In the instant case the plaintiff failed to give any evidence whatsoever and state as to that ceremony having taken place in his examination-in-chief. On cross-examination also he failed to substantiate that such ceremony had taken place. He did not call any independent witness to prove that such ceremony had taken place. Under those circumstances on the mere recital in the deed itself, no presumption could be drawn in view of serious challenge being thrown by the defendants. Considering the peculiar facts of the case it could not be expected that the defendants belonging completely to different community and family could by positive evidence show that such ceremony had not taken place, save and except challenging the said adoption thereby requiring the party setting up the adoption to prove by positive evidence that the physical act of giving and taking had taken place. Under those circumstances so far issue No. 1 is concerned I hold that the plaintiff had failed to prove the adoption as pleaded in the plaint.

11-12. So far issue No. 2 is concerned the plaintiff relied on a certified copy of a deed of settlement executed by Radha Rani Debi on 14th of February, 1971. The learned lawyer of the plaintiff relied first of all on Section 74 (2) of the Evidence Act and in the alternative on Sec. 65 (a) or (c) of the said act. So far the evidence of Ranjit K. Jain is concerned that was not absolute-

ly clear inasmuch as he could not positively state that the said document was in the custody of the defendant nor he could give substantial evidence as to the loss or destruction of the document. He could only state with regard thereto by stating that on 7th July, the defendants came to occupy the suit premises. They took charge of whatever belonged to Radha Rani Debi. There was no positive allegation that such document came into the possession of the defendants or that they had destroyed the same. However, it had been stated in the plaint itself in paragraph 5 that the defendants had removed and/or destroyed the original deed of settlement which was in the possession and custody of the Settlor and/or trustee, during her lifetime. Save and except a bare denial in the written statement, there was no specific denial that the said deed of settlement never came into possession of the defendants or they had no occasion of destroying and/or losing the said document. Under those circumstances Mr. Roy appearing on behalf of the plaintiff contended that the certified copy of the said deed should be treated as an exhibit and admitted in evidence. He relied on various cases.

13. In the case reported in AIR 1974 Orissa, 199 Chandra Sekhar Pati v. Ahalya Devi it had been held that (Para 7):

"Ext. 1 is a draft of the Anumati Patra alleged to have been executed by P. Somalingam, the admitted owner of the house, in favour of defendants 1 and 2 on 25-12-43. The original of Ext. 1 was not before the Court. The learned Subordinate Judge held that in the absence of the original being called for from defendants 1 and 2 Ext. 1 is inadmissible in evidence. Here, he committed a serious error of law. In the plaint, Ext. 1 was referred to. Defendants 1 and 2 denied existence of such a document. Under Section 66 of the Evidence Act, secondary evidence of the contents of the documents referred to in Section 65 clause (a) shall not be admissible unless certain steps are taken under this section, as prescribed. The proviso to the section engrafts certain exceptions. Clause (2) of the proviso lays down that no notice shall be required in order to render secondary evidence admissible in a case when from the very nature of the case, the adverse party must know that he will be requir-

ed to produce it. In this case, plaintiffs clearly made a reference to Ext. 1 in the plaint. Defendants 1 and 2 denied existence of such a document. The question of calling for the document from them did not arise. Ext. 1 cannot, therefore, be said to be inadmissible in evidence due to the absence of primary evidence."

In the case reported in AIR 1956 Bom 555 Vishwanath Vithoba v. Genu Kisan it had been held that (Para 3):

"The first point, which has been urged by Mr. Sukhthankar in this appeal is that the plaintiff has not proved that the three suit houses were purchased by Gyanuji. In order to prove his assertion on this point, the plaintiff has produced the certified copies of three sale deeds, Exhibits 75, 76 and 77.

Mr. Sukhthankar has urged that these copies of the sale deeds are not admissible in evidence. The plaintiff has stated in his evidence that the original sale deeds are not in his possession but they are in the possession of defendant 1. The plaintiff did not, however, give any notice to defendant 1 asking him to produce the original sale deeds.

Mr. Sukhthankar has, therefore, urged that the certified copies are not admissible in evidence as no notice was given to defendant 1 as required by clause (a) of Section 65, Evidence Act. The proviso to Section 66, however, enables the court to dispense with such notice in any case, in which the Court so thinks fit. In *Surendra Krishna v. Mirza Mahammad Syed Ali*, AIR 1936 PC 15, their Lordships observed:

"The only purpose of a notice under Sections 65 and 66, Evidence Act, is to give the party an opportunity by producing the original document to secure, if he pleases; the best evidence of its contents. The difference between a certified copy and the original for the purposes of the present case is not very obvious but secondary evidence is admissible when the party offering.....

In the present case after the death of Gyanuji, the next senior member of the family is Vithoba. The three sale deeds therefore in all probability went into the possession of Vithoba and after his death into the possession of the defendants. The plaintiff has stated that the original sale deeds are not with him. He has also stated that they are in the possession of defendant 1. There was no

cross-examination of the plaintiff in regard to his statement on this point.

Defendant 1 in his evidence did not deny that the original sale-deeds were in his possession. It would have been desirable if a question had been put to him on this point in the cross-examination by the plaintiff. But as the record stands, the plaintiff's statement that the original sale-deeds are with defendant 1 remains unchallenged. This is also in accordance with the probabilities of the case.

The certified copies of three sale-deeds Exhs. 75, 76 and 77 were also produced by the plaintiff along with the plaint. He has specifically stated in the plaint that these sale-deeds related to the three suit houses. There was no denial of this statement in the defendants' written statement.

If, therefore, the original sale deeds are in the possession of the defendant 1 as deposed to by the plaintiff and as the plaintiff's statement that the certified copies of the three sale-deeds produced by him related to the suit houses has not been denied by the defendants, we think this would be a proper case in which notice as required under clause (a) of Sec. 65, Evidence Act, should be dispensed with. In that case, the three certified copies, Exhibits 75, 76 and 77 would be admissible under clause (a) of Section 65, Evidence Act.

On the other hand if the sale deeds are not in the possession of the defendants and as they are also not in the possession of the plaintiff, they must be deemed to have been lost. In that case, the certified copies would be admissible under clause (a) of Section 65. The learned Judge was therefore right in admitting these three documents in evidence".

In the case reported in AIR 1954 Mad 486, *Karuppanna Gounder v. Kolandaswami Gounder* it has been held that (Para 4):

"When once the case for the introduction of secondary evidence is made out, certified copy got from the Registrar's office can be admitted under Section 57, sub-section (5) of the Registration Act, without other proof than the Registrar's certificate of the correctness of the copy and shall be taken as a true copy. As the certified copy obtained from a Registrar's office is admissible under Section 57 (5), Registration Act, for the purpose of proving the contents of the ori-

ginal documents, the mere production of such copy, without any further oral evidence to support it, would be enough to show what the original document contained".

In the case reported in AIR 1963 Punj 208, Arya Pratinidhi Sabha, Punjab Jul-lunder v. Dev Raj Vir Bhan it had been held that:

"Where the will would come into possession and did come into possession of the persons interested to deny it, no presumption that it was revoked by the testator can be raised specially when no bona fide search for it was proved to have been made at the testator's death, nor was there any occasion for such a search. This is a case where the original will is not lost but is being withheld by the interested parties.

The will was executed in 1914 by a Hindu, in the Punjab when no formalities were required to effectuate the same. The will was duly registered. The original was in possession of the persons who were interested to deny the same. A registered copy of the will was provided. The attesting witnesses were not in a position to say whether the contents of the will were the same as those in the copy.

Held that so far as the execution of the original will was concerned, it was proved by the endorsement of the Registrar. That endorsement left no manner of doubt that the will was executed by the testator to whom it was read over and who admitted its contents to be correct. Therefore, a certified copy of that will would be admissible in evidence in view of the fact that the original was not forthcoming and was being withheld by persons who were interested to deny it. Under Section 65 (f), Evidence Act read with Section 57 of Registration Act, the certified copy of the will was sufficient proof of the will.

The learned Counsel sought to contend that the certified copy of the registered will is not admissible in evidence. The short answer to this argument is that in view of the fact that the original will is not available, its secondary evidence can be led as required by Section 63 read with Section 65 of the Evidence Act. The Courts below have unanimously come to the conclusion that secondary evidence is admissible in this case, for the reason that the will is being withheld by the respon-

dents. According to clause (f) of Section 65 of the Indian Evidence Act, secondary evidence may be given of the existence, condition and contents of a document when the original is a document of which a certified copy is permitted by this Act or by any other law in force in India to be given in evidence, and in such a case according to Sec. 65, it is only the certified copy of the document which is admissible. According to Sec. 57 of the Indian Registration Act, certified copies of documents registered have to be supplied by the Registrar to all persons, applying for the same and according to sub-section (5) of Section 57 such copies given under this section be admissible for the purpose to prove the contents of the original documents".

In the case reported in AIR 1975 Cal 381, Rabindra N. Das v. Santosh Kumar Mitra, it had been further observed (at p. 385):

"Now in order to admit secondary evidence in proof of a document of this nature it is important to bear in mind the nature of the document, the evidence about the search, the evidence about the enquiries made and the evidence about the loss of the original. In this case it is undisputed that the deed of trust which was executed was also registered. That point is not controverted. It is further apparent from the evidence of Jagdish Chandra Sil that he had the document registered. Ex. H is a certified copy issued by the Registrar of Assurance of the said deed. The fact that on that date 2nd July, 1946, a deed was executed cannot also now be disputed and it is apparent from the conduct of Sm. Provabati Biswas herself in instituting a suit challenging the execution of the said document. It is nobody's case that any other deed or document had been executed on that date. In the background of the aforesaid facts I am of the opinion that on the presumption of regularity under Section 114 (c) of the Evidence Act the certified copy issued by the Registrar of Assurance should be accepted as the correct copy of the deed executed on the 2nd July, 1946. If that is so, then the evidence about the loss of the original will have to be adjudged in the light of the factors noted hereinbefore and on a consideration of all the facts and circumstances, I am of the opinion, that this certified copy should be admitted in the evidence as a copy of the deed of 2nd July, 1946".

Under those circumstances although the plaintiff's evidence was not positive to that effect but from all the facts taken together the certified copy of the deed of settlement should be tendered in evidence. So far as the contention of the defendant that the said deed of settlement was not a valid document or that it was executed under undue influence, inasmuch as Radha Rani Debi was an illiterate woman, under those circumstances the principles applicable to a case of pardanasin lady would also be applicable in the instant case, was unacceptable to this Court in as much as the defendant Kamal K. Chowdhury failed to substantiate such case by cogent evidence. His oral testimony was far from satisfactory, full of contradictions and he travelled far beyond the case as purported to have been made out in the written statement. Radha Rani Debi admitted the execution of the said document in subsequent pleadings.

In the case reported in AIR 1960 Cal 494, Biswanath Agarwalla v. Smt. Dhapu Debi Jejodia it had been held that (Para 26):

"In order to enable the plaintiff to tender the certified copy as a secondary evidence it is enough for the plaintiff to prove that the original is not in his possession and so far he is concerned it is lost".

The plaintiff in the instant case had relied on the deed of settlement. Under those circumstances if the plaintiff had the original with him he would have been the first person to produce the original before this Court. It had been contended by the plaintiff in the plaint that the said document had been destroyed by the defendants. There was no specific denial of such an allegation. Inasmuch as the defendants were relying on a will executed by Radha Rani Debi on the 15th July, 1974 it was to their interest that the original deed of settlement would not see the light of the day. Under the circumstances on the death of Radha Rani Debi the defendant No. 1 not only applied for the probate of the will dated 15th July, 1974 but as an executor had taken charge of all the properties belonging to Radha Rani Debi during her lifetime. In fact probate had been granted in respect of the said will. Although the original deed of settlement had been challenged by the defendant on the ground that the same was obtained by perpetrating fraud and/or under undue

influence exercised by Shewkaran Kathodia who prevailed upon Radha Rani to execute such deed of settlement, such case was unacceptable to this Court as Kamal K. Chowdhury failed to substantiate such case in his oral evidence which was contradictory and unreliable. He could not corroborate his statement by any other reliable evidence either oral and/or documentary. Under those circumstances that part of the defendant's case was unacceptable to this Court. In the alternative it was contended on behalf of the defendant No. 1 that even if there was a valid deed of settlement created by Radha Rani Debi such deed was not acted upon by her inasmuch as in the Corporation rate bills, rent receipts and other documents Radha Rani did not describe herself as a trustee under the said deed of settlement, moreover she had disposed of the said property by her will dated 15th July, 1974. Mr. Amiya Nath Bose very strenuously contended that Radha Rani Debi put her signature in Hindi on a document which was prepared in English script. Under those circumstances this Court should infer that the document was not understood by her properly and she did execute at the instance of Shewkaran Kathodia. The plaintiff examined Dhanesh Ch. Mitra an advocate who gave evidence stating that Sanat K. Mitra, the advocate who acted for Radha Rani not only in this particular document but also in all other suits where Radha Rani either filed the suit as a plaintiff or defended the suits as a defendant, in all those litigations Sanat K. Mitra had acted as her lawyer. According to the evidence of Dhanesh Ch. Mitra this deed of settlement was prepared at the instance of Radha Rani and as per her instructions and after the preparation of the original document the same was duly read over and explained by Dhanesh Ch. Mitra and after understanding the purports and contents thereof she duly executed the said deed. Although he could not produce his day book or other papers to indicate that he had such consultation with Radha Rani Debi but from the certified copy of the said deed it would appear that Dhanesh Ch. Mitra acted and signed as a witness to the said document and also he explained and read over the document to Radha Rani Debi before it was executed by her. Under those circumstances relying on the certified copy as also the

evidence of Dhanesh Ch. Mitra it appeared that such a deed of settlement was executed by Radha Rani Debi during her lifetime which fact had also been acknowledged by her in her written statement filed in the suits referred to above. Under the deed of settlement she appointed herself the first trustee and she managed the said property till she died. Under those circumstances relying on the evidence as tendered in this suit I answer issue No. 2 in the positive. So far issue No. 3 (a) is concerned it is an admitted fact that the said Will dated 15th July, 1974 had been probated by a competent court. Under those circumstances I answer issue No. 3 (a) in the positive. So far issue No. 3 (b) is concerned till the said probate is revoked and/or set aside and till the question of authority of Radha Rani Debi to execute a will in respect of a property which was the subject-matter of the deed of settlement, is validly and properly decided in a properly constituted suit the said probate is binding. So far issue No. 4 is concerned in view of my finding that the plaintiff could not prove the deed of adoption properly as such this suit is not maintainable by the plaintiff. Under those circumstances I dismiss the suit with costs. There will however, be a stay for three weeks.

Suit dismissed.

AIR 1982 CALCUTTA 505

PRADYOT KUMAR BANERJEE, J.

In the matter of Purshattamdas Bhiwaniwala and others, Petitioners.

Revision under S. 155, C.P.C. D/- 2-8-1982.

West Bengal Premises Tenancy Act (12 of 1956), Section 22 (2) — Expression "tenant wilfully or negligently makes any false statement" — Tenant depositing in name of "M/s. B. and others, a Firm" — Firm not existing — Deposit held invalid — Counsel's mistake held not good defence.

In the instant case, B and his four brothers purchased the suit premises. The letter of attornment was duly sent to the tenant thereof stating the names of the purchasers. An ejectment notice was served on the tenant. It was followed by a suit by the five brothers against the tenant. The tenant deposited rent in the name of "M/s. B. and

other, a firm". The deposit was not withdrawn by the landlords. The plaintiffs contended that the deposits under Section 22 (2) were made by the tenant wilfully and negligently making a false statement inasmuch as the plaintiffs were not "a firm" and that the deposits were therefore, invalid.

Held that the tenant knew fully well who the landlords were in view of the fact that the letter of attornment was sent by the erstwhile landlord giving full name of the present landlords who had purchased the premises and asking them to attorn to the present landlords. That letter was replied to by the tenant's Lawyer asking for the production of documents regarding the purchase. Assuming for a moment that he did not know who is his landlord, then he ought to have deposited the rent under Section 21 (1) on the ground that there was bona fide doubt as to the person to whom the rent was payable but in the affidavit the tenant stated that he deposited the rent because the landlords did not accept the rent sent to them by money order or by cheque. The affidavit filed by the tenant before the Rent Controller categorically stated that M/s. B. and others was a Firm who was the landlord. This was wilfully and negligently made by the tenant making the false statement about the description of the landlords. Hence the deposit is an invalid deposit being deposited wilfully and negligently in the name of a Firm who is not the landlord. (1960) 64 Cal WN 342, (1898) 2 Ch D 551 and (1963) 2 All ER 647, Ref. (Para 7)

The contention that the deposits were made under the advice of a lawyer for whose laches the tenant should not be made to suffer cannot be accepted to be correct when it is found that one of the tenants himself, had sworn the aforesaid affidavit before the Rent Controller and thereafter wilfully and negligently deposited rent in the wrong name. (1960) 64 Cal. W. N. 342, Foll. AIR 1980 SC 1664, Ref. (Para 8)

Cases Referred : Chronological Paras
AIR 1980 SC 1664 4, 8

(1963) 2 All ER 647 : (1963) 1 WLR 697

Finbow v. Air Ministry 4, 6

(1960) 64 Cal WN 342 6, 8

(1898) 2 Ch D 551 Cowen v. Truefitt Ltd.

4, 5

Saktinath Mukherjee, G. N. Pugalia and Bhaskar Ghosh, for Petitioners; A. C. Bhabra and Tarun Chatterjee, for Respondent.

ORDER :— This application is directed against an order passed by the learned Judge, City Civil Court, on an application under Secs. 17 (2) and 17 (2A) of the West Bengal Premises Tenancy Act read with Section 5 of the Limitation Act. The petitioners Nos. 1 to 5 purchased the suit premises on 27th March, 1974. On 27th March, 1974 the letter of attornment was sent to the defendant opposite party informing the names of the persons who purchased the premises in suit. On 10th April, 1974, it is alleged that the defendant opposite party acknowledged the receipt of the said letter and sought to know who are the actual purchasers from the erstwhile landlord. I do not like to consider any other facts for the purpose of this rule. The notice of ejection was served on behalf of the 5 persons on 22nd March, 1976. Mr. S. P. Roy, Advocate, on behalf of the defendant acknowledged the receipt of the notice of ejection on 30th April, 1976 and the suit was instituted on 27th May, 1976. On 12th March, 1976 the defendant appeared and deposited the amount calculated at the rate of rent last paid. It appears that on 15th March, 1976, the defendant deposited rent with the Rent Controller in favour of M/s. P. Bhiwaniwala & others, a Firm, for the month of February, 1976. It also appears that since February, 1976, till December, 1977 the defendant deposited rent in favour of M/s. P. Bhiwaniwala and others, a Firm. Under Section 17 (3) of the Act the application was filed by the petitioners and that the defence against the delivery of possession was struck out whereupon the defendant moved this Court against the order of striking out of defence against delivery of possession under Section 17 (3) of the Act and this Hon'ble Court by order dated 9th March, 1978 made the rule absolute and directed the rehearing of the application under Section 17 (3) of the Act on certain points. Under Section 17 (3) of the Act the application is still pending. In the meantime the defendant opposite party filed an application under Sections 17 (2), (2A) and (2B) read with Section 5 of the

Limitation Act. The learned Judge, City Civil Court, held, inter alia, that the deposits were made with the Rent Controller for the period from February 1976 to December 1977 in the name of M/s. P. Bhiwaniwala & others, a Firm, within one month from the date of service of summons were valid deposits. The defendant validly deposited the rent in the Court for the month of October, 1975 to January 1976 with interest under Section 17 (1) of the Act. The question for the decision was whether the deposits made in favour of M/s. P. Bhiwaniwala and others, a Firm, were valid deposits or not. The learned Judge held that the deposits are valid. It is further held that the rent for the month of December 1975 was remitted by postal money order dated 10-1-1976. He sent the cheque for the rent for the month of February 1976 but the landlord refused the cheque. As the landlord refused to accept, the rent was deposited with the Rent Controller from February 1976 to December 1977. The dispute, therefore, was raised under Section 17 (2) of the Act as to the validity of the deposit with the Rent Controller in the name of M/s. P. Bhiwaniwala and others, a Firm. The learned Judge also held that they are all valid deposits. Being aggrieved by the said judgment and order under Section 17 (2) of the Act read with Section 17 (2A), the landlord moved the present application.

2. Mr. Saktinath Mukherjee on behalf of the petitioners contended that the deposit made under Section 22 (2) of the West Bengal Premises Tenancy Act is invalid as according to Mr. Mukherjee the deposit was made by the tenant wilfully and negligently making the false statement for depositing the rent and the landlord has not withdrawn the amount deposited. Mr. Mukherjee contended that the rent deposited in the name of M/s. P. Bhiwaniwala and others, a Firm, is wilfully and negligently made by the tenant and as such the deposits are invalid.

3. Mr. Bhabra contended that the deposit was made after the proper tender to the landlord and after the landlord refused to receive the payment, the rent was deposited with the Rent Controller.

4. Mr. Bhabra contended that the petitioner gave receipt as M/s. P. Bhiwaniwala and others and therefore the deposit in the name of M/s. P. Bhiwaniwala and others, a Firm, is valid deposit. Mr. Bhabra contended that the word "Firm" is erroneous description of the landlord as the word "Firm" was redundant. The word "Firm" is used loosely on the advice of the Advocate of the tenant. It is argued by Mr. Bhabra that the Court may ignore the word "Firm" and in support of his contention relied upon the case reported in (1963) 2 All ER 647, (1898) 2 Ch D 551. Mr. Bhabra further contended that the deposit was made by the wrong advice of the lawyer and the client cannot suffer. Mr. Bhabra relied upon the case reported in AIR 1980 SC 1664, in support of his contention.

5. It appears to me, however, that Mr. Bhabra's contention cannot be accepted in view of the clear provision in law as stated in Section 22 (2) of the West Bengal Premises Tenancy Act. S. 22 (2) of the W. B. P. T. Act comes under Chapter IV regarding the deposit of rent. Section 21 provides for the tenant for depositing rent when the rent is not accepted by the landlord. Section 22 also provides for procedure for making the deposit and consequences of incorrect particulars in the application for deposit. In the present case, admittedly, the deposit has been made in the name of M/s. P. Bhiwaniwala and others, a Firm, after an affidavit has been sworn by Mr. Keshardeo Singhanian. Mr. Bhabra relied upon the case (reported in (1898) 2 Ch D 551 at p 554 Cowen v. Truefitt, Limited) in support of his contention.

6. In the said case there was a dispute between the plaintiff and the defendant for use of a staircase leading to four rooms on the second floor of the premises, 14 Old Bond Street, where the plaintiff carried on business of ladies' tea-room and ladies' club. There was no staircase in room No. 13 directly and there was only a staircase in No. 14, old Bond Street. It was admitted that the reference in the underlease to the staircase by which access was granted was not in accordance with the facts and had been inserted in this form by mistake. In the said case it was held in the facts and circumstances of the

case that in construing a deed purporting to assure a property, if there be a description of the property sufficient to render certain what is intended, the addition of a wrong name or of an erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars, will have no effect. In a case reported in (1963) 2 All ER 647 (Finbow v. Air Ministry) it was found that the order was made or approval granted in exercise of the statutory power or the order is otherwise a valid order though the reference of a particular section in the statute was patently wrong. This case, however, does not, in my opinion, at all answer the question raised in this case. In the present case the question is whether the opposite party tenant while depositing rent with the Rent Controller has acted wilfully and negligently in making the deposit in the name of M/s. P. Bhiwaniwala & others, a Firm. The admitted case is now that Mr. P. Bhiwaniwala and 4 brothers, the petitioners herein, purchased the property from the erstwhile owner who gave a letter of attornment to the petitioner but still thereafter the petitioners (defendant?) deposited rent with the Rent Controller in the name of the Firm. It must be remembered that while the petitioner (defendant?) made the deposit before the Rent Controller (he) had sworn an affidavit. In the said affidavit Mr. Keshardeo Singhanian stated specifically that M/s. P. Bhiwaniwala and others, a Firm, is a landlord of the tenant applicant. In the body of the affidavit it has been stated that they tendered the money to the landlord opposite party, that is, M/s. P. Bhiwaniwala and others, a Firm, who not having been accepted the same tender, the deposits are being made with the Rent Controller. In a case reported in (1960) 64 Cal WN 342, (Bengal Tent Factories Ltd. v. Amiya Prova Das Gupta) it was held by the Division Bench of this Court that the deposit of rent in favour of M/s. Amiya Prova Das Gupta instead of Mrs. Amiya Prova Das Gupta was a clear case of gross negligence and the deposit is held not to be valid deposit.

7. Mr. Bhabra, however, contended that the said case was decided on the basis of 1950 Act and the wordings of 1950 Act and the present Act are different. It was stated that the deposit

was made in the wrong name wilfully and negligently calculated to prevent the landlord from withdrawing the money. This argument, in my opinion, is of no avail to the opposite party tenant, inasmuch as, in the present case the opposite party tenant knew fully well in view of the fact that the letter of attornment was given by the erstwhile landlord giving full name of the present landlords who purchased from the erstwhile landlord and asking them to attorn to the present landlords. That letter was replied to by the tenant's Lawyer asking for the production of documents regarding the purchase. Assuming for a moment that he did not know who is his landlord, then he ought to have deposited the rent under S. 21 (1) of the Act on the ground that there is bona fide doubt as to the person to whom the rent is payable but in the present case in the affidavit the tenant has already stated that he deposited the rent because the landlords have not accepted the rent sent to them by money order or by cheque. In the present case, there is no doubt, in my opinion, that the petitioners are the landlords. In fact, after the suit was filed the petitioner went on depositing in favour of all the landlords. The affidavit filed before the Rent Controller before the deposit for the month of February, 1976 onwards, categorically stated that M/s. P. Bhiwaniwala and others is a Firm who was the landlord of the opposite party. This according to me was wilfully and negligently made by the tenant making the false statement about the description of the landlords. In my opinion, therefore, the opposite party tenant deposited the rent before the Rent Controller and the deposit is an invalid deposit being deposited wilfully and negligently in the name of a Firm who is not the landlord of the opposite party tenant.

8. Mr. Bhabra argued before me that the mistake in the affidavit filed before the Rent Controller was a mistake of the Lawyer through whom the affidavit has been filed and he wanted to rely upon the case reported in AIR 1980 SC 1664, (Santosh v. Om Prakash) in which the Supreme Court held that the parties should not suffer for the laches of the Advocate or "the wilful failure of the Advocate to deposit the

rent. In this case Mr. Bhabra wanted to file before me a copy of the affidavit filed by the learned Advocate but that was never filed in this case. In the circumstances, in my opinion, the plea that this is an Advocate's mistake or laches cannot be accepted to be correct, moreover, when it is found that one of the tenants himself, had sworn the affidavit before the Rent Controller and thereafter wilfully and negligently deposited in the wrong name cannot be attributed to the tenant the mistake of the learned Advocate. The case reported in (1960) 64 Cal WN 342 (Bengal Tent Factories Ltd. v. Amiya Prova Das Gupta) was also a case where the tenant wanted to give evidence saying that it was a mistake of the learned Advocate or their Advocate's clerk but that was not accepted by the Division Bench. In the present case, however, there is no affidavit filed by the learned Advocate. On the other hand, there are number of letters written by the learned Advocate which were taken into consideration by the Court below and in coming to a finding it was held that the word "Firm" does not make the deposit invalid. In my opinion, the learned Judge failed to consider in its proper perspective. Following the Division Bench decision reported in (1960) 64 Cal WN 342, it appears to me that there cannot be any doubt that the deposit made in favour of M/s. P. Bhiwaniwala and others, a Firm, is patently invalid deposit.

9. I, therefore, set aside the order passed by the learned Judge, City Civil Court, holding that the deposits made with the Rent Controller between February 1976 till December 1977 are not valid deposits and under Sections 17 (2) and (2A) of the West Bengal Premises Tenancy Act the application filed by the petitioner ought to have been rejected after holding that the deposits are invalid deposits. The learned Judge was wholly wrong in rejecting the application under Section 17 (2) of the Act after deciding that the deposits are valid deposits. In this matter no Rule was issued as notices were served on both the parties and both the parties argued at length and as such after hearing both the parties, I dispose of the matter setting aside the order passed under Section 17 (2) and (2A) of the

West Bengal Premises Tenancy Act holding that the deposits made in the name of Bhiwaniwala and others a Firm, are invalid deposits under Section 22 (2) of the West Bengal Premises Tenancy Act.

10. The application is thus disposed of.

11. There will be no order as to costs.

— Revision allowed.

AIR 1982 CALCUTTA 509

M. M. DUTT AND MONOJ
KUMAR MUKHERJEE, JJ.

Dr. Nilkamal Bez Boruah and another, Appellants v. The State of West Bengal and others, Respondents.

F. M. A. T. No. 270 of 1982, D/- 13-7-1982.*

(A) W. B. Land (Requisition and Acquisition) Act (2 of 1948), Sec. 3 (3) — Service of order of requisition — Validity — Two owners — Tender of order to durwan in requisitioned premises authorised to accept communication on behalf of both owners — Refusal to accept — Affixation on outer door of requisitioned premises — It amounts to effective service on both owners. (W. B. Land (Requisition and Acquisition) Rules (1948), R. 3 (a)).

Where the order of requisition was tendered to the durwan in the requisitioned premises authorised to accept all communications addressed to both owners or either of them, who was as such was the agent of both owners for the purpose of R. 3 (a) and on his refusing to accept, the same was affixed on the entrance door of the requisitioned premises, there was service of the order on both the owners and not only on one of them to whose residence it was forwarded earlier and thereafter was affixed on the entrance door of his residence on his being found to be absent at the residence. AIR 1982 Cal 180. Affirmed. (Para 10)

(B) W. B. Land (Requisition and Acquisition) Act (2 of 1948), Pre; S. 3 — Requisition under the Act — Urgency or

immediacy of requisition is not condition precedent.

It is not correct to say that unless there is urgency or immediacy for land, the provisions of the Act cannot be resorted to, for the preamble does not say that the Act is for speedy requisition as it provides that it is for speedy acquisition of land. (Para 12)

(C) W. B. Land (Requisition and Acquisition) Act (2 of 1948), Pre; S. 3 (1) — Acquisition under the Act — Not mala fide or does not amount to malice in law on ground that provisions of Land Acquisition Act are not resorted to. (Land Acquisition Act (1894), Section 4).

Where neither the Requisition Act nor the order under S. 3 (1) of the Act has been challenged as ultra vires Art. 14 of the Constitution the order of requisition is neither mala fide, nor the making of it is malice in law the acquisition under Section 3 (1) of the Acquisition Act could not be challenged as mala fide or amounting to malice in law on the ground that even though there was no urgency provisions of Land Acquisition Act were not resorted to for the purpose of acquisition. The State Govt. and authorities under the Act are at liberty to proceed under the provisions of the Act for the requisition of the premises. The order of requisition is neither mala fide, nor the making of it would amount to malice in law. Section 3 (1) of the Act does not lay down any such condition precedent to the exercise of the power of requisition. Even if it be assumed that requisition implies immediacy or urgency, in the absence of any specific provision in Sec. 3 (1) restricting the power of requisition only in case of urgency or immediacy, the question relating to the same is not at all justiciable. (Paras 13, 14)

(D) W. B. Land (Requisition and Acquisition) Act (2 of 1948), Sec. 3 (iA) — Acquisition of premises by Land Acquisition Collector on receipt of proposal from State Government — Officer inspecting premises and satisfying himself as to suitability of premises for purpose in question — Requisite formation of opinion on part of officer is to be presumed.

Where the premises was acquired after receiving a proposal from the State Govt. by the Land Acquisition Collector

*Against judgment of B. C. Ray, J., reported in AIR 1982 Cal 180.

in that behalf after inspecting the premises and after being satisfied that it was most suitable and convenient for the purpose of acquisition, i. e., for the establishment of a distribution centre of the Calcutta Electric Supply Corporation for maintaining supplies and services of electricity to the locality concerned, the acquisition would not be open to challenge on the ground that it was made on the direction of the State Government and there was not independent formation of opinion on the part of the Officer in question. In such a case even assuming the request to be a direction, the Land Acquisition Collector would be deemed to have independently formed his opinion as required under S. 3 (1). (Para 17)

(E) W. B. Land (Requisition and Acquisition) Act (2 of 1948), S. 3 (1) — Acquisition under, for company — Validity.

As soon as it is found that any land is requisitioned for any of the purposes stated in Section 3 (1) in accordance with the provisions of the Act, the order of requisition will be quite legal and valid, even though requisition has been made at the instance of a company or a corporation. In a welfare State, it is the duty of the Government to see that the purposes stated in Section 3 (1) are served and carried out in the interests of the community. It is not possible for the Government to carry out all these purposes itself, and it has to take the help of some organisation like companies, corporations etc. If it is said that the State Government cannot acquire land for effecting any of these purposes though a company and, if it is not possible for the State Government to do it itself, the interest of the community will be seriously prejudiced. One cannot be so technical in interpreting the Act in a manner that would jeopardize the welfare of the people. (Para 18)

Where the premises were acquired for ensuring effective distribution of supply of electricity in a locality, the acquisition would not be open to challenge on the ground that it was made at the instance of Electric Supply Company and not by the State Govt. (Para 18)

(F) W. B. Land (Requisition and Acquisition) Act (2 of 1948), Section 3 —

Acquisition under — Not invalid on ground of not giving a hearing to owner.

So far as the Act is concerned it does not, either expressly or by necessary implications, require a hearing to be given to the owner or occupier before the making of an order of acquisition. The owner or occupier is, however, entitled to make a representation to the State Government or Land Acquisition Collector and, if any such representation is made, the said authorities will no doubt consider the same. (Para 19)

Cases Referred : Chronological Paras

AIR 1981 SC 818	14
(1980) 2 Cal LJ 19 : 84 Cal WN 661	19
AIR 1978 SC 597	19
AIR 1978 SC 851	19
AIR 1972 SC 896	19
AIR 1972 SC 2656	19
AIR 1971 SC 961	19

Somen Bose; Paritosh Kr. Mukherjee and Ashis Roy, for Appellants; Sadhan Gupta, Addl. Advocate General and Amaresh Chakraborty, for Respondents. Dipankar Gupta, Mrs. Ruma Pal and Suchit Kumar Banerjee, for Calcutta Electric Supply Corporation Ltd.

M. M. DUTT, J.:— In this appeal the appellants, Nilkamal Bez Boruah and his wife Smt. Sushila Bez Boruah, alleged to have been divorced, have preferred this appeal against the judgment of B. C. Ray, J., (AIR 1982 Cal 180) whereby the learned Judge discharged the Rule Nisi issued on the application of the appellants under Article 226 of the Constitution, challenging an order of requisition under S. 3 (1) of the West Bengal Land (Requisition and Acquisition) Act II of 1948, hereinafter referred to as the Act.

2. The appellants claimed to have purchased the premises No. 2, Park Lane Calcutta on or about August 9, 1952, with their joint funds. The appellant No. 2, the first wife of the appellant No. 1 is alleged to have been divorced in 1954 by a decree of divorce of the High Court at Madras. It is alleged that on January 7, 1980 by a consent decree passed in Title Suit No. 1940 of 1979, the said premises No. 2, Park Lane, Calcutta was partitioned by metes and bounds between the appellants. Thereafter, by an order dated September 13, 1980 of the Corporation of Calcutta the name of the appellant No. 2 in respect of her half share in

the said premises was mutated. The case of the appellants is that there are three rooms in the said premises measuring 30' x 30' and there is an office accommodation of the appellant No. 1. A wholetime durwan of the appellant No. 1 has been residing in one of the said rooms.

3. On May 19, 1978, a negotiation started between the appellant No. 1 and the Calcutta Electric Supply Corporation Limited for the sale of the said premises No. 2, Park Lane, Calcutta. After the price was settled, a draft agreement for sale was prepared and sent by the appellant No. 1 to the Calcutta Electric Supply Corporation, but the sale was not effected. It is alleged that on account of the adamant attitude of the Calcutta Electric Supply Corporation, the sale did not materialise.

4. It appears that a notification dated June 20, 1979 was issued under Sec. 4 of the Land Acquisition Act, 1894 for the acquisition of the land and building of the said premises No. 2, Park Lane, Calcutta for the construction of a house for an institution known as "Urdu Academy". The appellants filed an objection in writing under Section 5A of the Land Acquisition Act, and they were also heard. It has been specifically averred in the writ petition that the appellants were not aware of the final fate of the land acquisition proceedings, namely, whether the same were abandoned or cancelled. It is alleged that no information either from the office of the Land Acquisition Collector or from the Deputy Secretary, Land and Land Revenue Department has ever been communicated to the appellant No. 1.

5. It is the case of the appellants that during the pendency of the said Land acquisition proceedings the impugned order of requisition dated October 16, 1981 was passed by the First Land Acquisition Collector, under S. 3 (1) of the Act requisitioning the land with building measuring 0.2627 acre comprised in the said premises No. 2, Park Lane, Calcutta "for a public purpose for maintaining supplies and services essential to the life of the community by the establishment of a power Distribution System". It is alleged that the said order under Section 3 (1) of the Act was not served on the appellants.

The case of the appellants is that the appellant No. 1 was in Madras from October 7, 1981 to October 22, 1981, for medical check-up. He received an information from his durwan through a telegram dated October 19, 1981. Upon receipt of the information, the appellant No. 1 returned from Madras on October 22, 1981 and came to know for the first time from his durwan, Sitaram Singh that "an order had been handed over on the Ration Shop on or about October 16, 1981 at 8 P. M.", and that on October 17, 1981 some persons, claiming themselves to be the employees of the Calcutta Electric Supply Corporation had broken open the lock of the main gate of the said premises No. 2, Park Lane, Calcutta at about 11 A. M. and had driven out the durwan by physical force. The office premises was also broken open, but the durwan was permitted to reside in the office premises. After service of a lawyer's letter dated October 26, 1981, demanding justice from the First Land Acquisition Collector who issued the said order under Section 3 (1) of the Act, the appellants filed a writ petition in this Court on October 30, 1981 and, as stated already a Rule Nisi out of which this appeal arises, was issued.

6. At the hearing of the Rule Nisi before the learned Judge, the legality of the impugned order under Sec. 3 (1) of the Act was challenged on the grounds of — (1) non-service of the order under Section 3 (1) of the Act, (2) pendency of the said land acquisition proceedings, (3) non-compliance with the principles of natural justice by not giving a hearing to the appellants before the impugned order was passed and (4) absence of formation of opinion by the Collector as required under Section 3 (1) of the Act.

7. The learned Judge, after considering the facts and circumstances of the case and the submissions made on behalf of either party, overruled all the aforesaid grounds challenging the legality of the impugned order and discharged the Rule Nisi. Hence this appeal.

8. It appears from the writ petition and also from the judgment of the learned Judge that the appellants complained that during the pendency of the said land acquisition proceedings

initiated for the acquisition of the said premises No. 2, Park Lane, Calcutta for the purpose of constructing a house for the Urdu Academy, the impugned order of requisition was passed. It has been averred in some of the paragraphs of the writ petition that the appellants were not aware of as to what had happened to the said land acquisition proceedings whether the same were abandoned or not. That these statements in the writ petition are untrue is apparent on the face of the letter dated October 26, 1981 of Mr. Asish Roy, Advocate demanding justice from the First Land Acquisition Collector. In Paragraph 4 of the said letter, it has been categorically stated that "by order No. 7922-LA (II) IS. 179 dated July 10, 1981, the said land acquisition proceedings were cancelled and abandoned by the Deputy Secretary, Government of West Bengal, Land and Land Reforms Department, Writers' Buildings, Calcutta-1". Thus it appears that the averments made in the writ petition that the appellants were not aware of as to whether the land acquisition proceedings were abandoned or not is untrue. The appellants also relied on the alleged pendency of the land acquisition proceedings as one of the principal grounds for challenging the validity of the impugned order under Sec. 3 (1) of the Act. The learned Judge had to deal with the said ground at length but, ultimately, overruled the same. In our opinion, on this ground alone the writ petition, is liable to be dismissed. Be that as it may, as much arguments have been made on behalf of the appellants on the merits of the case, we propose to consider the same.

9. The first point that has been urged by Mr. S. C. Bose, learned Counsel appearing on behalf of the appellants is that the impugned order under Section 3 (1) of the Act not having been served on the appellant No. 2, the alleged divorced wife of the appellant No. 1, it is illegal. In the writ petition, however, the appellants' case was that the impugned order was not served on both the appellants, but at the hearing before us the learned Counsel for the appellants had urged that the impugned order was not served on the appellant No. 2 only. It has been submitted by him that he will not be in a posi-

tion to say that the impugned order was not served on the appellant No. 1. Sub-section (2) of Section 3 of the Act provides that an order under sub-section (1) shall be served in the prescribed manner on the owner of the land and where the order relates to land in occupation of an occupier, not being the owner of the land, also on such occupier. Thereafter, sub-sec. (3) provides as follows :

"(3) If any person fails to comply with an order made under sub-sec. (1), the Collector or any person authorised by him in writing in this behalf shall execute the order in such manner as he considers expedient and may,—

(a) if he is a Magistrate, enforce the delivery of possession of the land in respect of which the order has been made to himself, or

(b) if he is not a Magistrate, apply to a Magistrate or; in Calcutta, as defined in clause (11) of Section 5 of the Calcutta Municipal Act, 1951, to the Commissioner of Police and such Magistrate or Commissioner, as the case may be, shall enforce the delivery of possession of such land to him".

The manner of service has been prescribed by Rule 3 of the West Bengal Land (Requisition and Acquisition) Rules, 1948, as follows :

"(3). The manner of service of Order — An order under sub-section (1) of Section 3 shall be served on the owner of the land and where the order relates to land in occupation of an occupier not being the owner of the land, also on such occupier—

(a) by delivering or tendering a copy thereof, endorsed either by the person authorised by the Act to make the order or by the Collector to the person on whom the order is to be served or his agent, or

(b) by fixing a copy thereof on the outer door of some conspicuous part of the house in which the person on whom the order is to be served ordinarily resides or carries on business or personally works for gain, or

(c) by sending the same to the person on whom the order is to be served by registered post with acknowledgment due, or

(d) by fixing a copy thereof in some conspicuous part of the land to which

the order relates and also in some conspicuous place of the office of Collector". The case of the respondents Nos. 1, 2 and 3 including the State of West Bengal and the First Land Acquisition Collector, Calcutta as pleaded in their application for vacating the interim order before the learned Judge is that the process server of the office of the First Land Acquisition Collector went to the residence of the appellant No. 1 at 60, Lake Place, Calcutta for the purpose of serving the impugned order on him on October 16, 1981, but the appellant No. 1 was found not available and, as such, the impugned order was served by affixing the same on the main door of the said premises No. 60, Lake Place, Calcutta. The process server also went to the requisitioned premises No. 2, Park Lane, Calcutta on the same day. The durwan of the appellant No. 1 was found available. He, however, refused to accept the impugned order after reading the contents of the same, and accordingly, the process server served the impugned order by affixing the same on the entrance door of the requisitioned premises in the presence of one Shyamal Agarwal, the owner of a Ration Shop, situate opposite to the requisitioned premises. A copy of the report of service submitted by the process server has been annexed to the said application.

10. As has been stated already, the learned counsel for the appellants does not dispute the service of the order on the appellant No. 1. He, however, submits that as the order was forwarded to the appellant No. 1, or in other words, as the order was meant for the appellant No. 1, the service of the order on the appellant No. 2 was no service on the appellant No. 2. It appears from a copy of the order that has been annexed to the writ petition that the Land Acquisition Collector forwarded the same to the appellant No. 1. The question that emerges is whether the service on the appellant No. 1 should be regarded as service on the appellant No. 2 as well. According to the respondents Nos. 1 to 3, the order was served by affixation on the outer door of the residence of the appellant No. 1 and, thereafter, on the entrance door of the requisitioned premises after the dur-

wan had refused to accept the same. The durwan has not filed any affidavit denying the allegations of the respondents that the order was handed over to him or that he had refused to accept service of the same. In the circumstances, we may proceed on the basis that the order was served on the durwan. Now under Rule 3 (1) (a) of the Rules, the order may be served by delivering or tendering a copy thereof to the person on whom the order is to be served or to his agent. Therefore, if a copy of the order is delivered or tendered to the agent of the owner or occupier, it will tantamount to good service on the owner or occupier, as the case may be. In the writ petition, it has been alleged that Sitaram Singh is the durwan of the appellant No. 1. In paragraph 8 of the letter of the lawyer dated October 26, 1981, it has been stated as follows: "I further say that the said order was never served nor attempted to be served upon the recorded joint owners viz., on my clients nor upon the authorised durwans of my clients, who reside inside the premises, but my clients had got a copy of the said order from a nearby ration shop." This statement shows that there were more than one durwan in the said premises. In paragraph 6 of the writ petition, it has been alleged that the durwan of the appellant No. 1 resides in one of the three rooms of the said premises No. 2, Park Lane, Calcutta. There is no whisper in the writ petition that besides the said Sitaram Singh any other person resides in the said premises. No submission has been made on behalf of the appellants that the appellant No. 2 has any durwan or that the durwan resides in the said premises. It is, therefore, manifestly clear that although in paragraph 8 of the letter of the lawyer the expression "authorised durwans" has been used, the same is not correct and refers to only one durwan, namely, the said Sitaram Singh. Sitaram Singh was, therefore, authorised to accept all communications addressed to the appellants or either of them. In other words, he was the agent of the appellants for the purpose of Rule 3 (a). When the order was tendered to Sitaram Singh that would also amount to service of the

order not only on the appellant No. 1, but also on the appellant No. 2. It is true that the order was forwarded to the appellant No. 1, but that is immaterial. Accordingly, we overrule the contention of the appellants that the impugned order was not served on the appellant No. 2.

11. It is the case of the Calcutta Electric Supply Corporation, the respondent No. 6 as also of the respondents Nos. 1 to 3 that there has been a marked growth in the demand for electricity in the area on both sides of Park Street. It is an imperative necessity to establish a primary distribution station immediately in the said area. It is not possible to expand and/or to put any further load on the existing distribution systems supplying electricity to the aforesaid area as there is already optimum utilisation of the existing primary distribution systems. In view of the extreme urgency for such a distribution centre, the Calcutta Electric Supply Corporation negotiated with the appellants for the purchase of the requisitioned premises No. 2, Park Lane, Calcutta. It has been already noticed that the draft agreement for sale was sent by the appellants to the Calcutta Electric Supply Corporation. According to the appellants, the negotiation failed on account of the adamant attitude of the Calcutta Electric Supply Corporation. This allegation appears to be untrue. The appellants have annexed to the writ petition some correspondence that passed between the Calcutta Electric Supply Corporation and the appellants. It appears from the said correspondence that the Calcutta Electric Supply Corporation approved of the draft agreement and remitted the same back to the appellant No. 1 requesting him to complete the sale, but in spite of repeated requests the appellant No. 1 remained silent and did not even care to acknowledge the letters written to him by the Calcutta Electric Supply Corporation in that regard. Thus it appears that the appellants themselves backed out and failed and neglected to complete the sale. In that predicament, the Calcutta Electric Supply Corporation had to approach the Government for the requisition of the said premises No. 2, Park Lane, Calcutta. It may be stated here that long before the im-

pugned order was made by the Collector, the land acquisition proceedings that were going on for the acquisition of the said premises for the purpose of the Urdu Academy were withdrawn.

12. It is urged on behalf of the appellants that land can be requisitioned under the provisions of the Act, only if there be an urgency for the same. Our attention has been drawn by the learned counsel for the appellants to the preamble of the Act which reads: "An Act to provide for the requisition and speedy acquisition of land for certain purposes." The preamble, in our opinion, does not at all help the contention of the learned counsel that unless there is urgency or immediacy for land, the provisions of the Act cannot be resorted to, for the preamble does not say that the Act is for speedy requisition as it provides that it is for speedy acquisition of land.

13. The learned counsel, however submits that the issuance of the impugned order under Section 3 (1) of the Act was mala fide or, in any event, it should be construed as malice in law vitiating the impugned order. It is contended by the learned counsel that as much time had elapsed between the attempt of the Calcutta Electric Supply Corporation to acquire the said premises by purchase and the actual requisition of the same, there was no immediate necessity for the said premises and it could be acquired under the provisions of the Land Acquisition Act when, the appellants could get an opportunity of being heard under S. 5A of the said Act and, in case of acquisition, could get the amount of compensation being the market value of the said premises, before delivery of possession of the same. In our opinion, in the facts and circumstances of the case, the question of acquisition under the Land Acquisition Act does not at all arise. The Land Acquisition Act provides for acquisition of land whereas the Act with which we are concerned provides for requisition and thereafter for acquisition of land. Acquisition and requisition are completely different. In case of acquisition, the owner loses both title and possession of the land acquired but in case of requisition, the owner retains title, but temporarily loses actual physical possession of the requisi-

tioned land. So we do not find any substance in the said contention of the learned counsel. It is significant to notice that neither the Act nor the impugned order under Section 3 (1) of the Act has been challenged as ultra vires Article 14 of the Constitution. In the circumstances, in our opinion, the respondents were at liberty to proceed under the provisions of the Act for the requisition of the said premises No. 2 Park Lane, Calcutta. The impugned order of requisition is neither mala fide nor the making of it is malice in law as contended on behalf of the appellants.

14. The main endeavour of the appellants is to show that there was no urgency for getting possession of the said premises No. 2, Park Lane, Calcutta-1 justifying the requisition of the same under the provisions of the Act. It is contended by the learned Counsel for the appellants that as there was no urgency, it would have been proper for the respondents Nos. 1 to 3 to acquire the said premises under the Land Acquisition Act. It is submitted that the question whether there was urgency or not is justiciable and, if there is no urgency, the impugned order of requisition should be quashed. In support of the contention that the question of urgency is justiciable and subject to judicial scrutiny, reliance has been placed by the learned counsel upon the decision of the Supreme Court in *Swadeshi Cotton Mills v. Union of India*, AIR 1981 SC 818. In that case the proposition, whether the opinion or satisfaction of the Government in regard to the necessity of taking immediate action as provided in S. 18-AA (1) of the Industries Development and Regulation Act, 1951 is subject of judicial review or not has been considered by the Supreme Court on the analogy of Section 17 of the Land Acquisition Act. It has been observed by the Supreme Court that even under Section 17 of the Land Acquisition Act, the satisfaction or opinion of Government/Authority in regard to the urgency of taking action thereunder, is not altogether immune from judicial scrutiny. We do not think that the decision in *Swadeshi Cotton Mills'* case is of any help to the appellants. The power under Section 17 of the Land Acquisition Act can be exer-

cised by the Government only on the ground of urgency or, in other words, urgency for the land sought to be acquired is the condition precedent to the exercise of power under Section 17. So in a case under S. 17, the question of urgency is justiciable. On the other hand, Section 3 (1) of the Act does not lay down any such condition precedent to the exercise of the power of requisition. Even if it be assumed that requisition implies immediacy or urgency, in the absence of any specific provision in Section 3 (1) restricting the power of requisition only in case of urgency or immediacy, the question relating to the same is not at all justiciable. The contention of the appellants is, therefore, unsound and is rejected.

15. On the materials on record we, however, find that there was urgency. The urgency became greater after the Calcutta Electric Supply Corporation had to waste a considerable time for the purchase of the said premises and for which the appellants were responsible. At the time the said premises was requisitioned, there was a great urgency and it was not possible for the Calcutta Electric Supply Corporation to wait any longer. In the circumstances, we do not see any substance in the said contention of the appellants. Thus, even if the question of urgency is justiciable, we find that there was urgency for the land of the said premises justifying the requisition of the same.

16. The next contention of the appellants is that as there was no formation of opinion by the Collector, the impugned order is illegal and void. Section 3 (1) inter alia provides for the formation of opinion by the State Government as to the necessity for maintaining supplies and services essential to the life of the community etc., before passing an order of requisition. Under sub-section (1A) of Section 3 of the Act, a Collector of a district, an Additional Magistrate or the First Land Acquisition Collector, Calcutta, when authorised by the State Government in this behalf, may exercise within his jurisdiction the powers conferred by sub-section (1). It is not disputed that the First Land Acquisition Collector, Calcutta, has been so authorised. In view of such authorisation by the State Government, the First Land Ac-

quisition Collector was to form the opinion under Section 3 (1) before he passed the impugned order. It is submitted on behalf of the appellants that the Collector did not form any opinion, but he passed the impugned order as directed by the State Government. In support of this contention, the learned counsel for the appellants had placed reliance upon the letter dated July 16, 1981 by the Deputy Secretary to the Land and Land Reforms Department, Government of West Bengal addressed to the First Land Acquisition Collector, Calcutta. In the said letter, the urgency of the implementation of the project of the Power Department was pointed out and it was requested that immediate steps might be taken under the provisions of the Act for the requisition of the said premises No. 2, Park Lane, Calcutta. Counsel submits that the said letter contains a direction of the Government to the First Land Acquisition Collector, Calcutta to requisition the said premises and, in view of such direction, he passed the impugned order of requisition. So, it is submitted on behalf of the appellants that the Collector did not form any opinion and he passed the impugned order as directed by the Government.

17. It has been stated already that Calcutta Electric Supply Corporation failed in its attempt to acquire by purchase the said premises from the appellants. Thereafter, it approached the Government for the requisition of the said premises, and the Government after being satisfied about the need and urgency for the said premises, requested the First Land Acquisition Collector to take immediate steps under the provisions of the Act. We do not think that the request of the Government made to the First Land Acquisition Collector to take steps under the Act for the requisition of the said premises, was a direction. In the application for vacating the interim order filed in the trial Court by the respondents Nos. 1, 2 and 3 and affirmed by the respondent No. 3, the First Land Acquisition Collector, Calcutta, it has been categorically stated that on receipt of the proposal, the respondent No. 3 inspected the said premises and was satisfied that it was most suitable and convenient for the establishment of a distribution centre

of the Calcutta Electric Supply Corporation for maintaining supplies and services essential to the life of community. Thus it appears that the respondent No. 3 himself formed the opinion before he issued the impugned order of requisition. It has been already found that no direction was given by the State Government to the First Land Acquisition Collector, Calcutta, but even assuming it to be so, the question is whether the First Land Acquisition Collector, Calcutta had independently formed his opinion as required under Section 3 (1) of the Act which, in our opinion, he did. So, we are unable to accept the contention of the appellants.

18. Another ground of attack of the appellants to the validity of the impugned order is that the provisions of the Act do not permit the State Government to requisition any land for a company which, in the instant case, is the Calcutta Electric Supply Corporation Ltd. Under Section 3 (1), subject to the proviso thereto, any land can be requisitioned by the State Government inter alia for maintaining supplies and services essential to the community, for increasing employment, for providing proper facilities for transport, communication, irrigation or drainage or for the creation of better living conditions in rural and urban areas. The question is not as to whose instance the requisition is made, but whether the requisition is made for any of the purposes mentioned in Section 3 (1) of the Act. In our opinion, as soon as it is found that any land is requisitioned for any of the aforesaid purposes, in accordance with the provisions of the Act, the order of requisition will be quite legal and valid, even though requisition has been made at the instance of a company or a corporation. In a welfare State, it is the duty of the Government to see that the aforesaid purposes are served and carried out in the interests of the community. It is not possible for the Government to carry out all these purposes itself, and it has to take the help of some organisation like companies, corporations etc. If it is held that the State Government cannot acquire land for effecting any of these purposes through a company and, if it is not possible for the State Government to do it itself, the interest of the commu-

nity will be seriously prejudiced. We do not think that we should be so technical in interpreting the Act in a manner that would jeopardize the welfare of the people. In case the impugned order of requisition is set aside, the result will be disastrous; a section of the community around the locality of the said premises No. 2, Park Lane, Calcutta will be deprived of the supply of electricity, and it would affect to a great extent the normal activities of daily life. We are, therefore, unable to accept the above contention of the appellants. The contention is overruled.

19. In the last resort, the appellants assail the validity of the impugned order on the ground that the respondents Nos. 1, 2 and 3 have violated the principles of natural justice. It is contended on behalf of the appellants that they should have been given an opportunity of being heard before the impugned order was passed. The learned counsel for the appellants submits that by necessary implications Section 3 (1) of the Act gives an indication that the owner or occupier, as the case may be, should be heard before an order of requisition is made. Our attention has been drawn by the learned counsel to the proviso to Section 3 (1) of the Act which reads as follows :

"Provided that no land for the purpose of religious worship or used by an educational or charitable institution shall be requisitioned under this section."

It is submitted that before passing an order of requisition, the State Government has to enquire from the owner or the occupier whether the land is for the purpose of religious worship or used by an educational or charitable institution. Thus, it is submitted, the proviso strongly suggests a hearing before an order under Section 3 (1) is made. It is contended that the Act not having expressly excluded compliance with the principles of natural justice, it was incumbent upon the authorities concerned to give a hearing to the appellants. In support of these contentions reliance has been placed by the learned counsel for the appellants upon some decisions of the Supreme Court — *Madan Gopal v. District Magistrate, Allahabad*, AIR 1972 SC 2656; *Daud*

Ahmad v. The District Magistrate, Allahabad, AIR 1972 SC 896; *Smt. Maneka Gandhi v. Union of India*, AIR 1978 SC 697; *Mohinder Singh Gill v. Chief Election Commr., New Delhi*, AIR 1978 SC 851. While I was sitting with A.N. Sen, C. J. (as his Lordship then was) similar contentions along with all the above decisions in regard to the Act with which we are concerned have been elaborately considered by me in the decision in *Smt. Sushila Devi Fomra v. State of West Bengal*, (1980) 2 Cal LJ 19. In that case, in considering the contention of the appellant I relied upon the decision of the Supreme Court in *S. M. Nandy v. State of West Bengal*, AIR 1971 SC 961, where the constitutional validity of the Act was challenged on three grounds : (1) absence of any provision for a notice to the owner or the occupier of the property before an order of requisition is passed, (2) absence of any provision for an appeal against an order of requisition and (3) bar of a civil suit under Section 11 of the Act. On the first ground, namely, absence of any provision for a notice to the owner or occupier of the property before the making of an order of requisition, the Supreme Court observed as follows (at p. 963):—

"It is true that there is no express provision to make a representation against an order of requisition, but there is no bar to a representation being made after an order is served under Section 3 (2) of the Act. We have no doubt that if the representation raises a point which overrides the public purpose it would be favourably considered by the State Government or other Government authorities, as the case may be."

It has been held in *Fomra's case* (supra) that the decision of the Supreme Court in *S. M. Nandy's case* is an authority for the view that the Act does not contemplate giving of a notice and hearing to the person affected before the making of an order of requisition. As *S. M. Nandy's case* is a case in point on the Act with which we are concerned we feel bound by the same, although we have not failed to notice that the field of operation of the principles of natural justice has been extended to a large extent. But so far as the Act is concerned we hold that it does not,

either expressly or by necessary implications, require a hearing to be given to the owner or occupier before the making of an order. The appellants are, however, entitled to make a representation to the respondents Nos. 1 to 3 and, if any such representation is made, the said respondents will no doubt consider the same. Be that as it may, for the same reasons as given in Fomra's case (supra) which, we do not propose to repeat and, in view of the said observation of the Supreme Court in S. M. Nandy's case (supra), it is difficult for us to accept the contention of the appellants that as no prior hearing was given to them the impugned order is invalid and void.

20. Before we conclude, it may be observed that in view of the conduct of the appellants, this Court should not exercise its discretion in their favour under Article 226 of the Constitution. It has been already found that after the price was settled and the Calcutta Electric Supply Corporation approved of the draft agreement sent by the appellant No. 1 the latter deliberately avoided the completion of the sale of the requisitioned premises. In our opinion, the appellants have not come to this Court with clean hands and, accordingly, on this ground the writ petition is also liable to be dismissed.

21. In the result, for the reasons aforesaid, the appeal is dismissed. There will, however, be no order as to costs.

22. On behalf of the appellants, a prayer has been made for the stay of operation of this judgment. It is, however, submitted on behalf of the respondent No. 6, the Calcutta Electric Supply Corporation Limited that they would not demolish any structure, if there be any existing now, in the said premises No. 2, Park Lane, Calcutta for a period of three weeks from date.

23. In view of the said submission, we do not think that there is any necessity for staying the operation of the judgment for the said period.

MONOJ KUMAR MUKHERJEE, J.:—
I agree.

Appeal dismissed.

AIR 1982 CALCUTTA 518

B. C. CHAKRABARTI, J.

Jyotsna Ranjan Chakrabarti, Petitioner v. N. K. Mitra, Opposite Party.

C. O. No. 1578 of 1982, D/- 8-7-1982.

West Bengal Premises Tenancy Act (12 of 1956), S. 29-B (inserted by Act No. 52 of 1976 and as amended by Act No. 36 of 1978) — Summary trial for eviction — Expression "a landlord who is a retired member etc." — Does not cover a retired member of armed forces who was not a landlord at the time of his retirement but became so many years thereafter by subsequent acquisition of interest.

The expression "landlord who is a retired member" clearly postulates a situation where the retired member is a landlord and is in need of occupation of the premises let out to the tenant at or about the time of retirement. A retired member of the armed forces who was not a landlord at the time of his retirement but became so, many years thereafter by subsequent acquisition of interest is not covered by the expression "a landlord who is a retired member etc." (Para 8)

Where a retired member of armed forces who was not a landlord of the tenant at the time of his retirement but became so 9 years after his retirement by virtue of a deed of gift from his mother filed an application under Section 29-B for eviction of the tenant who was inducted by his mother nearly two years after his retirement, the application was clearly misconceived. The applicant, in the instant case, could not claim eviction on the ground of his own requirement for two reasons. Firstly, because the applicant was neither the landlord nor the owner of the premises at the time of his retirement, and secondly, because the tenancy was created long after his retirement. Therefore, the applicant had no cause of action at that time so as to entitle him to a decree for eviction even under the ordinary procedure. The Rent Controller had no jurisdiction in such circumstances to pass an order for eviction under S. 29-B of the Act. (Para 8)

Saktinath Mukherjee with Pradipta Ray, for Petitioner; S. C. Chakrabarti, for Opposite Party.

ORDER :— This revisional application at the instance of the tenant is directed against an order of eviction passed by the Additional Rent Controller, Barrackpur in case No. R. C. 45 of 1981 under Section 29B of the West Bengal Premises Tenancy Act.

2. The petitioner's case in brief is as follows :

The petitioner was inducted as a tenant in the western half portion of the ground floor of premises No. 292B, Bangur Avenue, Dum Dum by the then owner Smt. Probhabati Mitra at a monthly rental of Rs. 150/- payable according to English Calendar.

3. In November, 1979, the petitioner was informed by Smt. Probhabati Mitra that she had gifted the entire ground floor of the said premises to her son Sri N. K. Mitra (Opposite Party No. 1). Since then the opposite party No. 1 started collecting rent from the petitioner. In or about the month of February, 1980 the petitioner received a notice to quit dated February 15, 1980 under Section 106 of the Transfer of Property Act read with Section 13 (6) of the West Bengal Premises Tenancy Act. It was stated in the notice that the opposite party No. 1 was a retired military officer, that he required the premises for his own use and occupation and the petitioner was asked to vacate the suit premises with the expiry of the month of April 1980. Thereafter the opposite party No. 1 filed an application under Section 29B of the West Bengal Premises Tenancy Act for eviction of the petitioner which was registered as R. C. Case No. 45 of 1981. In the said application the opposite party No. 1 made out a case of reasonable requirement for own use and occupation. The application was accompanied by a certificate issued by the Lt. Col. Randhir Singh as required under S. 29B (2) of the Act. The petitioner filed an opposition to the application and eventually the learned Additional Rent Controller by his judgment dated 24-2-1982 passed an order for eviction of the petitioner from the suit premises.

4. Being aggrieved by the order the petitioner has moved the present revisional application. The application has been heard on notice to and upon contest by the opposite party No. 1.

5. The following facts which appear from the evidence adduced before the Rent Controller are not disputed. The petitioner was inducted as a tenant in 1972 by Smt. Probhabati Mitra. Smt. Probhabati Mitra gifted the ground floor of the said premises to the opposite party No. 1 by a deed of gift dated 26-9-1979. The opposite party No. 1, who was a member of the armed forces in the medical corps retired from service in 1970. Thereafter he lived at Meerut for 8 or 9 years and then came to Calcutta to stay as a tenant in his present accommodation.

6. Section 29B was first introduced by the West Bengal Premises Tenancy (Amendment) Act, 1976. It provided for summary trial of applications for eviction under certain circumstances. This provision was further amended in 1978 by the West Bengal Premises Tenancy (Amendment) Act, 1978. Section 29B as it now stands provides for a special procedure for disposal of applications for eviction on the ground of bona fide requirement by retired or retiring members of the armed forces. The Section in its material part reads as follows :—

"(1) No Civil Court shall entertain any application by a landlord being a government employee, and who being in occupation of any residential premises allotted to him by his employer is required by, or in pursuance of, an order made by such employer to vacate such residential accommodation, or in default, to incur certain obligations on the ground that he owns as a residential accommodation either in his own name or in the name of his wife or dependent child at or near the place where he is posted for the time being, or by a landlord who is a retired member of the naval, military or air force of the Union of India or will retire within a period of less than one year as such member, for the recovery of possession of any premises on the ground specified in Clause (ff) of sub-section (1) of Section 13 but such application shall be dealt with by the Controller in accordance with the procedure specified in this section."

7. The opposite party No. 1 apparently claiming to be a retired member of the armed forces of the Union of India filed the application by invoking

the special procedure prescribed in the said Section. It is contended by Mr. Mukherjee appearing on behalf of the petitioner that in the facts and circumstances of the case the opposite party No. 1 is not entitled to the benefit of the said section. Mr. Chakrabarti in opposing the application contended on the other hand that the opposite party No. 1 being a retired member of the armed forces and having satisfied the learned Rent Controller about his requirements is well covered by the provisions of the section.

8. From the Statement of Objects and Reasons annexed to the bill enacting the West Bengal Premises Tenancy (Amendment) Act 1976 it appears that the object behind the provision was to assist employees of the Central or the State Government or any local authority who are required to vacate occupation of residential accommodation allotted to them by their employers it was considered necessary to provide for a special and speedy procedure to enable such employees to recover possession of their own premises. The object behind the further amendment in 1978 was to extend the benefit of the section to retired or retiring members of the armed forces who cannot get back possession of their residence let out to tenants, at the end of their service life. Keeping these objects in view and the language of the section it seems that the opposite party No. 1 in the particular circumstances of the case was not really intended to be covered by the special provisions. The section refers to a "landlord who is a retired member of the naval, military or air force of the Union of India or will retire within a period of less than one year as such member." In the present case the petitioner was inducted as a tenant in 1972. The premises at that time belonged to the mother of the opposite party No. 1. Opposite Party No. 1 had already retired from service in 1970. It is plain therefore that the opposite party No. 1 was not a landlord at the time when he retired. He was not even the owner of the premises. He became the owner in 1979 by virtue of the deed of gift. The expression "landlord who is a retired member" clearly postulates a situation where the retired member is a landlord and is in need of occupation of the pre-

mises let out to the tenant at or about the time of retirement. A retired member of the armed forces who was not a landlord at the time of retirement but became so many years thereafter by subsequent acquisition of interest is not covered by the expression "a landlord who is a retired member etc." In the instant case the admitted position is that the opposite party No. 1 was not the landlord of the petitioner at the time of his retirement in 1970. As a matter of fact the tenancy was not in existence at that time. At the time of his retirement in 1970, the opposite party could not claim eviction on the ground of his own requirement for two reasons — firstly he was neither the landlord nor the owner of the premises at that time and secondly because the tenancy was created long thereafter. Therefore he had no cause of action at that time so as to entitle him to a decree for eviction even under the ordinary procedure. To extend the benefit of the summary procedure to such a person was never within the intention of the legislature. Therefore it seems to me that the application under S. 29B by the opposite party No. 1 filed 9 years after his retirement and the tenancy having been created nearly two years after such retirement, was misconceived. The learned Rent Controller had no jurisdiction in such circumstances to pass an order for eviction under Section 29B of the Act. The impugned order therefore, cannot be sustained. The order was without jurisdiction. The application accordingly succeeds and is allowed and the order impugned in this application is set aside.

9. There will be no order for costs.

10. Let the order be communicated to the Court below forthwith.

Application allowed.

AIR 1982 CALCUTTA 520

M. M. DUTT AND MONOJ KUMAR
MUKHERJEE, JJ.

Avery India Ltd. Appellant v. Controller, Weights and Measures, Govt. of West Bengal and others, Respondents.

A. F. O. O. No. 70 of 1978, D/- 7-6-1982.

GZ/HZ/D43/82/VAN/SNV

West Bengal Standards of Weights and Measures (Enforcement) Rules (1959), R. 24 — Memo No. 2035 (60) dated Oct. 28, 1960 — Manufacture of complete set of component parts of weighing machine — Disclosure thereof in fortnightly return essential.

On a proper construction of R. 24 read with Memo No. 2035 (60) dated Oct. 28, 1960 whereby a form of return has been prescribed a complete set of component parts of a weighing machine will be considered as the weighing machine and it is required to be disclosed in the fortnightly return by the manufacturer.

(Para 9)

S. Roychoudhury with Dr. T. Banerjee and S. P. Mazumdar, for Appellant; Amaresh Chakraborty and P. Bose, for Respondents.

M. M. DUTTA, J. :— In this appeal the appellant, Avery India Limited, has challenged the propriety of the judgment of a learned single Judge of this Court whereby the learned Judges discharged the rule nisi obtained by the appellant on its application under Article 226 of the Constitution.

2. The principal question that is involved in this appeal is whether the appellant is liable to disclose in the fortnightly returns that are submitted by him under the West Bengal Standards of Weights and Measures (Enforcement) Act, 1958, the sets of component parts which, if assembled, would make complete weighing machines. In this connection, we may refer to the provision of sub-section (2) of S. 9 of the Act which provides that no weighing instrument or measuring instrument shall be sold or delivered or used in any transaction unless it has been verified or re-verified in accordance with the rules made under the Act and stamped with a stamp of verification in such manner as may be prescribed. Rule 24 of the Rules framed under the Act provides that every manufacturer or repairer of, or dealer in weights, measures, weighing instruments or measuring instruments shall maintain such records in such form and submit such returns as the Controller may direct.

3. In the fortnightly returns submitted by the appellant during the period from 1st April 1964 to 28th Feb. 1965, it was stated by the appellant that it had produced only 466 weighing in-

struments. But in the application dated 19th Mar. 1965 for the renewal of the manufacturing licence, the appellant stated that during the said period the appellant had produced 7,344 sets of components of weighing instruments.

4. A show cause notice dated Aug. 13, 1965 was served by the Controller of Weights and Measures, West Bengal upon the appellant calling upon it to show cause why the renewal of the manufacturing licence of the appellant for the year 1965-66 should not be refused under Rule 23 (3) of the West Bengal Standards of Weights and Measures (Enforcement) Rules, 1959 for the appellant's failure to comply with the provisions of Rule 24 of the Rules.

5. The appellant had shown cause to the said notice. The case of the appellant was that it had not, as a matter of fact, manufactured 7,344 weighing instruments, but the figure 7,344 represented the component parts of weighing instruments before they were assembled. Indeed, in the application for renewal it has been stated by the appellant that it had manufactured 7,344 sets of components of weighing machines. The Controller of Weights and Measures by his Memo No. 7237 dated Oct. 22, 1965 refused to renew the manufacturing licence of the appellant for the year 1965-66 under Rule 23 (3) of the Rules, and by Memo No. 7246 of the same date directed the seizure of all stocks of weights, measures, weighing instruments and measuring instruments in the factory of the appellant. Thereafter, the appellant moved this Court under Art. 226 of the Constitution and, as stated already, a Rule Nisi was issued on the said application.

6. The learned Judge, however, could not accept the contention of the appellant that the component parts before they were assembled could not constitute weighing machines and, as such, the appellant had violated the provision of Rule 24 of the Rules. In that view of the matter, the learned Judge discharged the Rule Nisi. Hence, this appeal.

7. It is true that Rule 24 does not refer to component parts but to weighing instrument or measuring instrument. A complete instrument comes into existence after the component parts are assembled. But that is of little significance. In our opinion, for the purpose

of Rule 24 when the component parts of a complete instrument are manufactured, the appellant will have to disclose the same in the fortnightly returns as complete instruments. Unless that is done, a manufacturer may never assemble the component parts and would be in a position to circumvent the provision of Rule 24.

8. It is, however, contended by Mr. Subrata Roy Chowdhury, learned counsel appearing on behalf of the appellant that if component parts before they are assembled are considered as complete instruments and disclosed as such in the fortnightly returns, in that case, the authority would insist on their being stamped under S. 9 (2) of the Act, and the appellant will have to pay charges therefor even if they are not sold or delivered in West Bengal. We do not think that there can be any justification for this apprehension of the appellant. Under S. 9 (2) of the Act, so long as the weighing machines or instruments are not sold or delivered or used in any transaction they are not required to be stamped. It is the case of the appellant that the component parts are sent to its depots in Bihar and after the same are assembled they are sold and delivered in Bihar in accordance with the corresponding Bihar Act. There can be no doubt that before selling any instrument in Bihar the appellant has to get the instrument stamped under the Bihar Act and pay the necessary charges therefor. In our opinion, S. 9 (2) contemplates sale and delivery of any instrument in the State of West Bengal and not to any other place outside the State, for the Act only extends to the whole of West Bengal. If the appellant wants to sell a weighing machine outside West Bengal, we do not think that it can be insisted that the machine should be stamped here in West Bengal.

9. In our opinion, on a proper construction of Rule 24 read with Memo No. 2035 (60) dated Oct. 28, 1960 whereby a form of return has been prescribed, a complete set of component parts of a weighing machine will be considered as the weighing machine and is required to be disclosed in the fortnightly return. It seems that on a misconception of the provision of Rule 24 read with Memo No. 2035 (60) dated Oct. 28, 1960, the appellant did not disclose the said 7,344 sets of component parts in its fortnightly

returns. The Controller of Weights and Measures should not have taken such a drastic measure against the appellant by not renewing its licence. The appellant should have been given a chance to rectify the returns.

10. In the circumstances, we set aside the impugned orders of the Controller as contained in the said Memos Nos. 7237 and 7246; both dated Oct. 22, 1965 and make the Rule Nisi absolute. The Controller of Weights and Measures, West Bengal is directed to renew the manufacturing licence of the appellant with effect from 1st April, 1965 within a month from date subject to the compliance by the appellant of all formalities in that regard. Let appropriate writs in the above terms issue. It is made clear that the appellant shall henceforth disclose in the fortnightly returns the number of sets of component parts which, if assembled, will constitute weighing machines or instruments.

11. The order of the learned Judge is set aside and the appeal is allowed.

12. There will, however, be no order as to costs.

13. It appears that pursuant to the order of this Court dated April 20, 1978 a sum of Rs. 1,68,000 has been deposited by the appellant with the United Bank of India in the name of Sandersons & Morgans, the Advocates on record for the appellant. The said sum with interest thereon may be withdrawn from the said Bank after four weeks from date and, upon such withdrawal, the same may be made over to the appellant. Till the licence is renewed, the appellant will be entitled to continue its manufacturing operations of the weighing machines in accordance with the provisions of the Act and the Rules.

Appeal allowed.

AIR 1982 CALCUTTA 522

M. M. DUTT AND

MONOJ KUMAR MUKHERJEE, JJ.

Anderson Wright and Co., Appellant v. State of West Bengal and others, Respondents.

A. F. O. O. No. 591 of 1979, D/- 21-4-1982.

(A) West Bengal Premises Requisition and Control (Temporary Provisions) Act (5 of

EZ/FZ/C115/82/HR/RSK

1947), S. 3 (1) read with 1st proviso — Section does not by necessary implication provide for notice and hearing before an order of requisition is passed. AIR 1972 SC 2656, Discussed; AIR 1972 SC 896, Ref.

(Para 14)

(B) West Bengal Premises Requisition and Control (Temporary Provisions) Act (5 of 1947), S. 4 (1) — Notice under — There is service of notice under S. 4 (1) if an order of requisition also directs person in occupation to vacate premises within time prescribed by Section 4 (1) — Notice to vacate is to be served only on person in occupation — Notice not giving minimum period of time to vacate requisitioned premises must be held to be insufficient.

In a given case it will be sufficient compliance of Section 4 (1) of the Act, if the Collector in forwarding an order of requisition also directs the person in occupation to vacate the premises within the time prescribed by S. 4 (1). The notice under S. 4 (1) to vacate is to be served on the person in occupation. In other words, only the person who is in actual physical possession of the requisitioned premises will be directed to vacate the same. (Paras 18, 19)

Held, as the order of requisition directed the appellant to vacate the requisitioned premises it could not but be held that the appellant was served with a notice under Section 4 (1) of the Act. Though a notice under Section 4 (1) of the Act was served on the appellant, yet it did not give the minimum period of time to vacate the requisitioned premises such period being ten days from the date of the order of requisition. The notice was insufficient. However, as the appellant was not in actual physical possession of the requisitioned premises, it could not be said to be prejudiced by the insufficiency or shortness of the notice under Section 4 (1) since the question of serving a notice on the appellant did not arise. When he was not in actual physical possession of the requisitioned premises. (Paras 18, 19)

Cases Referred :	Chronological	Paras
AIR 1981 SC 818		15
AIR 1981 SC 136		15
AIR 1981 Cal 130		18, 19
AIR 1980 SC 318		15
AIR 1978 SC 597		15
AIR 1972 SC 896		14
AIR 1972 SC 2656		13, 14

Dr. D. Pal; Bhaskar Gupta; S. Khaitan, for Appellant; Sachindra Chandra Das Gupta and Suproakash Banerjee (for Nos. 1 to 3),

R. C. Deb; Hiranmoy Dutta; Ashim Ghosh; Malay Guha; P. K. Sen Gupta and Tapas Kumar Mukherjee, for Respondents.

M. M. DUTT, J.:— The appellant, Anderson Wright and Co., a partnership firm has preferred this appeal against the judgment of Amiya Kumar Mookerji, J. whereby the learned Judge has discharged the Rule Nisi issued on the application of the appellant under Article 226 of the Constitution of India.

2. In the writ petition, the appellant challenged an order of requisition dated Sept. 28, 1977 of the State Government issued under Section 3 (1) of the West Bengal Premises Requisition and Control (Temporary Provisions) Act, 1947 (Act V of 1947), hereinafter referred to as the Act. By the said order, the entire northern block of the third floor, servants' quarters on the top floor and the garage in the ground floor of premises No. 7, Red Cross Place (formerly 7, Welleslay Place), Calcutta including all furniture, fans, lights and other fittings and other fixtures lying in the northern block with right of passage through the stairs and use of the northern side lift, gate and right of user of the T. C. by the south-eastern side of the northern block were requisitioned. The possession of the requisitioned premises was alleged to have been taken on Oct. 4, 1977 at 9.30 A. M. and handed over to the Khardah Company Ltd., the respondent No. 4, a sick industry.

3. The case of the appellant is that it is a tenant in respect of the third floor of the said premises No. 7, Red Cross Place with one garage in the ground floor and the servants' quarter on the terrace under one Durga Prosad Roy, the added respondent, Sarat Chandra Roy and others. By different agreements the appellant allowed East Coast Commercial Co. Ltd., Ramnugger Cane and Sugar Co. Ltd., and the respondent No. 4, Khardah Company Ltd. to occupy different portions of the northern block of the third floor of the said premises under leave and licence agreements. The management of the Khardah Company Ltd. was taken over by the Central Government by a notification dated May 16, 1977 issued under the Industries Development and Regulation Act, 1951. The Industrial Reconstruction Corporation of India was appointed the 'authorised person' to take over the management of Khardah Company and Sri J. C. Talukdar was appointed the Chairman of the managing committee of the Company.

4. The appellant received from the First Land Acquisition Collector, Calcutta an

order No. 19/77, dated May 27, 1977 made by the Governor of West Bengal under Clause (b) of sub-sec. (3) of S. 3 of the Act. The order is set out below :

**"GOVERNMENT OF WEST BENGAL
LAND UTILISATION AND REFORMS
AND LAND AND LAND REVENUE**

**DEPARTMENT
Requisition Bench**

ORDER

No. 19/77

Calcutta, the 27th May 1977.

WHEREAS it is proposed to requisition the premises described in the schedule below for a public purpose under sub-section (1) of Section 3 of the West Bengal Premises Requisition and Control (Temporary Provisions) Act, 1947 (West Bengal Act V of 1947).

Now, therefore, in exercise of the power conferred by Cl. (b) of sub-section (3) of the said Act the Governor is pleased to direct that until the expiry of three months from the date of the order Shri Sarat Chandra Roy and Sri Durga Prasad Roy of 101, Sovabazar St., Calcutta-6, the owners and M/s. Anderson Wright and Co., of 7, Wellesley Place, Calcutta 1, the tenant shall not, without the permission of the State Government, let out the said premises.

The Schedule

Description of the premises

7, Wellesley Place (3rd floor), Calcutta, Northern portion, measuring approx. 5550 ft. and right of use of other amenities now in occupation of Khardah Co. Ltd.

By Order of the Governor

Sd/- Illegible

Deputy Secretary to the
Government of West Bengal.

No. 331

Copy forwarded to Messrs. Anderson Wright and Co. of 7, Wellesley Place, Calcutta-1, tenant of the premises referred to in the order above.

Sd/- Illegible

First Land Acquisition Collector

Calcutta.

5, Bankshall Street,
Calcutta.

The 27th May, 1977."

The appellant by its letter dated June -6, 1977 addressed to the Dy. Secretary, Govt. of West Bengal and the First Land Acquisition Collector, Calcutta made the following representation :

To

(1) The Deputy Secretary to the Government of West Bengal, Govt. of West Bengal, Land Utilisation and Reforms and Land and Land Revenue Department, Requisition Branch, Writers' Buildings, Calcutta-1.

(2) The First Land Acquisition Collector, Calcutta, Calcutta-1.

Dear Sirs,

Sub : Order No. 19/77 dt. 27th May, 1977.

Copy of the aforesaid order was forwarded to us by the First Land Acquisition Collector, Calcutta vide his memo No. 331 dated 27th May, 1977. We are very much surprised to note the contents thereof.

Without prejudice to our rights and contentions in the matter, we wish to bring the following facts to your kind consideration :

1. It is incorrect that Khardah Co. Ltd. are occupying 5550 sq. ft. of space on the northern portion of the 3rd floor of premises No. 7, Wellesley Place, Calcutta.

2. Actually by and under an agreement of leave and licence dated the 18th Feb., 1976 the said Khardah Co. Ltd. is occupying only 1000 sq. ft. of space on the northern side out of the office space belonging to us on the 3rd floor of premises No. 7, Wellesley Place, Calcutta-1. The said Khardah Co. Ltd., is occupying the said 1000 sq. ft. of the office space as licensee under us on and from the 1st of Jan., 1976 at a licence fee payable to us at the rate of Rs. 2/- per sq. ft. per month according to English Calendar month. We further place on record that since Jan., 1976 no licence fee has been paid to us by the said Khardah Company Ltd.

3. The rest of the portion is being used and/or enjoyed by M/s. Ramnugger Cane and Sugar Co. Ltd. and/or East Coast Commercial Co. Ltd. by and under separate deeds of leave and licence from time to time entered into with them by us and or by ourselves. We would request you to make note of the aforesaid position. However, as directed by your aforesaid order, we shall not disturb the status quo in any manner. In the meantime, we are trying to contact the Chairman of the committee of Management and IRCI appointed for the purpose of management of Khardah Co. Ltd. in order to (effect?) an amicable settlement with regard to the use and enjoyment of the office space required by them.

Yours faithfully,

For Anderson Wright & Co.,

Sd/- Illegible

Partner.

Copy to :

1. Mr. J. C. Talukdar,
Chairman, Committee of Management,
Khardah Co. Ltd. 7, Wellesley Place,
Calcutta-1.
2. Industrial Reconstruction Corporation of
India Ltd. 19, Netaji Subhas Road, Cal-
cutta-1.
3. The Ramnugger Cane and Sugar Co. Ltd.,
Calcutta-1.
4. East Coast Commercial Co. Ltd., Cal-
cutta-1.

5. It appears from the said representation that according to the appellant, Khardah Company had been in occupation of only 1000 sq. ft. out of 5500 sq. ft. of floor space in the northern block and the remaining portion was under the occupation of the other licensees of the appellant, namely, Ramnugger Cane and Sugar Co. Ltd. and East Coast Commercial Co. Ltd. The appellant by its letter dated June 22, 1977 stated the same thing to Sri J. C. Talukdar, the Chairman of the managing committee of Khardah Company, that is to say, the appellant claimed that besides 1000 sq. ft. of the northern block of the third floor of the said premises which was in occupation of Khardah Company at a licence fee of Rs. 2/- per sq. ft., the other licensees of the appellant had been in occupation of the remaining floor space of the said northern block. The appellant also signified its willingness to give to Khardah Company a floor space of 4000 sq. ft. of the said northern block on leave and licence at a licence fee of Rs. 2/- per sq. ft. Thereafter, a correspondence ensued between the appellant and the said Sri J. C. Talukdar as to the terms and conditions of such leave and the licence. Indeed, by its letter dated September 8, 1977, the appellant sent to the said Sri J. C. Talukdar a draft of the proposed leave and licence agreement. The proposed leave and licence agreement did not ultimately materialize.

6. It was alleged by the appellant that on Oct. 3, 1977, the appellant received from the First Land Acquisition Collector, Calcutta, a copy of the impugned order of requisition dated September 28, 1977 made by the State Government under Section 3(1) of the Act stating inter alia that the northern block of the third floor etc., of the said premises as described in the schedule to the said order was needed for a public purpose. In forwarding the copy of the impugned order by his memo No. 479 Req. dated September 30, 1977, the First Land Acquisition

Collector, Calcutta directed the appellant to place the requisitioned property at his disposal and control on and from Oct. 4, 1977 at 9-30 A. M. or on any subsequent day when an officer deputed from his office would take charge and possession of the property and prepare a schedule of existing fixtures.

7. On Oct. 4, 1977, the appellant moved a writ petition against the order of requisition before B. C. Ray, J. and obtained the Rule Nisi out of which this appeal arises. The appellant also obtained an interim order whereby the parties were directed to maintain status quo. It has been alleged by the appellant in its affidavit-in-reply that the said interim order was communicated to the respondents by the appellant's learned Advocate Miss. Aparna Datta by her letter dated Oct. 4, 1977, and a photostat copy of the said letter was affixed on the outer gate of the northern block in the third floor of the said premises. It is alleged by the appellant that the officers of the respondents had forcibly taken possession of the northern block by breaking open the lock at 4 P. M. on that day, that is, Oct. 4, 1977. In this connection, it may be recalled that according to the respondents, possession was taken at 9-30 A. M. and they have denied that possession was taken at 4 P. M.

8. At the hearing of the Rule Nisi from Amiya Kumar Mookerji J., the impugned order was challenged on behalf of the appellant on the grounds that there was no formation of opinion before the impugned order was issued; that the order was not served on the appellant as required under Section 3 (1) of the Act; that no notice under Section 4 (1) of the Act was served on the appellant; that the impugned order was mala fide and there was no public purpose inasmuch as the Khardah Company had been already in possession of a portion of the requisitioned premises; and that no opportunity of being heard was given to the appellant before the impugned order was passed.

9. The learned Judge overruled all the above contentions of the appellant. The learned Judge observed that he was satisfied from the records produced before him that a copy of the impugned order was duly served on the appellant. It was held by the learned Judge that service of a notice under Section 4 (1) of the Act was not necessary. As to the appellant's contention that it should have been given an opportunity of making a representation before the impugned order was made the learned Judge, on a consideration of some decisions of the Supreme

Court as also of this Court, took the view that it was not necessary that before any order of requisition was passed by the State Government, the owner or the occupier of the property should be given a hearing or should be allowed to put objections to the proposed order of requisition. It was, however, observed by the learned Judge that representations might be made by the aggrieved party after the order of requisition was served on him. The contention of the appellant, that the impugned order was mala fide, and that there was no public purpose, was rejected. Upon the said findings, the learned Judge discharged the Rule Nisi. Hence this appeal.

10. The appellant did not make the owners of the said premises No. 7, Red Cross Place, Calcutta, parties in the writ petition. One Durga Prosad Roy, claiming to be the present owner of the said premises filed an application in the appeal praying for his addition as a party respondent. The application was allowed and he was added as a party respondent in the appeal. He had contested the appeal and supported the respondents.

11. We fail to understand why the appellant assailed the validity of the order of requisition before the learned Judge on the ground of non-service of the same on the appellant when, it is apparent from the writ petition, a copy of the order of requisition was forwarded to the appellant on Oct. 3, 1977 by the First Land Acquisition Collector, Calcutta by his memo No. 479 Req. dated Sept. 30, 1977. In view of the said contention, the learned Judge had to look into the Government records and, as stated already, came to the finding that the impugned order of requisition was duly served on the appellant. No such contention has, however, been advanced before us on behalf of the appellant.

12. Dr. Debi Pal, assisted by Mr. Bhaskar Gupta, learned counsel appearing on behalf of the appellant has urged before us two points. The first point is that the provisions of the Act not having excluded, either expressly or by necessary implications, the rules of natural justice, on the contrary, there being sufficient indication for compliance of such rules in S. 3 (1) of the Act, it was incumbent upon the respondents to give the appellant an opportunity of being heard before the impugned order of requisition was made by the State Government. It is submitted that as the respondents had acted in defiance of the rules of natural justice, the impugned order of requisition is invalid and should be

quashed. The second point relates to non-service on the appellant of any notice under Section 4 (1) of the Act. The contention of the appellant in this regard is that as the notice under Section 4 (1) of the Act was not served, nor was the appellant given a reasonable time to vacate the requisitioned premises, the taking of possession of the same was illegal and the appellant should be restored back to possession and the impugned order should be struck down on that ground.

13. So far as the first point relating to the compliance of the rules of natural justice is concerned, it has been vehemently urged on behalf of the appellant that the proviso to Section 3 (1) gives a strong indication that before an order of requisition is issued, the owner and the occupier of the premises in question should be given a hearing. The proviso to Section 3 (1) enjoins that no premises exclusively used for the purpose of religious worship shall be requisitioned. In support of this contention much reliance has been placed on behalf of the appellant on a decision of the Supreme Court in *Madan Gopal v. District Magistrate, Allahabad*, AIR 1972 SC 2656. In that case, requisition was made under Section 3 of the U. P. (Temporary) Accommodation Requisition Act, 1947. Section 3 of the U. P. Act provides for requisition. The first proviso to Section 3 of the U. P. Act is somewhat similar to the proviso to Section 3 (1) of the Act with which we are concerned. Besides the first proviso, Section 3 of the U. P. Act contains another proviso providing inter alia that no accommodation which is in the actual occupation of any person shall be requisitioned unless the District Magistrate is further of the opinion that suitable accommodation exists for his needs or has been provided to him. It has been observed by the Supreme Court that although the U. P. Act does not contain an express provision for notice and hearing before the making of a requisitioning order, such a provision should be read there by necessary implication. It has been pointed out that there are objective factors which should be enquired into before any order is made. Further, the Supreme Court observed that the first proviso to Section 3 of the U. P. Act strongly suggests the implication of notice and hearing in the main part of Section 3. It is also pointed out that the second proviso requires that the owner of the property should be heard before it is requisitioned.

14. Relying on the observation of the Supreme Court on the first proviso to Section 3 of the U. P. Act, it has been submit-

ied on behalf of the appellant that as the proviso to Section 3 (1) of the Act is similar to the first proviso to Section 3 of the U. P. Act, it should be held that the said proviso also suggests notice and hearing before the making of an order under Section 3 (1) of the Act. We have noticed the second proviso to Section 3 of the U. P. Act which is absent from Section 3 (1) of the Act. It is true that the Supreme Court in *Madan Gopal's* case has observed that the first proviso to Section 3 of the U. P. Act strongly suggests the implication of notice and hearing, but the Court has also taken into consideration the second proviso. In this connection, we may refer to another decision of the Supreme Court in *Daud Ahmad v. District Magistrate, Allahabad*, AIR 1972 SC 896 where the Supreme Court, on a consideration of only the second proviso to Section 3 of the U. P. Act, observed that the person affected should be given a notice and hearing before any order of requisition was made. It has been observed "It is the nature of the power and the circumstances and conditions under which it is exercised that will occasion the invocation of the principle of natural justice. Deprivation of property affects rights of a person. If under the Requisition Act the petitioner was to be deprived of the occupation of the premises the District Magistrate had to hold an enquiry in order to arrive at an opinion that there existed alternative accommodation for the petitioner or the District Magistrate was to provide alternative accommodation". Thus it follows that the second proviso to S. 3 of the U. P. Act was of much significance on the question of notice and hearing by implication before the making of an order of requisition. There is, however no provision like the second proviso to Section 3 of the U. P. Act in Section 3 (1) of the Act with which we are concerned and, that makes all the difference between these two provisions. We are, therefore, unable to accept the contention of the appellant that by necessary implication Section 3 (1) of the Act provides for notice and hearing before an order of requisition is made.

15. It is, however, urged that Sec. 3 (1) of the Act not having excluded, either expressly or by necessary implication, the observance of the principles of natural justice, such notice and hearing to the person affected like the appellant should have been given before the respondents made the order of requisition. In support of this contention, the appellant has placed reliance on a few decisions of the Supreme Court which are:

Swadeshi Cotton Mills v. Union of India, AIR 1981 SC 818; *S. L. Kapoor v. Jagmohan*, AIR 1981 SC 136; *Madhusudan Chhotalal Patel v. Special Land Acquisition Officer*, AIR 1980 SC 318; *Smt. Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

16. We do not think that in the facts and circumstances of the case, we are to consider the question as an abstract proposition of law. We may assume in favour of the appellant that the respondents are obliged to comply with the principles of natural justice by giving the person affected an opportunity of being heard or of making a representation before issuing an order of requisition. On such assumption, let us now consider whether the appellant was given such an opportunity. It has been stated already that by order No. 19/77 dated May 27, 1977 which has been set out above, the appellant was communicated the information, *inter alia*, that the northern block of the third floor of premises No. 7, Red Cross Place, Calcutta was proposed to be requisitioned under Section 3 (1) of the Act, and the appellant and the owners were directed not to let out the premises until the expiry of three months from the date of the said order without the permission of the State Government. After the receipt of the said order the appellant, by its letter dated June 6, 1977 which has also been set out above, made a representation to the Dy. Secretary to the Govt. of West Bengal and the First Land Acquisition Collector, Calcutta. In the said representation, the appellant stated that the Khardah Company was in occupation of only 1000 sq. ft. of the floor area of the said northern block out of 5500 sq. ft., and the remaining floor area was in the occupation of Ramnugger Cane and Sugar Co. Ltd. and East Coast Commercial Co. Ltd. under separate leave and licence agreements with the appellant. The appellant also stated in the said representation that it would not disturb the status quo in any manner as directed. It is apparent from the said representation that the appellant was not, in the least, aggrieved by the proposal for requisition of the northern block, and it was only interested in establishing that it was in occupation of 4500 sq. ft. of floor space of the said northern block, presumably for the purpose of monthly compensation. Indeed, in its correspondence with Khardah Company, the appellant claimed its occupation of 4500 sq. ft. of floor space and tried to persuade Sri J. C. Talukdar, the Chairman of the committee of management of the said company to enter into a leave and licence agreement with the

appellant in respect of 4000 sq. ft. of floor space at the rate of Rs. 2/- per sq. ft. per month. Be that as it may, it is manifestly clear from the facts stated above that before the impugned order was passed, the appellant was served with a notice of the proposed order of requisition and, indeed, the appellant had made a representation in writing. In the circumstances, in our opinion, it does not lie in the mouth of the appellant that it was not given any opportunity of being heard or of making a representation before the impugned order of requisition was made. The contention of the appellant is without any substance and is rejected.

17. We may now consider the second point of the appellant as to the non-service of any notice under Section 4 (1) of the Act. Clause (a) of Section 4 (1) provides "where any premises are requisitioned under this Act the Collector may by notice in writing order the person in occupation of the premises, if any, to vacate the premises within a period of ten days from the service of the notice". Under the proviso to Section 4 (1), the Collector may, for reasons to be recorded in writing, extend the said period up to two months. There is serious dispute between the parties as to the time when possession was taken by the Collector. According to the respondents, possession of the northern block was taken on Oct. 4, 1977 at 9-30 A. M. At that time, one Sri S. C. Talwar was present. On the other hand, it is alleged by the appellant that possession of the requisitioned premises was forcibly taken at 4 P. M. on that date. We are, however, not really concerned as to when possession was taken by the respondents on Oct. 4, 1977.

18. The question before us is whether the appellant was served with a notice under Section 4 (1) of the Act. Section 4 (1) provides for service of a notice requiring the person in occupation to vacate within a period of ten days which may be extended by the Collector up to two months. In a Bench decision of this Court under the Act in *Smt. Sudhira Bala Roy v. State of West Bengal*, AIR 1981 Cal 130 it has been observed that so long as the person in actual physical possession of the premises is not called upon to vacate the premises, he will not be obliged to do so, even though he is served with the order of requisition. Further, it has been observed that in order to give effect to the order of requisition, a notice in writing has to be served on the person in actual possession of the premises to vacate the same. The complaint of the appellant is that no notice under Sec. 4 (1)

of the Act has been served on it. This allegation of the appellant however, does not appear to be true. It has been noticed earlier that in forwarding a copy of the order of requisition to the appellant by his memo No. 479 Req. dated Sept. 30, 1977, the First Land Acquisition Collector, Calcutta, directed the appellant to place the requisitioned property at his disposal and control on and from Oct. 4, 1977 at 9-30 A. M. or on any subsequent day when an officer deputed from his office would take charge and possession of the property. This direction was given by the Collector obviously under Section 4 (1) of the Act. In our opinion, in a given case it will be sufficient compliance of S. 4 (1) of the Act, if the Collector in forwarding an order of requisition also directs the person in occupation to vacate the premises within the time prescribed by Section 4 (1). In view of the facts stated above, it cannot but be held that the appellant was served with a notice under Section 4 (1) of the Act. It seems to us that as the said memo of the Collector directed the appellant to vacate the requisitioned premises, the learned Judge held that no notice u/s. 4 (1) of the Act was necessary. There is, therefore, no foundation for the complaint of the appellant that no notice u/s. 4 (1) of the Act was served on it.

19. Though a notice u/s. 4 (1) of the Act was served on the appellant, yet it did not give the minimum period of time to vacate the requisitioned premises; such period being ten days from the date of the order of requisition. The notice must, therefore, be held to be insufficient. But the question is, was the appellant prejudiced by the insufficiency or shortness of the notice or can the appellant make a complaint about the same? The answer to the question should be in the negative. The notice u/s. 4 (1) to vacate is to be served on the person in occupation. In other words, only the person who is in actual physical possession of the requisitioned premises will be directed to vacate the same as held by this Court in *Sudhira Bala's case* (supra). It is the case of the appellant that Ramnugger Cane & Sugar Co. Ltd. and/or the East Coast Commercial Co. Ltd. were in occupation of the remaining portion of the northern block on the third floor of the said premises. Therefore, on its own admission, the appellant was not in actual physical possession of any portion of the requisitioned premises and, therefore, the question of serving a notice on the appellant does not arise as rightly contended by Mr. P. K. Sen Gupta, learned counsel for the added

respondent, the owner. We do not think that, as the appellant was not in actual physical possession of the requisitioned premises, it was prejudiced by the insufficiency or shortness of the notice u/s. 4 (1) of the Act. The contention of the appellant relating to the alleged non-service of the notice under S. 4 (1) of the Act is without any substance and is overruled. No other point has been urged on behalf of the appellant.

20. For the reasons aforesaid, the judgment of the learned Judge is affirmed and this appeal is dismissed. In view, however, of the facts and circumstances of the case, there will be no order for costs.

21. The appellant prays for a certificate for appeal to the Supreme Court under Article 134A of the Constitution. We do not think that any substantial question of law of general importance is involved in this case. The oral prayer for a certificate is, accordingly, disallowed.

22. No order need be made on the application for compensation filed on behalf of the added respondents. The application shall be deemed to have been disposed of along with this appeal. This order is without prejudice to the rights and contentions of the parties for compensation before the appropriate forum.

MONOJ KUMAR MUKHERJEE, J.:— I agree.

Appeal dismissed.

AIR 1982 CALCUTTA 529

DIPAK KUMAR SEN, J.

Dr. Ashis Ranjan Das, Appellant v. Rajendra Nath Mullick, Respondent.

Suit No. 558 of 1981, D/- 20-4-1982.

Civil P. C. (5 of 1908), O. 39, R. 1 — Agreement to execute lease of plot of land — Suit for specific performance of — Right of defendant to ask for interlocutory relief restraining plaintiff to make any construction — Plaintiff in possession of plot — Defendant, held, was entitled to interlocutory injunction against plaintiff.

In a suit filed by the plaintiff the defendant can apply for an interlocutory injunction against the plaintiff only if the relief claimed by the defendant arises out of the plaintiff's cause of action or is incidental to it. AIR 1975 Kant 137, Rel. on. (Para 23)

BZ/HZ/C234/82/GDR

1982 Cal./34 XI G—19

In the instant case the plot of land, subject matter of suit for specific performance of contract, was admittedly in possession of the plaintiff.

Held, that the relief sought by the defendant for an injunction restraining the plaintiff from making any or further construction in the said plot till the disposal of the suit arose out of the plaintiff's cause of action and in any event was incidental thereto. The defendant, therefore, was entitled to ask for such interlocutory relief in the suit of the plaintiff. (Para 26)

Cases Referred: Chronological Paras
AIR 1975 Kant 137 23
(1894) 2 Ch 541 : 70 LT 786 : 63 LJ Ch 723,
Carter v. Fey 23

ORDER:— Dr. Ashis Ranjan Das, the plaintiff, instituted this suit on the 24th July, 1981 against Rajendra Nath Mullick the sole defendant, claiming, inter alia, (a) a decree for specific performance of an agreement between the parties for a lease of a portion of premises No. 2 Auckland Place, Calcutta, to be executed by the defendant in favour of the plaintiff, (b) mandatory injunction directing the defendant to execute and register in favour of the plaintiff a lease in the form set out in Annexure B to the plaint or in such other form as may be prescribed, (c) in default, the Registrar, Original Side of this Court be directed to execute and register such lease in favour of the plaintiff, (d) in the alternative, a decree for Rupees 29,000/- and a further decree for Rupees 1,00,000/- or (e) alternatively, an enquiry into the compensation and a decree for the sum as may be ascertained on such enquiry and other reliefs.

2. The plaintiff's cause of action is materially as follows:—

The defendant is the owner of the said premises No. 2 Auckland Place, Calcutta, which includes a plot of land measuring about 4 cottahs 5 chatacks and 7 sq. ft.

3. The plaintiff and the defendant arrived at an agreement on or about the 30th Aug., 1978 for grant of a building lease of the said plot of land by the defendant to the plaintiff for a period of 50 years from execution with option to the plaintiff of renewal thereof for further 20 years at a rent of Rs. 900/- per month payable according to the English calendar for the first two years and thereafter at the rate of Rs. 1,500/- per month for the next ten years with provision for further increase thereafter as also a premium of Rs. 50,000/- to be paid by the plaintiff

to the defendant at or before the execution of the lease.

4. It was also agreed that the plaintiff would construct a four storeyed building on the said plot and would make over possession of a flat in the second floor thereof for the use and occupation of the defendant. It is alleged that the said agreement was entered into between the parties orally and is implied from their course of dealings thereafter.

5. On the same day, that is the 30th Aug., 1978, subsequent to the said agreement the plaintiff it is alleged paid Rs. 29,000/- in part payment of the said premium to the defendant who accepted the same.

6. At the material time there was a motor garage in the said plot owned by one Gonzales. The plaintiff alleges that the defendant persuaded Gonzales to vacate the said plot whereafter the possession thereof was delivered to the plaintiff on or about the 8th Sept., 1978.

7. On or about the 29th May 1981, a draft lease was sent to the Advocate of the defendant for approval and return, but the defendant thereafter avoided the execution of the lease on diverse pretexts.

8. The case of the defendant is, that there has been no concluded contract between the parties and that the plaintiff is not entitled to specific performance.

9. The defendant alleges that in or about 1978 the parties had negotiations for grant of a building lease by the defendant to the plaintiff of the said plot on inter alia the following terms and conditions:—

(a) The plaintiff could construct a 4 storeyed building on the said plot within 4 years from the date of the contract and the entire second floor containing 2 self-contained flats would be given to the defendant;

(b) The lease would be for 50 years certain with an option for renewal for a further period of 20 years;

(c) The monthly rent to be agreed upon would be subject to an increase at the rate of 15% every 10th year for certain term and 20% after every 10 years for an option period;

(d) A premium would be paid by the plaintiff to the defendant.

10. A draft of the proposed terms and conditions of the lease was made over by the defendant to the plaintiff in June or July 1978.

11. It was tentatively agreed that the premium payable by the plaintiff to the defendant

would be between Rs. 1.5 Lakhs and Rs. 2,00,000/- and that the rent would be approximately Rs. 1,000/- per month subject to periodic increases.

12. The defendant alleges that before finalisation of the terms and conditions on or about the 30th Aug., 1978 the defendant obtained a loan of Rs. 29,000/- from the plaintiff and it was agreed that the said loan would be adjusted against the premium on finalisation of the agreement of lease.

13. The defendant alleges that since July, 1981 the defendant was obstructed by the plaintiff from having access to the said plot and that the plaintiff, its servants and agents trespassed into the said plot wrongfully. The defendant lodged complaints to the police and instituted criminal proceedings before the Executive Magistrate, Calcutta.

14. It is alleged that the said Gonzales surrendered the possession of the said plot of land to the defendant and not to the plaintiff.

15. It is alleged that the plaintiff has since taken forceful possession of the said plot wrongfully since the middle of Jan., 1982 and has put up bamboo structures and tin shades thereon and is utilising the same by letting it out for parking of cars. It is contended that the plaintiff has no right, title and interest in the said plot and should not be permitted to continue in wrongful possession thereof.

16. In this application of the defendant on a notice dated the 23rd Feb., 1982, inter alia, the following orders have been prayed for:—

(a) A Receiver over the said plot.

(b) An injunction restraining the plaintiff from making any or further construction in the said plot till the disposal of the suit.

(c) An injunction restraining the plaintiff from parking or allowing the parking of vehicles in the said plot till the disposal of the suit.

(d) An injunction restraining the plaintiff from realising any fee for parking of vehicles in the said plot.

(e) The Receiver be directed to realise all fees for parking of vehicles in the said plot and to invest the same.

17. The plaintiff has affirmed an affidavit on the 12th March, 1982 which has been filed in opposition to the petition. It is, inter alia, alleged in this affidavit that after the defendant persuaded the said Gonzales to vacate the said plot of land possession thereof was duly delivered to the plaintiff in

part performance of the said lease. The plaintiff alleges further that he has constructed the fencing demarcating the said plot from the rest of the premises and has constructed a gate for the purpose of egress and ingress to the same. The plaintiff denies having put up any bamboo structures or tin sheds in the said plot and alleges that temporary constructions were already there before he came into the possession of the plot.

18. The plaintiff alleges that it is the defendant who intended to occupy the said plot forcibly after the possession thereof was made over to the plaintiff and that the plaintiff had to lodge complaints to the police and initiate proceedings under S. 144 of the Cr. P. C. The plaintiff alleges further that the defendant knew long ago that the said plot was being utilised for parking of cars upon payment of fees.

19. The plaintiff alleges that he has been in continuous possession of the said plot since Sept., 1978 without any objection from the defendant and that the defendant did not institute any legal proceedings for recovery of possession of the said plot. It is contended that the defendant is not entitled to make the application in the suit instituted by the plaintiff.

20. The defendant has affirmed an affidavit on the 1st April, 1982, which has been filed in reply to the said affidavit of the plaintiff. It is, inter alia, stated in this affidavit that the constructions were made by the plaintiff in the said plot only since the middle of Jan., 1982.

21. At the hearing learned counsel reiterated the respective contentions in the pleadings. Documents were brought to the notice of the Court on behalf of the defendant to show that there was no concluded contract between the parties and that the case of the plaintiff as recorded in the correspondence from time to time indicated that the terms of the contract were never finalised.

22. Learned counsel for the plaintiff contended that irrespective of merits, the defendant was not entitled to ask for interlocutory reliefs in the suit of the plaintiff.

23. In support of such contention learned counsel for the plaintiff cited:

(a) *Suganda Bai v. Sulu Bai*, reported in AIR 1975 Kant 137. In this case the plaintiff instituted a suit in the Munsiff's Court for a permanent injunction restraining the defendants from interfering with the possession of the premises in disputes, but did not

apply for any interlocutory relief. Later, the defendant No. 1 made an application in the suit for an injunction restraining the plaintiff from interfering with her possession of the property in dispute.

On a revision from an order allowing the application it was held by the Karnataka High Court that the cause of action of the defendant No. 1 was different from that of the plaintiff and had arisen later. Following two English decisions it was also held that only where the relief claimed by the defendant arose out of the plaintiff's cause of action or was incidental to it that the defendant could apply for an interlocutory injunction against the plaintiff.

(b) *Carter v. Fey*, reported in 1894 (2) Ch. 541. In this case the plaintiff's action was for a perpetual injunction restraining the defendant from carrying on a particular business within a certain limit in Winchester. On the same day the plaintiff moved for an interlocutory injunction. The defendant entered appearance and thereafter, gave a notice for an interlocutory injunction restraining the plaintiff from using the name of the defendant in carrying on the business of the plaintiff. Both the motions were dismissed in the first Court. On an appeal by the defendant Lindley L. J. held that the defendant was not entitled to any interlocutory injunction and observed as follows:—

"The question is whether a defendant who is in a hurry is entitled to apply by way of motion in the plaintiff's action for an injunction without waiting to deliver a counter-claim or issuing a writ in a cross-action, where the relief which he seeks is not in any way comprised in or incidental to the plaintiff's cause of action. In the present case the plaintiff only claims an injunction to restrain the defendant from carrying on a business within a certain limit."

* * * * *

The defendant's claim is not for any relief arising out of or incidental to the relief sought to be obtained by the plaintiff in his action.

* * * * *

If the defendant's application for an injunction were in any way connected with or incidental to the object and purpose of the plaintiff's action, he would have good ground for his contention; but it has really nothing to do with the relief sought by the plaintiff."

"The question is this — whether the defendant can move for an injunction against the plaintiff without filing a counter-claim or issuing a writ in a cross-action. In my

opinion, he can in some cases, but only in cases where the defendant's claim to relief arises out of the plaintiff's cause of action, or is incidental to it."

24. Relying on the above decisions learned counsel for the plaintiff contended that the defendant's cause of action, if any, was in tort, viz., trespass by the plaintiff in the defendant's land whereas the cause of action of the plaintiff was an agreement of which specific performance was being claimed.

25. In the facts it appears that the subject matter of the suit i.e., the said plot, is admittedly in the possession of the plaintiff. It is also admitted that no lease has yet been executed in favour of the plaintiff and that the plaintiff has not paid the premium nor is paying the rent which is payable according to him. The plaintiff being in possession is enjoying the fruits of the property by collecting parking fees. The defendant has been totally deprived of the use of the said land.

26. Hence, if the defendant had been in possession of the land in dispute the plaintiff would have been entitled to apply for orders restraining the defendant from altering the character of the property. Such a relief would arise out of the plaintiff's cause of action. The plaintiff being in possession of the property, in the instant case there is no reason why the defendant should be held disentitled from claiming the said relief and a claim to such relief in my view must be held to arise out of the plaintiff's cause of action and in any event incidental thereto. If the suit fails the defendant will have a right to obtain possession of the property in the condition as it was originally. It is also open to the defendant to make a counter-claim by amending his written statement or by way of an additional written statement.

27. The plaintiff has come to this Court seeking the equitable relief of specific performance. He must do equity himself and not alter the character of the property till he succeeds in the suit.

28. For the reasons above, the application is allowed. There will be an injunction restraining the plaintiff from making any further construction in the said plot till the disposal of the suit. In the event the defendant makes a counter-claim in the suit the defendant will be at liberty to apply for further interim orders.

29. Costs: costs in the cause.

30. There will be a stay of operation of the order for one week from date. The ad-

interim order will continue. In the event the plaintiff makes any alteration or repair to the existing structures, in the said plot in the meantime the same should be done on a reasonable notice to the defendant.

31. Liberty to apply.

Application allowed.

AIR 1982 CALCUTTA 532

ANIL K. SEN AND B. C.

CHAKRABARTI, JJ.

Prosad Kumar Dhara, Petitioner v. Kamala Kanta Dikshit and others, Respondents.

C. C. Nos. 547-548 of 1982, D/- 7-4-1982.

(A) W. B. Restoration of Alienated Land Act (23 of 1973), Ss. 2 (2) and 4 — 'Land' means primarily agricultural land.

The above Act does not profess to reopen all transfers of all properties but is intended only to give relief to agriculturists in respect of distress sales or the like and the clause defining land limits the expression to agricultural land. The term 'homestead' occurring in the definition means the homestead of agriculturist and not any structure on non-agricultural land. In this case the land and the building thereon sold was within the municipal area primarily let out to tenants and therefore did not answer the definition of land for the purpose of relief under Section 4 of the Act. (Paras 3 to 5)

(B) W. B. Restoration of Alienated Land Act (23 of 1973), S. 4 — Requisites for claiming relief under S. 4.

Section 4 provides that where before the commencement of the Act a person holding not more than 2 hectares of land in the aggregate on the date of transfer transferred the whole or any part of his land by sale to any person, then, on fulfilment of certain conditions, the transferor can apply to the Special Officer for restoration of such land to him. One out of the two alternative conditions to be fulfilled is that the transfer must have been made after the expiry of the year 1967 and must be in distress or in need of money for maintenance of the transferor or his family or in meeting the costs of his cultivation. 'Land' referred to in S. 4 is defined by the Act to mean agricultural land and includes homestead, tank, well and water channel. In this case the transferor inter alia was shown to be a contractor and the sale deed recited that he needed moneys

EZ/GZ/C103/82/FVN/SSG-H

for purposes of his business. It was held that in the circumstances land sold was not liable to be restored to the transferor.

(Paras 5 to 7)

Tapan Kumar Dutta, for Petitioner;
Amitava Nayak, for Respondents.

ANIL K. SEN, J.:— These are two applications under Art. 227 of the Constitution arising out of two proceedings under the West Bengal Restoration of Alienated Land Act, 1973 being Cases Nos. 89 and 90/75-76. The respective opposite parties Kamala Kanta Dikshit and Lakshmi Kanta Dikshit initiated those proceedings for restoration of lands and buildings transferred by them in favour of the present petitioner in the year 1968.

2. It is not in dispute that the two brothers were the owners of a premises consisting of four rooms, verandah, kitchen and privy situate at holding No. 107, Ward No. 3 within the Tamluk Municipality. In the year 1968 the two brothers by two sale deeds transferred their respective shares in the said property to the present petitioners and the deeds recite that such sale was being made to meet the need of money for the business of the two brothers. As and when the West Bengal Restoration of Alienated Land Act, 1973, came into force, these two brothers, the transferors, initiated the aforesaid two proceedings under S. 4 of the said Act for restoration of the land so transferred.

3. Section 4 provides that where before the commencement of the Act a person being the transferor holding not more than 2 hectares of land in the aggregate on the date of transfer transferred the whole or any part of his land by sale to any person being the transferee, then, on fulfilment of certain conditions, the transferor may make an application to the Special Officer for restoration of such land to him. One out of the two alternative conditions to be fulfilled is that the transfer must have been made after the expiry of the year 1967 and must be in distress or in need of money for maintenance of the transferor or his family or for meeting the costs of his cultivation. 'Land' referred to in S. 4 has been defined by the Act to mean agricultural land and includes homestead, tank, well and water-channel.

4. Such being the provision, the Special Officer dismissed both the applications upon a clear finding that the requirements of Section 4 had not been fulfilled. According to him the property transferred is a property situate within the municipal area primarily let-out to tenants and as such, does not answer the description of the term 'land' as

defined in the Act. He further held that, since the transfer again was effected to meet the need of money for the respective business of the transferors, the basic requirement of Sec. 4 cannot be said to have been fulfilled. The applications were thus dismissed by the Special Officer. The transferors preferred appeals under the statute to the appellate authority, namely, the Collector. The appellate authority held that neither of the reasons assigned by the Special Officer can be said to be good reason for rejecting the prayer for restoration under the Act. He thought that the transferred land in respect of which restoration has been prayed for 'need not essentially be agricultural for being within the purview of the Act' and the petitioner need not have his residence therein. So far as the reason for the transfer is concerned the appellate authority found fault with the Special Officer in accepting the reason as recited in the deed in preference to the one disclosed in his evidence before the Tribunal. Collector thought that the Special Officer had not given any reason for such a finding. The appellate authority further found that there was procedural infirmity when a certificate issued by the S. D. O. was taken into evidence without examining him as to its contents.

5. On a careful consideration of the orders passed by the two Tribunals below, we are of the opinion that the order of the appellate authority is unsustainable as it is based upon a clear misconception of the law on the point. The appellate authority failed to appreciate that the Act under consideration does not profess to reopen all transfers of all properties. It was intended to give relief to agriculturists in respect of distress sales or the like and on the definition clause land has been defined to be limited to agricultural land. Obviously the term 'homestead' when included within the meaning of the term land means the homestead or an agriculturist and not any and every structure on non-agricultural land. This seems to be clear on the context and the appellate authority was in error in thinking that the land or the structure thereon need not necessarily be agricultural. So far as the procedural irregularity referred to by the appellate authority is concerned, he failed to take note of the fact that the certificate of the S. D. O. was not of primary importance because the document of transfer itself recites that the transfer was being made to meet the need of money for the respective businesses of the transferors. If the transfer was for such a purpose, it would certainly not come within the purview of S. 4. When the pur-

pose of the transfer was so recited there was no reason for incorporating a false recital and such a clear admission of the transferors as to the purpose for which the transfer was being effected, has not been explained in any other manner. It was, therefore, open to the Special Officer to accept the same in preference to the subsequent interested statement made at the hearing of these applications which had not been otherwise established or corroborated. Therefore, even if the Special Officer relied upon a certificate of the S. D. O. to show that the transferor was a contractor and even if such certificate had not been formally proved, it matters little so far as the final conclusion of the Special Officer is concerned which is clearly supported by the transferors' own admission made in the deeds.

6. Such being the position, we are unable to support the order made by the appellate authority which has been made on a clear misconception of law.

7. These applications, therefore, succeed. The impugned orders passed by the appellate authority being set aside, those of the Special Officer are restored.

8. No order is made as to costs in either of these revisional applications.

B. C. CHAKRABARTI, J.:— I agree.

Petitions allowed.

AIR 1982 CALCUTTA 534

AMITABHA DUTTA, J.

Bhuth Nath Mondal and others, Appellants v. Kalipada Mondal and others, Respondents.

S. A. No. 1505 of 1965, D/- 8-7-1982.

Hindu Law — Shebaitship — Right of succession — Nature of. (Transfer of Property Act (1882), Ss. 16, 25).

Where the founder's disposition in the deeds of endowment was that after the death of the son of his brother to whom the shebaitship was bequeathed, his male descendants would become shebait one after another excluding the female heirs or their descendants and only after failure of determination of these previous series of estates the nearest descendants of the founder's brothers or the seniormost among them if there be more than one of the same class, would become shebait, the incapacity of the legatee's line to succeed because of the illegality of such disposition contrary to the

Hindu Law of inheritance would not entitle any of the three nephews of the founder who were alive at the time of the deeds of endowment to any benefit under those deeds. Such position also followed from the principle inherent in Ss. 16 and 25 of the T. P. Act. The principle is that if the subsequent interest is to take effect upon the failure of the prior interest and the prior interest is against the law and so invalid, the subsequent interest would also fail. Therefore the person who was one of the nephews of the founder would not succeed to any interest in the shebaitship under the deeds of endowment. (1872) 9 Beng LR 377 (PC), Rel. on. (Para 9)

Cases Referred: Chronological Paras
 AIR 1952 SC 109: 1951 SCR 655 11
 AIR 1943 PC 89: 70 Ind App 57 10
 (1884) ILR 10 Cal 1102 (FB) 11
 (1872) 9 Beng LR 377 (PC) 9

Rabindra Nath Mitra, for Appellants;
 Panchanan Pal and Sarthi Charan Ray, for Respondents.

JUDGMENT:— This is an appeal by the defendants from the decision of the learned Subordinate Judge, Second Court, Midnapur remanding the suit for retrial on a particular issue after giving the plaintiff opportunity to amend the plaint.

2. The material facts of the case are not in dispute. Nemai Mondal of Bar Chimulia P. S. Tamluk was separate from his five brothers and had considerable properties. He married thrice to have a son and his third surviving wife was Jhanadamoyee. He brought up Rakhal, son of his brother Titu. Nemai Mondal made absolute dedication of his properties to two deities viz. Shree Shree Iswar Radeshyam Jew Thakur and Shree Shree Iswar Parameswar Jew Thakur installed by him under two deeds of endowment dated 2-8-1926 and 6-8-1926, appointing himself as the sole shebait. He prescribed the mode of devolution of shebaitship in the following manner: After his death his son and thereafter his wife and if no son is born to him his wife Jnanadamoyee will be the next shebait. After the death of Jnanadamoyee the shabaiti right will devolve on Rakhal. After Rakhal's death his male descendants only (excluding all female heirs and their descendants) will become shebait one after another. In case Rakhal or any of his sons or grandsons dies without any male issue, then the nearest descendant of the founder's brothers and if there be more than one such descendant then one who is the seniormost

in age and religious in mind among the members of the same class will become the shebait of the deities. Nemai Mondal died in 1342 B. S. leaving his widow, two daughters Basan Bala (the defendant No. 17) and Mokshada (the defendant No. 18) and no son. Jnanadamoyee died in 1350 B. S. Thereafter Rakhal became shebait and he died without any son in Baisakh 1354 B. S. At the time of execution of the deeds of endowment and the death of the founder his three other nephews (brother's sons) who were living were Mohendra (father of the contesting defendants Nos. 1 to 6), Kalipada (the plaintiff) and his brother Haripada (the defendant No. 16). After Rakhal's death Mahendra exercised the shebaiti right till his death which took place in Jaistha 1365 B. S. The two daughters of the founder and their sons purported to execute a deed of relinquishment called 'Tyagpatra' dated 29th Kartick 1361 B. S. (15th Nov., 1954) in respect of the shebaiti right in favour of Mahendra, father of the defendants Nos. 1 to 6.

3. The plaintiff brought the suit for a declaration of his shebaiti right and other incidental relief alleging that the aforesaid deed of relinquishment is fraudulent, collusive and void and claiming that he is the sole shebait of the deities according to the terms of the deeds of endowment.

4. The contesting defendants resisted the suit on the ground that after Rakhal's death the daughters of the founder became entitled to the shebaiti right and they relinquished their limited interest in favour of Mahendra Mondal who thus became the absolute shebait and whose interest devolved after his death on the defendants Nos. 1 to 6.

5. The learned Munsif has found that the disposition of the shebaiti right to Rakhal for life under the deeds of endowment is valid that the order of succession laid down after the death of Rakhal limited to his male heirs and their descendants and excluding his female heirs and their descendants being inconsistent with the Hindu law of inheritance is void that the shebaiti right therefore, devolved on the defendants Nos. 17 and 18 the two daughters and heirs of the founder after Rakhal's death in Baisakh 1354 B. S. and that the plaintiff having no right as shebait is not entitled to any relief in the suit. On these findings the trial Court has dismissed the suit.

6. Before the first appellate Court both parties accepted the position that the line of succession prescribed in the deeds of endow-

ment is valid up to the disposition of the shebaiti right to Rakhal for life and that after Rakhal's death the shebaitship reverted to the defendants Nos. 17 and 18 who were the heirs of the founder as his daughters. Before the Court of appeal a contention was raised on behalf of the plaintiff/appellant that as the defendants Nos. 17 and 18 relinquished their limited interest in the shebaiti right by the registered deed of relinquishment in Kartick 1361 B. S., the shebaitship devolved on the next heirs of the founder who were Mahendra Mondal, Kalipada Mondal (the plaintiff) and his brother Haripada Mondal each having 1/3rd share. The appellate Court being conscious that the plaintiff was raising a new case inconsistent with the plaint in which the said deed of relinquishment has been seriously challenged as void, came to the conclusion that the plaintiff should be given an opportunity to make out his new case and in that view remanded the suit to the trial Court directing retrial on framing the issue viz., "Whether the plaintiff has got 1/3rd right to the office of Shebaitship in the facts and circumstances of the case" after giving the plaintiff opportunity to amend the plaint.

7. The learned advocate for the defendants/appellants has submitted before this Court that the Court of appeal below has erred in law in permitting the plaintiff to amend the plaint for raising a new case totally inconsistent with paragraph 8 of the plaint in which the deed of relinquishment has been seriously challenged as fraudulent, collusive and void. It is further submitted that the founder's daughters along with their sons could not validly relinquish or surrender their limited interest in favour of Mahendra one of the brothers' son of the founder who was not the nearest reversioner as surrender of a Hindu woman's estate to be valid must be made in respect of the whole estate in favour of the entire body of the nearest reversioners.

8. On the other hand it is submitted on behalf of the plaintiff/respondents that as Mahendra, Kalipada and Haripada, three nephews of the founder Nemai Mondal were alive at the time of execution of the deeds of endowment and also at the death of the founder they became entitled to the shebaiti right in equal shares after the death of Rakhal without any male issue and so the first appellate Court was right in remanding suit in exercise of its power under O. 41, R. 33 of the Code of Civil Procedure.

9. In my view, the aforesaid submission on behalf of the plaintiff/respondents is not

well founded and cannot prevail as it militates against the decision in the case of *Tagore v. Tagore* (1872-9 Beng LR 377) (PC). In that case property was bequeathed to (1) A for life and his heirs in tail male, (2) after failure or determination of the above estate, to B and his heirs in tail male and (3) after failure or determination of the last mentioned estate to the heirs of C in tail male. At the time of the testator's death A and B were alive but C was dead; A had no son; B had a son; D born in the lifetime of the testator. C's grandson F was alive at the time of the testator's death. The testator died leaving an only son S. It was held by the Privy Council that A took life interest and all other bequests were void. The estates tail male were void as they were inconsistent with the Hindu law of inheritance. Although B and D were alive at the time of the testator's death they took nothing under the will for they were only to make after failure or determination of the previous series of estate that is to say after the actual exhaustion of the line of A in conformity with the will which could not arise. The incapacity of A's line to succeed by reason of illegality of the will did not entitle B or D to any benefit under the will. For the same reason F who was in existence at the testator's death took nothing under the will (vide Mulla's Hindu Law 13th Edition pages 418-419). Similarly in the present case the founder's disposition in the deeds of endowment was that after the death of Rakhal his male descendants will become shebait one after another excluding the female heirs or their descendants and only after failure or determination of these previous series of estates the nearest descendant of the founder's brothers or the seniormost among them if their be more than one of the same class, will become shebait. The incapacity of Rakhal's line to succeed because of the illegality of such disposition contrary to the Hindu law of inheritance did not entitle any of the three nephews of the founder who were alive at the time of the deeds of endowment to any benefit under those deeds. This position also follows from the principle inherent in Ss. 16 and 25 of the Transfer of Property Act. The principle is that if the subsequent interest is to take effect upon the failure of the prior interest and the prior interest is against the law and so invalid, the subsequent interest would also fail. So there can be no question of the plaintiff's succeeding to any interest in the shebaitship under the deeds of endowment.

10. It is settled law that whom the founder makes a limited grant of shebaitship the residue still remains in him or his heirs as an estate of inheritance. When the limited shebaitship end the next shebait would be the person in whom the residuary shebait right had come to vest at that time by devolution or successive devolutions as the case may be under the Hindu law of inheritance. (See *Bhabatarini Debi v. Ashalata Debi*, (1943) 70 Ind App 57 : (AIR 1943 PC 89)).

11. The registered deed of relinquishment of Kartick 1361 B.S. marked Exhibit 'C' shows that the two daughters of the founder relinquished their shebaiti right in favour of Mahendra, father of the defendants Nos. 1 to 6 and the sons of the limited owners who were the nearest reversioners also joined in executing the deed. But it is doubtful whether such a transaction can be supported on the theory that it amounts in effect to surrender in favour of the nearest reversioners and relinquishment or gift by them of the estate to the stranger. In *Mummareddi v. Pitti Durairaja*, 1951 SCR 655 at pp. 664-666 : (AIR 1952 SC 109 at pp. 112-113) B. K. Mukherjea J. (as he then was) delivering the judgment of the Supreme Court felt the necessity to reconsider the view expressed in *Nobokishore's case* (1884) ILR 10 Cal 1102 (FB) based on such theory of extension of the doctrine of surrender involving the double fiction of a surrender by the widow in favour of the consenting reversioner and a transfer by the latter to the alienee although both the fictions are contrary to actual facts. The plaintiff has impugned in the plaint the deed of relinquishment but has not adduced any oral evidence to support his challenge. In any event, the alienation is *prima facie* binding on the daughters of the founder who are alive. Even if the plaintiff is permitted to plead an inconsistent case that the deed of relinquishment is valid and operative, he will not gain anything as in that case the shebaitship would go to Mahendra and after his death to the legal heirs of Mahendra. There is no legal basis of any possible claim of the plaintiff to 1/3rd share in the shebaiti right regarding which the first appellate Court had proposed the framing of an issue for decision on retrial of the suit. It is futile to raise such issue in this suit.

12. For the aforesaid reasons, I find that the Court of appeal below has failed to exercise its discretion properly and did not pay sufficient attention to the legal position in making the impugned order of remand which cannot, therefore, be sustained.

13. In the result, the appeal is allowed. The decision of the first appellate Court is set aside and the judgment and decree of the trial Court are restored. The parties do bear their own costs throughout.

Appeal allowed.

AIR 1982 CALCUTTA 537

S. C. GHOSE, C. J. AND R. N. PYNE, J.

Bihar State Agro-Industries Development Corporation Ltd., Appellant v. Ram Chand Khosla and another, Respondents.

Appeal No. 346 of 1979 in Suit No. 906 of 1978, D/- 25-6-1982.

(A) Civil P. C. (5 of 1908), Section 20 — Cause of action — Suit for realisation of claims — Appointment of Receiver by High Court — Is a part of cause of action.

Where a Receiver appointed by High Court in a suit files suit against a third party for realisation of claims or dues, the fact of appointment of the Receiver by the Court is a part of the cause of action. Appeal No. 143 of 1954, D/- 12-3-1956 (Cal), Rel. on.

(Para 10)

(B) Letters Patent (Cal.), Clause 12 — Leave to file suit under — Revocation of — Factors to be considered. Decision of single Judge in Suit No. 906 of 1978, D/- 27-8-1979 (Cal), Reversed.

The transaction of supplying pump sets out of which the claim for recovery of damages arose took place at Patna. The place of business of the defendants who supplied pump sets to the plaintiffs was at Patna and the relevant document relating to the contract and the transaction were also at Patna. Both the defendants were at Patna. All the relevant documents of the defendants were at Patna and places in Bihar. To prove the defects in the pump sets supplied by the defendants and the loss and damages suffered by the plaintiff for breach of contract various witnesses would have to be called and various documents would have to be produced by the plaintiff and all the documents and witnesses of the plaintiff were either at Patna or in places in Bihar. Except that the Receiver was appointed by Calcutta High Court and admission, if any, was made in the Receiver's meeting no part of the cause of action had arisen within the jurisdiction of Calcutta High Court.

Held, considering the respective advantages and disadvantages of the parties in the facts and circumstances of the case the balance

of convenience was in favour of the suit being tried by a Court at Patna. Leave under Clause 12 of the Letters Patent was liable to be revoked. Decision of single Judge in Suit No. 906 of 1978, D/- 27-8-1979 (Cal), Reversed. (Para 18)

Cases Referred : Chronological Paras
(1977) Suit No. 587 of 1973, D/- 5-4-1977

(Cal), Universal Engineers and Traders v. Premier Traders	1
AIR 1972 Cal 82	11
AIR 1970 Cal 394	11
AIR 1960 SC 100	12
ILR (1956) 2 Cal 255	11
(1956) Appeal No. 143 of 1954, D/- 12-3-1956 (Cal), Satya Narain Mundra v. Rai Bahadur Kishore Chand	9
AIR 1955 Mad 526	7
AIR 1920 Cal 337 : 56 Ind Cas 50 : 21 Cri LJ 402 (FB)	7

R. N. PYNE, J.:— This appeal is directed against an order dated 27th Aug., 1979 of Mrs. Khastgir, J. dismissing the appellant's application for revocation of leave granted under Cl. 12 of the Letters Patent to institute the Suit No. 906 of 1978 (Ram Chand Khosla v. State of Bihar). The facts out of which the said application in the Court of the first instance arose are briefly as follows:

Ram Chand Khosla, the plaintiff in Suit No. 906 of 1979 (1978?) was appointed as Receiver by and under a consent decree dated 5th April, 1977 passed in Suit No. 587 of 1973 (Universal Engineers and Traders v. Premier Traders) by this Court for the purpose of collecting and realising the dues payable to Premier Traders and was empowered to bring suit for that purpose.

2. Pursuant to the power conferred under the said decree Ramchand Khosla as plaintiff filed the said suit being Suit No. 906 of 1978 against State of Bihar and the appellant, inter alia, for recovery of Rupees 4,46,576.40 p. and other reliefs. The plaintiff's case in the plaint is as follows:

Pursuant to an order dated 21st April, 1973 placed by the defendant No. 1, State of Bihar with the said Messrs. Premier Traders, Exhibition Road, Patna 300 pumping sets were sold by the said Premier Traders (hereinafter referred to as 'the said firm') to the defendant No. 1 and out of the same, 200 pumping sets were supplied to District Agricultural Officer at Muzaffarpur and 100 Pumping sets were supplied to the Sub-Divisional Officer at Sitamari as instructed by the State of Bihar. In the said order it is mentioned that the appellant is the consignee and payment is to be made by it. The appellant

at the instance of the State of Bihar (respondent No. 2 herein) from time to time made part payments to the said firm of Messrs. Premier Traders aggregating to Rs. 5,93,249.75 p. leaving a balance of Rupees 2,54,250.25 p. on account of price of the said goods. In terms of the said order the said firm deposited with the respondent No. 2 a sum of Rs. 16,950/- as and by way of security. According to the plaintiff in Suit No. 906 of 1979 (1978 ?) as Receiver he was authorised to collect the dues of the said firm of Premier Traders and as a result thereof there was due and owing by the defendants in the said suit a sum of Rs. 4,46,576.50 p. including the sum of Rs. 16,950/- the amount of security deposit and the sum of Rupees 1,75,376.15 p. being the amount of interest at the rate of 12% from 10th July, 1973 to 30th Nov., 1978. Here it may be mentioned that in the letter dated 24th May, 1973 addressed by the said firm to the Deputy Secretary, Department of Agricultural and Animal Husbandry (Agriculture) Govt. of Bihar, Patna, relating to the transaction it is stated 'Subject to Patna Jurisdiction'.

3. It was alleged that the defendants in the said suit though expressly admitted and acknowledged the amount due and payable to the said firm of Premier Traders yet withheld the payment of the sum of Rupees 4,46,576.50 p. to the plaintiff in the said suit. Further, at a meeting of the Receiver appointed by an order dated January 3, 1974 passed in the said Suit No. 587 of 1973 held at Bar Library Club, Calcutta on Jan. 24, 1974 one Mr. D. P. Srivastava the authorised agent and representative of the defendant No. 2 (i.e., appellant herein) acknowledged for and on behalf of the defendant No. 2 the liability of the defendant No. 2 and the dues of the said Premier Traders and promised to pay the said amount to the said Receiver appointed in the said suit after observing all rules and regulations of the orders placed on the said firm. It was further alleged that by letters the defendants in the said Suit No. 906 of 1979 (1978 ?) admitted and acknowledged their liability in respect of the plaintiff's dues.

4. The appellant's case as stated in its petition filed in the Court of the first instance was that State of Bihar defendant No. 1 in the said Suit No. 906 of 1979 (1978 ?) placed an order dated 21st April, 1973 upon Messrs. Premier Traders at Patna for 300 pumping sets as fully mentioned in the said petition on various terms and conditions contained in the said order. It appears that ap-

pellant was the consignee of said pumps and would make payment for the same as mentioned in the said order. It is further stated that 200 pump sets were delivered to the District Agricultural Officer at Muzaffarpur and 100 pump sets were delivered to the Sub-Divisional Officer at Sitamari. It is stated that 50 pump sets out of the 200 sets supplied to Muzaffarpur and 52 sets out of 100 sets supplied at Sitamari were found fitted with duplicate pumps in place of Kirloskar pumps and in spite of the request of the appellant Premier Traders did not replace the said duplicate pumps. It is further stated that several pumps supplied by Premier Traders were found to be defective. The said firm was directed to remove the same but it failed and neglected to remove the same and thereby committed breach of the contract. Further, in breach of the terms of the said order the said firm did not open service station. Due to the said fact the appellant suffered loss and damages. The said fact was duly brought to the notice of the said firm by several letters addressed by the appellant to the said firm. It is also stated that the said firm was paid an aggregate sum of Rs. 5,93,249.75 on account of the price of the pump sets supplied by it. It is further stated that as the said firm failed and neglected to replace their 102 defective pumps, 41 pumps were disposed of by the defendant on account of the said firm and appellant directed the said firm to take back the remaining 61 pumps rejected by the appellant. The said firm, however, failed and neglected to replace the said defective pumps. In the petition at pages 16 and 17 of the paper book it appears that the appellant has stated the amount of loss and/or damages suffered by it and according to the appellant, a sum of Rs. 38,896.75 became due and payable to the said firm. The appellant received a notice dated 3rd July, 1976 under Section 21 of the Bihar Sales Tax Act from the Sales Tax Authorities claiming a sum of Rs. 34,438.85 p. which became due on account of sales tax payable by the said firm for the period 1968-1969 and 1973-1974. The appellant stated that after deducting the said sum of Rs. 34,438.85 p. only a sum of Rupees 4,457.90 p. was due and payable by the appellant to the said firm. According to the appellant, a notice dated 8th Feb., 1977 was received by the appellant from Messrs. T. Banerji and Company, Solicitors of the respondent No. 1 demanding payment on behalf of the said firm. The appellant through its advocate's letter dated 21st April, 1973 informed the Solicitor of the respondent

No. 1 about the amount recoverable by the appellant from the said firm.

5. From the judgment appealed against it appears that before the learned Judge of the Court of the first instance three grounds were urged by the appellant for revocation of leave under Clause 12 of the Letters Patent viz., (i) no part of the cause of action had arisen within the jurisdiction of this Court; (ii) balance of convenience was in favour of the trial of the suit at a convenient forum in Bihar and (iii) parties had particularly chosen a forum, i.e. High Court at Patna before which all disputes arising in respect of the agreement entered into by and between the parties should be referred to.

6. On the first point the learned Judge of the Court of the first instance held that the plaintiff (respondent No. 1 herein) was appointed as Receiver by this Court; goods were supplied from Calcutta within the jurisdiction of this Court and that at the meeting held by the Receiver in Suit No. 587 of 1973 one Mr. Srivastava appearing on behalf of the appellant acknowledged the liability of the appellant and a letter dated 3rd Nov., 1978 written by the appellant's Accounts Officer acknowledging liability was received by the Receiver in the said Suit No. 587 of 1973 within the jurisdiction of this Court. On the second point the learned Judge of the Court of the first instance was of the opinion that in view of the admission and acknowledgement made on behalf of the appellant it was not necessary for the defendants in Suit No. 906 of 1979 (1978?) to bring any witness to Calcutta at the time of hearing of the suit. Regarding the third contention it was held that the agreement regarding choice of forum was between Premier Traders and the State of Bihar but so far as the appellant is concerned there was no such agreement. Therefore, instead of bringing the suit piecemeal it should be decided by one Court.

7. On the question of whether any part of the cause of action has arisen within the jurisdiction of the Court. Counsel for the appellant has submitted that appointment of the plaintiff as Receiver by this Court is no part of the cause of action. In this connection counsel relied on the case of *Muthuchellappa Chettiar v. Paliniappa*, AIR 1955 Mad 526. It has been further submitted that the place wherefrom goods are sent is no part of the cause of action and in this connection reliance has been placed on the case of *Yeluchuri Venkatachannaya v. Emperor*, (1920) 56 Ind Cas 50 : (AIR 1920 Cal 337)

(FB). It was further submitted that there was in fact no admission of liability in the Receiver's meeting held at Calcutta because admission, if any, was qualified and conditional and Srivastava who attended the Receiver's meeting for the appellant had no authority to make any admission and therefore there was no valid admission. Regarding the question of acknowledgement by letter dated 3-11-1978 it was submitted that such letter was sent to Patna Office of the Premier Traders. Therefore, according to counsel, no part of the cause of action in Suit No. 906 of 1979 (1978?) had arisen within the original side of this Court.

8. Counsel for the respondent No. 1 in his argument supported the decision appealed against on the grounds mentioned by the learned Judge of the Court of the first instance.

9. The question whether the appointment of a Receiver by an order made by this Court with power to realise debts and claims is a part of the cause of action in a suit filed by such Receiver or not has been decided by an unreported judgment of a Division Bench of this Court in Appeal No. 143 of 1954 (*Satya Narain Mundra v. Rai Bahadur Kishore Chand*) dated 12th March, 1956. It was held that where a Receiver appointed by this Court in a suit files suit against a third party for realisation of claims or dues the fact of appointment of the Receiver by the Court is a part of the cause of action. Therefore, the fact of appointment of the plaintiff as Receiver in Suit No. 587 of 1979 (1978?) by this Court in our view is a part of the cause of action in Suit No. 906 of 1979 (1978?).

10. The next point is in favour of which Court lies the balance of convenience. In the petition and in paragraph 15 of the affidavit-in-reply the appellant has stated in details the facts as to why the balance of convenience lies in favour of trial by a Court at Patna. It is stated that the balance of convenience is overwhelmingly in favour of the suit being heard by the Court at Patna than this Hon'ble Court. It will be tremendously costly to call all the witnesses (a list containing the names of 30 witnesses is annexed to affidavit-in-reply) to Calcutta from Patna, Muzaffarpur and Sitamari and to produce the voluminous records relating to the said contract, delivery of the pumping sets, the inspection reports of the competent Engineers of the Government of Bihar, the then Sub-Divisional Officers of Muzaffarpur and Sitamari and the inspector who visited the installations of the said pumps which were

sent to the diverse places in the said Districts for operation and those pumps which were rejected as defective and not in accordance with the specification under the terms of the contract. According to the appellant almost whole of the cause of action has arisen in Patna and great hardships amounting to injustice will be caused to the appellant if the suit is allowed to be tried by this Hon'ble Court inasmuch as the competent Engineers and Officers of the defendants in the suit who would be more than thirty in number would be required to appear and give evidence as witnesses and all of them are at Patna, Muzaffarpur and Sitamari. The competent Officer of the Commercial Taxes Government of Bihar will be also required to appear and give evidence and also to produce records relating to the Sales Tax in respect of the said sale and the statutory demand notices that have been forwarded to the defendant No. 2 for non-payment of sales tax by the said M/s. Premier Traders to the Sales Tax Authorities. The entire records relating to the dealings and transactions with M/s. Premier Traders are at Patna and their representatives are also at Patna who are also necessary witnesses with regard to the disputes and differences as to the alleged claim of the plaintiff in the said suit. On the contrary the plaintiff is not required to produce any other records except the certified copy of the decree by which he has been appointed as Receiver and has been authorised to collect debts of the said M/s. Premier Traders as also the records of the meeting of the Receiver in which admission was made by the appellants representative. Further, according to the appellant, there is no scope for any oral evidence by the plaintiff or by Mrs. Indrani Chatterjee (previous receiver) in this suit and the records relating to the contract between the defendants and the said Premier Traders are all with the defendants and the said Premier Traders at Patna.

11. Counsel for the appellant in his argument reiterated the facts stated hereinbefore in support of his contention that balance of convenience lies in favour of the suit being tried at Patna. He has further submitted that the admission or acknowledgement of liability upon which the learned Judge of the Court of the first instance has relied upon are qualified and conditional. In support of his contention reliance has been placed on AIR 1972 Cal 82; ILR (1956) 2 Cal 255 and AIR 1970 Cal 394.

12. Counsel for the respondent No. 1 has submitted that in view of the admission

made before the Receiver as stated herein after and the letters dated 3rd Oct., 1970 and 3rd Nov. 1978 containing acknowledgement of liability it is not necessary to call witnesses as stated by the appellant. Further, in view of the admission and acknowledgement of liability it is not necessary to prove the plaintiff's claim. It is the submission of the counsel that admission unless explained is decisive. Further, in view of the admission and acknowledgement the suit cannot be converted into a witness action. Counsel has relied on AIR 1960 SC 100 and AIR 1953 (sic) SC 758 at p. 765.

13. On the question of balance of convenience learned Judge has relied on the admission made before the previous Receiver and the letters dated 30th Oct., 1977 and 3rd Nov., 1978. In view of such admission and acknowledgement according to the learned Judge defendants need not come to Calcutta with their witnesses.

14. Admission of the liability according to the plaintiff was made by the appellant's representative in the Receivers meeting held on 24th Jan., 1974 at Calcutta. Relevant portion of the minutes of the Receiver's meeting is set out hereunder.

"Regarding Agenda No. (2): Statement of Mr. D. P. Srivastava authorised representative of the Corporation. Mr. D. P. Srivastava has received the letter dated 12th January, 1974 on behalf of the Corporation and states that the security deposit and other amount lying with the Bihar State Agro-Industries Development Corporation Ltd. on account of Messrs. Premier Traders will be paid to the Id. Receiver after observing all rules and regulations of the orders placed on Messrs. Premier Traders, Patna, by the Govt. of Bihar. The payment is subject to detailed checking of their pumping sets by the concerned authorities and clearance from Govt. of Bihar Agriculture and Animal Husbandry Deptt. as well as legal section of the Corporation (Books of account were produced by the authorised representative of the Corporation)."

Letters dated 30th October, 1977 and 3rd November, 1978 are set out hereunder.

"Annexure 'C'

Bihar Government
Agriculture Department.

From

Shri S. P. N. Sharma,

Joint Secretary,
Govt. of Bihar.

To :

Chairman,

Bihar State Agro-Industries Development
Corpn. Ltd., Sinha Library Road.
Patna.

Sub.: Payment of Diesel Engine Pumping
Sets supplied by M/s. Premier Traders, Exhi-
bition Road, Patna.

No.: Corporation Letter No. 440 D/- 5-2-1977,
Letter No. 5540 dated 25-7-1976, Letter No.
1516 dated 28-6-1977.

Dear Sir,

According to the direction by the Agricul-
tural Office Order No. 17503 dated 30-10-
1973 in connection with the above subject
and according to the judgment of Honour-
able High Court of Calcutta, you are re-
quested to make the payment against the
supply and against the security money to
Shri Ram Chand Khosla receiver appointed
by Honourable Calcutta High Court.

2. At the time of making payment the dues
of Sales Tax Department should be also
considered. The information in this connec-
tion is being sent to Sales Tax Office or to
Sri Khosla.

3. Copies of the report in connection with
the pumping sets received from District Agri-
cultural Officer, Muzaffarpur Divisional Agri-
cultural Officer, Sitamari, are enclosed here-
with.

4. How much payment is due, it is to be con-
sidered by the Corporation.

Action taken in this respect should be
made known to the Government.

Yours faithfully

S. P. N. Sharma,
Joint Secretary."

"Bihar State Agro-Industries Development
Corporation Ltd.

(Government Undertaking)

Regd. Office Krishi Udyog Bhawan Sinha
Library Road, Patna-800001.

Ref. 7300

D/- 3-11-1978.

To

M/s. Premier Traders,
Exhibition Road.
Patna.

Sub.: Confirmation of Balance.

Dear Sir,

As per our annual accounts for the year
ending 31st March, 1976, a credit balance of
Rs. 2,54,250.25 (two lakhs fifty four thousand
two hundred fifty and paise twentyfive only)

stands in your name. This may kindly be
confirmed.

As the confirmation certificate in respect
of the aforesaid balance is required by our
Auditors, an early reply will be highly ap-
preciated.

Yours faithfully,

for B. S. A. I. D. C. Ltd.

A. K. Sinha

Accounts Officer-II

21-10-1978."

15. In the facts and circumstances of this
case we are unable to uphold the finding of
the learned Judge of the Court of the first
instance that in view of the admission and
acknowledgement of liability made by or on
behalf of the appellant it will not be neces-
sary for the plaintiff (i.e. respondent No. 1)
to prove his claim or no witness need be
called at the hearing of the suit.

16. The statements made by Srivastava at
the Receiver's meeting as stated hereinbefore
upon which the respondent No. 1 relies as
admission of liability is a qualified statement.
It is made clear that payment would be
made after observing all rules and regula-
tions of the orders placed upon the said firm
and subject to detailed checking of the pump
sets by concerned authorities and clearance
from the Government of Bihar, Agriculture
and Animal Husbandry Department as well
as legal section of the appellant. Thus the
admission of liability, if any, by Srivastava
is qualified and/or conditional. Further, the
authority of Srivastava to make such state-
ment is also challenged by the appellant.
Similarly, paragraphs 2 and 4 of the letter
dated 30th Oct., 1977 makes it clear that at
the time of making payment dues of Sales
Tax Authorities is to be considered and fur-
ther how much is due to the firm is to be
considered by the appellant. In the premises
it cannot be said that there is unconditional
acknowledgement of liability by this letter.

17. On the letter dated 3rd Nov., 1978
strong reliance was placed by the respondent
No. 1. It is to be noted that it is stated in
this letter credit balance standing in the name
of the firm was up to 31st March, 1976 and
confirmation thereof was asked for from the
said firm. This letter only shows the amount
lying to the credit of the firm on the basis of
the pump sets delivered by the firm to the
appellant. But as stated hereinbefore the ap-
pellant has various claims against the said
firm as was fully stated in its Advocate's
letter dated 21st Sept., 1977 (p. 44 of the
Paper Book). Those claims might have
arisen after 31st March, 1976. If this letter

is read along with other letters mentioned above it cannot, in our view, be said that there is unconditional acknowledgment of the respondent No. 1's claim in the suit for which it will not be necessary to call any witness at the trial. In our view, the appellant is entitled to claim loss and damages in respect of the defective pump sets as well as for breach of the contract. Of course such claim will have to be proved by the appellant. Accordingly it cannot be said that in view of the above letter no evidence is necessary in this suit. Considering the facts and circumstances of this case, in our view, balance of convenience lies in favour of this suit being tried by the Court at Patna. The transaction out of which the claim arises took place at Patna. The place of business of the said firm who supplied the pump sets is at Patna and the relevant document relating to the contract and the transaction are at Patna. Both the defendants are at Patna. All the relevant documents of the defendants are at Patna, Muzaffarpur and Sitamari. To prove the defects in the pump sets supplied by the said firm and the loss and damages suffered by the appellant for breach of contract various witnesses will have to be called and various documents will have to be produced by the appellant. Further, the appellant will have to prove the circumstances in which the said letter dated 3rd Nov., 1978 was written. This letter was sent to the Patna Office of the said firm. All the documents and witnesses of the appellant are either at Patna or Muzaffarpur or Sitamari. Excepting that the respondent No. 1 was appointed by this Court and admission, if any, was made in the Receiver's meeting no part of the cause of action had arisen within the jurisdiction of this Court. If the suit is tried in this Court, all the said documents and witnesses will have to be produced before this Court. Apart from the great inconvenience that will be caused to the appellant it will have to incur enormous expenses. Whereas the plaintiff will have to produce the certified copy of the decree and the minutes of the Receiver's meeting entitling him to realise the claim of the said firm. The office of the said firm being at Patna all the documents relating to the transaction will be at Patna. If any witness is to be called by the plaintiff regarding the transaction they are at Patna. In the above circumstances if the appellant is compelled to contest this suit in this Court it will have to bring all the documents and witnesses at Calcutta and apart from great inconvenience and hardship that would cause

serious prejudice amounting to injustice to the appellant. If the suit is tried in the Court at Patna the respondent No. 1 will not be required to take many documents or witnesses to Patna. Considering the respective advantages and disadvantages of the parties it appears to us that in the facts and circumstances of this case the balance of convenience is in favour of this suit being tried by a Court at Patna. In this connection the fact that in the letter dated 24th May, 1973 the firm stated 'subject to Patna jurisdiction' should also be taken into consideration.

18. For reasons stated above, in our view, the appeal should succeed and the same is allowed. Leave under clause 12 of the Letters Patent is revoked and all further proceedings in the Suit No. 906 of 1978 (Ram Chand Khosla v. State of Bihar) are stayed. In the facts and circumstances of this case there will be no order as to costs.

S. C. GHOSE, C. J.:— I agree.

Appeal allowed.

AIR 1982 CALCUTTA 542

P. C. BOROOAH, J.

Tanvar Eqbal and others, Petitioners v. Union of India and others, Respondents.

C. R. No. 3679 (W) of 1979, D/- 18-6-1982.

(A) Defence of India Rules (1962), R. 133 V (1) — Govt. Notification No. 12/2/65 E. Pty. dated 10-9-1965 — Constitution of India, Article 226 — Questions of fact — Cannot be gone into by Court exercising powers under Writ Jurisdiction.

Certain property found belonging to a Pakistani National was transferred after its vesting in the Custodian of enemy property for India. The Custodian issued a notice to the legal heirs of the Vendee since dead stating that the said transfer was illegal and asking him to show cause as to why all rents and profits of the property so far collected should not be deposited by him with the Custodian. In a writ petition against the notice, the legal heirs sought to dispute the fact that the vendor had migrated to Pakistan on the stated date and that her property could vest in the Custodian under the Notification dated 10-9-1965.

Held that, the question whether the vendor was an Indian citizen or a Pakistani National on the date of the alleged transfer of property in question and whether she in fact migrated to Pakistan on the stated date or

GZ/HZ/D50/82/AGM/MVJ

had all along remained in India are disputed questions of fact which can only be decided on the basis of evidence and cannot be gone into by the Court exercising powers under the constitutional writ jurisdiction.

(Para 8)

(B) Defence of India Act (1962), S. 2 (c) (ii) — Defence of India Rules (1962), Rr. 133 A (f), 133 V (1) — Govt. Notification No. 12/2/65 E. Pty. dated 10-9-1965 — Immovable property belonging to Pakistani National not staying in India — Transfer of, by owner in 1969 — By Govt. Notification dated 10-9-1965 that property automatically vested in Custodian of enemy property for India — Transfer by original owner after such vesting was illegal. (1975) 79 Cal WN 153 and (1977) 2 Cal LJ 96, Dissented from.

Certain immovable property belonging to the wife of a Pakistani National, who herself later migrated to Pakistan, was transferred to an Indian National by a deed of conveyance registered on 1-9-1969. The vendee later died. In 1979 the Custodian for enemy property for India issued a notice to the legal heir of the deceased vendee declaring the said transfer as illegal and asking the legal heir to show cause as to why rent and profits of the property so far collected should not be deposited by him with the Custodian. In a writ petition against the notice;

Held, that by virtue of the Notification dated 10-9-1965 the property belonging to the Pakistani National on that date automatically vested in the Custodian of Enemy Property for India. As such, the transfer of the property on 1-9-1969 by the original owner was illegal. The notice issued by the Custodian was therefore in accordance with law. AIR 1957 SC 344, Rel. on; (1975) 79 Cal WN 153 and (1977) 2 Cal LJ 96, Dissented from. (Para 9)

Cases Referred:	Chronological	Paras
(1977) 2 Cal LJ 96		5, 10
(1975) 79 Cal WN 153		5, 9
AIR 1957 SC 344		7, 11

Sankar Das Banerji, J. Islam and Satya Narayan Das, for Petitioners; D. N. Das, B. S. Bagchi, for Union of India; Jamini Kumar Banerjee and Biswanath Chakraborty (for Nos. 5 to 7) and Dipankar Ghosh, Ajit Kumar Panja, Sibaji Sen and Debaprasad Bhattacharyya (for Nos. 8, 9 and 10), for Respondents.

ORDER:— The petitioners, who are eleven in number, claim to be the legal heirs and representatives of one Sheikh Gholam Rasul Qais who died intestate on the 17th Jan., 1977. The said Sheikh Gholam Rasul

Qais purportedly purchased premises No. 6, Harinbari First Lane, Calcutta-73 from one Mst. Khadiza Bi by means of a registered deed of conveyance dated Sept. 1, 1969. The particulars of the registration have been set out in para 4 of the petition.

2. It is stated in para 3 of the petition that the said premises had been purchased by Mst. Khadiza Bi from the original owners by a registered kobala dated Feb. 15, 1945. After the death of Sheikh Gholam Rasul Qais the said property is said to have devolved upon the petitioners in accordance with the principles of succession under the Mohammedan Law.

3. In this writ petition the petitioners have challenged the Notice dated April 21, 1979 issued by Sri A. S. Dasgupta, Assistant Custodian of enemy property, to the first petitioner Janab Tanwir Eqbal, wherein it has been stated that it has been ascertained that the immoveable property at 6, Harinbari First Lane, Calcutta-73 was owned by Mst. Khadiza Khatun, wife of Abdul Rasis, a Pakistani National, and is therefore "Enemy Property" and had vested in the Custodian of Enemy Property for the Government of India by virtue of a Notification issued by the Government of India, Ministry of Commerce, on Sept. 10, 1965 and as the property in question was purported to have been transferred to the late Ghulam Rasul Qais under a registered deed of conveyance dated Sept. 1, 1969, such transfer of the property after vesting was illegal and the first petitioner was asked to show cause within ten days of the receipt of the notice as to why the rent and profits of the said enemy property should not be collected by the Custodian and why he should not deposit the rents and profits so far collected since Sept. 10, 1965 with the said Custodian. A copy of this notice, which is Annex. 'C' to the petition, is the subject matter of challenge in this Rule.

4. Mr. Sankar Das Banerji appearing on behalf of the petitioners, has submitted that Mst. Khadiza Bi alias Khadiza Khatun had never migrated to Pakistan and she was an Indian citizen and continued to be such on the date of the sale of the property in question to the late Gholam Rasul Qais. Mr. Banerji has further submitted that in coming to the conclusion that Mst. Khadiza Bi was a Pakistani National, the respondents have relied on a report dated Sept. 14, 1979 from the Deputy Commissioner of Police, Special Branch, Calcutta, addressed to the Assistant Custodian of Enemy Property, according to which Mst. Khatiza Khatun not Khadija,

the owner of 6, Harinbari First Lane, Calcutta-73, migrated to West Pakistan in the year 1949. Copy of this letter is Annex. "A" to the supplementary affidavit affirmed on behalf of the respondents Nos. 1, 2 and 3 by Sri Manindra Kumar Dutta, the General Assistant in the office of the Custodian of Enemy Property for India at Calcutta on Jan. 22, 1981. Mr. Banerji has further submitted that this report should not be relied upon in view of the statement made in paragraph 9 (2) of the affidavit-in-opposition affirmed by the same deponent on Jan. 9, 1981 from which it appears that the respondents' source of information is a purported letter dated Dec. 16, 1978 from one Md. Soleman to the effect that Khadiza Bibi, the owner of 6, Harinbari First Lane, Calcutta-73, and her husband Abdul Rashid migrated to Pakistan in 1947 and permanently settled in Karachi and became Pakistani Nationals. Mr. Banerji's further contention is that in view of the conflicting submissions made in the two affidavits this Court should come to the conclusion that Mst. Khadiza Khatun was never a Pakistani National.

5. The next submission of Mr. Banerji is that the Notification dated Sept. 10, 1965 issued by the Ministry of Commerce, in exercise of the power conferred by sub-rule (1) of R. 133 V of the Defence of India Rules, 1962 ceased to have any force after the Defence of India Act and the Rules were repealed on July 10, 1968 and the impugned order having been issued on Sept. 14, 1979 cannot be given effect to. In this connection, Mr. Banerji has relied on two single Bench decisions of this Court, the first being the case of *Asaduliah Chowdhury v. State of West Bengal*, reported in (1975) 79 Cal WN 153 and the second is the case of *Md. Nazrul Islam v. Union of India*, reported in (1977) 2 Cal LJ 96.

6. Mr. Dipankar Ghosh appearing for the added respondents Nos. 8, 9 and 10, has submitted that by virtue of the Notification dated Sept. 10, 1965 all immovable property in India belonging to or held by or managed on behalf of all Pakistani Nationals vested in the Custodian of Enemy Property for India with immediate effect. Mr. Ghosh's contention is that Mst. Khadiza Khatun does not come within the definition of 'Enemy' within the meaning of the Defence of India Rules, 1962. He has drawn my attention to sub-clause (4) to R. 133-I of the Rules which defines 'enemy property' to mean any property for the time being belonging to or held or managed on behalf of any enemy as

defined in R. 133-A, an enemy subject or any enemy firm. Mr. Ghosh then referred me to R. 133-A and submitted that Mst. Khadiza Khatun cannot be brought within the definition of enemy as defined in sub-clauses (a) to (g) of the said Rule. As such the Notification dated Sept. 10, 1965 can have no manner of application to any immovable property owned by her.

7. Mr. D. N. Das, appearing on behalf of the Custodian of the Enemy Property, has opposed this Rule. He has submitted that on the date of purported sale of the aforesaid property by Mst. Khadiza Bibi, the question whether she was a Pakistani National or an India citizen is a pure question of fact which should not be gone into by this Court. Mr. Das has also drawn my attention to the definition of 'enemy' under Section 2 (c) (ii) of the Defence of India Act, 1962 where 'enemy' has been defined to mean "any person belonging to a country committing such external aggression and he has also referred to R. 133 A (b) of the Rules which defines 'enemy' to mean "any individual resident in enemy territory". Mr. Das's submission is that in view of these definitions there should not be any manner of doubt that Mst. Khadiza Khatun was in fact an enemy within the meaning of the Act and the Rules. As regards the two decisions cited by Mr. Banerji, Mr. Das has submitted that the two learned Judges completely overlooked the fact that on and from Sept. 10, 1965 all enemy property automatically vested in the Government of India and even if the impugned order was passed after the expiry of the Defence of India Act or the Rules in the year 1968, the vesting would not be affected. Mr. Das has in this connection drawn my attention to a decision of the Supreme Court in the case of *Fruit & Vegetable Merchants' Union v. Delhi Improvement Trust*, reported in AIR 1957 SC 344 where the Supreme Court was construing the meaning of the word "vest" under Ss. 16 and 17 of the Land Acquisition Act, 1894. The Supreme Court, held, inter alia, that in the cases contemplated by Ss. 16 and 17, the property acquired becomes the property of the Government without any conditions or limitations either as to the title or possession and the legislature has made it clear that the vesting of the property is not for any limited purpose or limited duration. Mr. Das has submitted that inasmuch as the two learned Judges in the decisions cited by Mr. Banerji did not take into consideration the effect of automatic vesting of the property from the date of the Notification or

the aforesaid decision of the Supreme Court, I am not bound by those decisions nor should I refer this matter to a larger Bench as suggested by Mr. Banerji.

8. The question whether Mst. Khadiza Bibi was an Indian citizen or a Pakistani national on the date of the alleged transfer of the property in question to Sheikh Gholam Rasul Qais and whether she had in fact migrated to West Pakistan or had all along remained in India are disputed questions of fact which can only be decided on the basis of evidence and cannot be gone into by this Court exercising powers under the constitutional writ jurisdiction. Moreover, most of the grounds urged by the writ petitioners in support of the Rule also raise pure questions of fact. Besides the facts disclosed in the supplementary affidavit and the affidavit-in-opposition affirmed on behalf of the respondents Nos. 1, 2 and 3 and which have been referred to above *prima facie* bring in Mst. Khatija Khatun within the meaning of 'enemy' as defined under S. 2 (c) (ii) of the Defence of India Act, 1962 and clause (f) of R. 133 A of the Defence of India Rules, 1962.

9. The notification issued by the Government of India, Ministry of Commerce, being Notification No. 12/2/65 E. Pty., dated the 10th Sept., 1965 reads thus:—

"In exercise of the powers conferred by sub-rule (1) of Rule 133-V of the Defence of India Rules 1962, the Central Government hereby orders that all immovable property in India, belonging to or held by or managed on behalf of all Pakistani nationals, shall vest in the Custodian of Enemy Property for India with immediate effect.

Nothing in this notification shall apply to any such property, belonging to or held by or managed on behalf of such of the Pakistani nationals as are employed in the different Missions of the Government of Pakistan in India."

By virtue of this notification enemy property automatically vested in the Government of India from the date of the notification. As such, premises No. 6 Harinbari First Lane, Calcutta-73, having on that day belonged to a Pakistani national automatically vested in the Government of India.

10. In the case of Asadulla Chowdhury v. State of West Bengal (1975-79 Cal WN 153) (supra) D. Pal, J. (as he then was) held an order issued by the J. L. R. O. Mathura-

pur Circle in the district of Malda to be bad as the order of vesting was issued after the expiry of the period of emergency on July 10, 1968. A similar view was expressed by Amiya Kumar Mookerjee, J. in the case of Md. Nazrul Islam v. Union of India (1977-2 Cal LJ 96) (supra).

11. Both the learned Judges in holding the impugned orders to be bad did not take into consideration the question that on and from the date of the notification dated September 10, 1965 all immovable property held or managed on behalf of all Pakistani nationals would automatically vest in the Custodian of Enemy Property for India. The learned Judge also did not take into consideration the decision of the Supreme Court as to effect of vesting in the case of the Fruit and Vegetable Merchants Union v. Delhi Improvement Trust (AIR 1957 SC 344) (supra). In the premises both the decisions, in my view, can be dissented from as the main question, namely, that of automatic vesting from the date of the notification was either overlooked or not brought to the notice of the learned Judges.

12. For the reasons stated above, I do not find any merit in this application. The Rule is accordingly discharged. All interim orders are vacated. The Receiver is also discharged she will hand over the possession of the property and submit all the accounts together with the amounts of the rents collected upto date to the Custodian of the Enemy Property. I also make it clear that the discharge of this Rule will not prevent the petitioners from agitating the questions of fact which they have raised in this petition in an appropriate Civil Court.

13. There will be no order as to costs.

14. Mr. Das has disputed that some persons who are at present claiming to occupy premises No. 6, Haribari First Lane, Calcutta-73, are not at all tenants. The Custodian of Enemy Property will be at liberty to realise the compensation and/or rent for the said rooms in alleged occupation of such persons without prejudice to the rights and contentions of the parties.

15. Mr. Sankar Das Banerjee orally prays for a stay of the operation of this order. His prayer is refused.

16. As prayed for, let plain copies of the ordering portion of this judgment duly countersigned be handed over to the learned Advocate for the respective parties.

Petition dismissed.

AIR 1982 CALCUTTA 546**SUHAS CHANDRA SEN, J.****Md. Zazmul Ahasen, Petitioner v. State of West Bengal and others, Respondents.****C. R. No. 10811 (W) of 1981, D/- 19-3-1982.**

Essential Commodities Act (10 of 1955), Sections 3, 7 — West Bengal Food Grains Control Order (1951), Cl. 13 (2) — Cancellation of dealership of ration — Order not containing any reasons why charges against dealer were held proved and explanation given by him was not acceptable — Order not a speaking one and liable to be set aside. AIR 1970 SC 1362, Rel. on. (Constitution of India, Art. 226). (Paras 8, 9, 11)

Cases Referred: Chronological Paras
AIR 1970 SC 1302 9

J. Islam, for Petitioner; M. K. Ghosh, for Respondents.

ORDER:— The petitioner, Modammad Zazmul Ahasen, is a modified Ration Dealer under the Scheme framed by the West Bengal Government for distribution of food-stuffs to consumers and runs a modified Ration Shop in Dhalhara, P. S. Tandua, Midnapore. The petitioner is working as a modified Ration Dealer since 17th May, 1967.

2. The petitioner's licence was renewed from time to time. The last such renewal was on 5th Sept., 1975, and the licence was valid up to 4th Sept., 1980.

3. On or about 18th July, 1980, the Circle Inspector, Food and Supplies, Tamuluk and the Inspector of Food and Supplies, Tamuluk, the respondents Nos. 6 and 7 herein visited the shop of the petitioner for inspection. It is alleged that during inspection the petitioner could not produce books of accounts relating to rationed commodities. Stock Books, Daily Sales Register, Non-drawal Register and Cash Memos could not be produced for the period of six months up to 19th July, 1980. On enquiry from the Ration-card-holders present in the shop it was discovered that the petitioner did not issue any Cash Memos to consumers and books of accounts were not maintained. The petitioner was given time for production of books of accounts in the Office of the Sub-Divisional Controller (Food and Supplies), Tamuluk, the respondent No. 5 herein. The petitioner appeared in person but did not produce the books of accounts. On 22nd July, 1980, the petitioner produced books of accounts relating to the period 17th July,

1980, to 20th July, 1980, but the books of accounts prior to that period were not produced. There was a further allegation that the petitioner had inflated falsely the quantity of rationed commodities distributed by the petitioner in his weekly returns and that the petitioner had shown bogus distribution and had made unauthorised disposal of stocks of modified rationed commodities. A notice to show cause why the dealership of the petitioner should not be terminated was issued by the respondent No. 5 on 28th July, 1980. On 29th August, 1980, the petitioner submitted a detailed reply in which he dealt with the allegation made against him in the show cause notice point by point.

4. The petitioner also made a writ petition challenging the proceedings commenced by the Sub-Divisional Controller (Food and Supplies), Tamuluk, the respondent No. 5 herein. The said writ petition was disposed of by D. K. Sen J. on 9th Sept., 1980. By his order D. K. Sen J. gave liberty to the respondents to continue with the proceedings initiated by the show cause notice but the order of suspension was stayed till disposal of the said proceedings. Thereafter on 25th Sept., 1981, the Sub-Divisional Controller (Food and Supplies), Tamuluk, by an order dated 25th Sept., 1981, with the approval of the District Magistrate, Midnapore, cancelled the modified ration agreement/dealership under para 17 of the agreement. The order was made effective from 28th Sept., 1981.

5. The petitioner in the writ petition made herein has challenged the legality and validity of the order dated 28th Sept., 1981, passed by the respondent No. 5. The petitioner has urged that the respondents have acted mala fide against the petitioner and the respondents have stopped supply of modified ration articles to the petitioner on and from 22nd July, 1980, even before the show cause notice was issued. It was further alleged that no fresh notice of hearing was given and the impugned order was passed without giving an opportunity of being heard to the petitioner.

6. Supply of foodstuff was resumed to the petitioner on 25th Aug., 1980. The petitioner applied on 12th Aug., 1980, for two months' time to reply to the show cause notice. On 29th Aug., 1980, the petitioner submitted his answers to the show cause notice and thereafter the case was heard.

7. In view of the aforesaid facts it cannot be said that the respondents have acted mala fide or that the petitioner was not given a reasonable opportunity of showing cause in this case.

8. The petitioner has also urged that the impugned order is not a speaking order. Although the charges have been dealt with in detail by the petitioner, the respondents had merely held "But after careful consideration of your written explanation it appears that your reply to the aforesaid charges are fully unsatisfactory. Also at the time of personal hearing you failed to refute any of the charges framed against you." Although the charges have been set out in detail, the petitioner's reply to the said charges have not been set out nor dealt with anywhere in the order.

9. In my opinion, the petitioner should succeed on this point. The respondent No. 5 did not give any reason why he held the charges proved and the explanations given by the petitioner unacceptable. The Supreme Court in the case of Mahabir Prasad v. State of U. P., AIR 1970 SC 1302 observed at pages 1303-1304 "The case discloses a disturbing state of affairs. The Authorities have disclosed by their conduct a reckless disregard of the rights of the appellants. The order passed by the District Magistrate cancelling the licences was quasi-judicial; it could be made only on a consideration of the charges and the explanation given by the appellants. That necessarily implied that the District Magistrate had to give some reasons why he held the charges proved, and the explanation unacceptable."

10. S. A. de Smith in his Judicial Review of Administrative Action, Third Edition, has stated at p. 197 "Unless the licensee has already been given to understand when he was granted the licence that renewal is not to be expected, non-renewal may seriously upset his plans, cause him economic loss and perhaps cast a slur on his reputation."

11. In this case serious allegations have been made against the petitioner in the show cause notice. The petitioner has answered the allegations point by point. The respondent No. 5 should have given some reasons in his order for coming to the conclusion that the petitioner's explanation was not acceptable.

12. In the facts and circumstances of this case the impugned order dated 28th Sept., 1981, is quashed. The rule is made absolute. The respondents will, however, be at liberty to pass a fresh order in accordance with law in this case.

13. The respondents are directed to resume supply of ration articles to the peti-

tioner immediately. There will be no order as to costs.

Petition allowed.

AIR 1982, CALCUTTA 547

CHITTATOSH MOOKERJEE AND

RAM KRISHNA SHARMA, JJ.

Smritikana Bag, Appellant v. Dilip Kumar Bag, Respondent.

A. F. O. D. No. 181 of 1980, D/- 28-8-1981.

(A) Hindu Marriage Act (25 of 1955), Sections 13 (1) (iii) and 14 — Divorce petition by husband under Section 13 (1) (iii) presented within one year of marriage — No application filed under proviso to S. 14 (1) for permission to present petition nor any case of exceptional hardship to husband or of exceptional depravity on part of the wife pleaded — Also, no cogent evidence produced to establish that insanity was incurable or mental disorder was of such kind and magnitude that it was not reasonably possible to live with wife — Held, petition was barred under Section 14 and case for divorce was not made out under Section 13 (1) (iii). AIR 1945 Cal 381, Refd.; AIR 1967 J & K. 89, Disting.

(Para 18)

(B) Hindu Marriage Act (25 of 1955), Section 12 (1) (b) — Petition for annulment of marriage on ground that wife was insane — No cogent evidence produced to establish that at time of marriage wife was of unsound mind or was suffering from some mental disorder — Held, petition was liable to be dismissed.

(Para 20)

Cases	Referred :	Chronological	Paras
AIR 1967 J & K 89			7
AIR 1957 Mad 423			6
1956 CLY 2831, Bamford v. Bamford			6
(1949) 2 All ER 127 : 1949 P 353: 65 TLR			
461, Bowman v. Bowman			6
AIR 1945 Cal 381			5

Bhaskar Ghosh, for Appellant; Sailendra Bhusan Bakshi and Sailendra Nath Dutta, for Respondent.

CHITTATOSH MOOKERJEE, J.:— The appellant wife has preferred this appeal against the judgment and decree passed by the learned Additional District Judge, 12th Court, Alipore dissolving her marriage with the respondent husband under S. 13 (1) (iii) of the Hindu Marriage Act, 1955. The learned Additional District Judge, however, dismissed the prayer of the respondent husband for annulling the marriage of the par-

HZ/IZ/D485/82/HR/RSK

ties on the ground specified in S. 12 (1) (b) of the said Act. The respondent husband has also filed a cross-objection against the said dismissal of his prayer for annulment of their marriage.

2. On 3rd March, 1976 the marriage between the appellant and the respondent according to Hindu rites took place at 50/1, Shib Thakurbari Lane, P. S. Behala, District 24 Parganas. On 21st Sept., 1976 Dilip Kumar Bag, the respondent herein, had presented in the Court of the District Judge, 24 Parganas his petition for annulment of his marriage with the appellant under S. 12 and in the alternative for dissolution of the said marriage under Section 13 (1) (iii) of the Hindu Marriage Act, 1955. Although the said petition for divorce was presented by the respondent husband before even one year had elapsed since the date of his marriage with the respondent, he did not make any application under the proviso to Sec. 14 (1) of the Hindu Marriage Act for allowing him to present the said petition for dissolution of marriage. He did not plead any case of exceptional hardship to him or of exceptional depravity on the part of his wife. Therefore, it is patent that on the date of the presentation of the said petition, the Court below was not competent to entertain the respondent husband's petition for dissolution of his marriage with the appellant by a decree of divorce. But the said bar under S. 14 of the Hindu Marriage Act did not apply to the respondent's petition for annulling the marriage under Section 12 (1) of the said Act. It is somewhat strange that none of the parties had drawn the attention of the Court below to the provisions of S. 14 (1) of the Hindu Marriage Act and overlooking the said provisions, the Court below has dissolved by a decree of divorce the marriage between the appellant and the respondent.

3. We find from the records that on 1st April, 1977 the present appellant had filed her written statement in the present case and on 15th April, 1977 the trial Court had framed the issues. On 14th May, 1977 the respondent husband, who was the petitioner in the Court below, purported to file an application under O. 6, R. 17 of the Code read with S. 39 (2) of the Marriage Laws (Amendment) Act, 1976. He prayed that he might be allowed to amend his main application 'with a view to give further details and to avail of the reliefs provided in the Marriage Laws (Amendment) Act, 1976'. It was further averred "that the main application was drafted in 'hot haste', due to oversight

and inadvertence, proper details of happenings" were not given in the main application. It may be pointed out that the Marriage Laws (Amendment) Act, 1976 (Act 68 of 1976) was published in the Gazette of India Extraordinary Issue dated May 27, 1976 and on 21st Sept., 1976 the respondent husband had presented his petition for annulment and in the alternative for dissolution of the marriage with the appellant wife. Therefore, the provisions of sub-section (2) of S. 39 of the Marriage Laws (Amendment) Act, 1976 were not attracted to the facts of the present case. But, undoubtedly the Court below had jurisdiction to allow amendments prayed for the purpose of determining the real questions in controversy between the parties. The Court below had allowed the amendments prayed for. Therefore, the present appellant had filed an additional written statement.

4. Mr. Bakshi, learned advocate appearing on behalf of the respondent husband, has not disputed that on the original date of his client's petition under S. 13 (1) (iii), the trial Court was not competent to entertain it, but he has submitted that after expiry of more than one year from the date of marriage, the respondent husband had applied, inter alia, for amendment of his petition under Section 13 (1) (ii) of the Hindu Marriage Act and we ought to treat the date on which the said amendment application was filed as the date of presentation of the instant petition for divorce. According to Mr. Bakshi, learned advocate for the respondent husband, therefore, the Court below was competent to pass the impugned decree for dissolution of the marriage between the parties.

5. A Hindu marriage no longer creates 'indissoluble ties' between the husband and the wife; and S. 13 of the Hindu Marriage Act, 1955 sets out grounds of divorce. But the legislature by enacting Section 14 has imposed a ban upon presenting a petition for divorce unless one year has elapsed from the date of marriage. In case of exceptional hardship to the petitioner or exceptional depravity of the respondent, the Court under proviso to Section 14 (1) of the Act may, however, allow a petition under S. 13 to be filed within one year from the date of marriage. The sub-sec. (1) of Section 14 begins with the expression 'notwithstanding anything contained in this Act ...'. Therefore, in spite of other provisions including those of S. 13 of the Hindu Marriage Act, the Court cannot entertain any petition for divorce within one year of marriage. The

suit is to be regarded as not entertained if it is thrown out at its inception without decision on its merits. The inability to entertain means not inability to grant relief to the plaintiff but inability to give him a trial at all (vide observations of B. K. Mukherjea and Elias, JJ. in *Nakul Chandra v. Shyamapada Ghose*, AIR 1945 Cal 381 regarding the scope of S. 37-A (3) of the Bengal Agricultural Debtors Act).

6. The object of S. 14 (i) is clearly to prevent the parties from presenting a divorce petition without giving a trial to their marriage for at least one year. Thus, Section 14 has been enacted "with the object of preventing hasty suits for dissolution of marriage" (see observations of Lord Denning in *Bowman v. Bowman*, (1949) 2 All ER 127 : 1949 P. 353-356, with reference to the provisions of Section 1 (1) of Matrimonial Causes Act, 1937, which was replaced by Matrimonial Cases Act, 1950, Section 2; thereafter, by Matrimonial Cases Act, 1965, Section 2 and thereafter, by Matrimonial Cases Act, 1973, Section 3. See also Rayden on Divorce (13th Edition), Vol. 1, Chapter XI, Sections I and II, pages 316-320). Rayden on Divorce (13th Edition) in a note under Chapter XI, Section I page 349, has referred to *Bamford v. Bamford*, 1956 CLY 2831, where the marriage took place on 27th June, 1956 and it was held that the earliest date on which the petition could have been filed was 28th June, 1956 and accordingly the petition was dismissed). We agree with the observations made in *Meganatha Nayar v. Shrimathi Susheela*, AIR 1957 Mad 423, that S. 14 of the Hindu Marriage Act is grounded on public policy and that it provides restrictions upon hasty recourse to legal proceeding without making any real effort to save the marriage.

6-A. We have already noted that the present respondent husband did not make any application before the trial Court for permission to present his petition for divorce within one year of his marriage with the present appellant. He did not plead or prove his exceptional hardship or exceptional depravity on the part of the wife. Therefore, the proviso to Section 14 (1) was not attracted to the present case. Further, even in a case where such permission under S. 14 (1) proviso is obtained by misrepresentation or concealment of the nature of the case, the Court has been given a discretion either to direct that the decree for dissolution shall not have effect till the expiry of one year from the date of marriage or to dismiss the

petition without prejudice to file a fresh petition after expiry of one year from the marriage.

7. The decision of the Division Bench of Jammu and Kashmir High Court in *Sawita Devi v. Pran Nath*, AIR 1967 J & K 89 is distinguishable on facts. Without obtaining leave under the proviso to S. 14, a petition under Section 13 of the Hindu Marriage Act was presented within three years of marriage. The learned District Judge while allowing the amendment of the said petition granted leave under proviso to S. 14 (j) of the Act (as the said provision stood before the amendment of the Marriage Laws Regulation Act, 1976). The learned Judges of the Jammu and Kashmir High Court did not agree with the trial Court that the case was a fit one for granting such leave but accepted the submission of the learned lawyer for the husband that the application in question was a composite one under Sections 10 and 13 of the Act. The learned Judges further applied the principles that in order to shorten the course of litigation and to do complete justice between the parties, the Court ought to take notice of subsequent events. According to the Division Bench, in the interest of the parties and also for doing substantial justice, the petitioner husband ought to be allowed to amend his petition subject to payment of costs.

8. The respondent husband's petition under Section 13 (1) (iii) of the Hindu Marriage Act, 1955 was not only prematurely filed, but also the evidence about appellant wife's mental condition covered such a short period that it is not possible to satisfactorily decide whether or not she was really of unsound mind or suffered from any mental disorder of a kind and of such an extent that the petitioner husband was not reasonably expected to live with her.

9. Even after the amendment of the Marriage Laws (Amendment) Act, 1976, only in cases of certain kinds of mental disorder of the respondent, the Court under S. 13 (1) (iii) of the Hindu Marriage Act may dissolve marriage by decree of divorce. The petitioner by merely proving that the respondent is of unsound mind or suffers from mental disorder cannot obtain divorce. The petitioner would be required to prove that the respondent had been incurably of unsound mind. Alternatively, he ought to prove that the respondent to the petition under Section 13 (1) of the Hindu Marriage Act had been suffering continuously or intermittently from mental disorder which according to Explanation (a) of Clause (iii) of Sec-

tion 13 (1) means "mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia". The Explanation (b) to Clause (iii) of Section 13 (1) gives the meaning of the expression "psychopathic disorder". No doubt, it is no longer relevant whether such psychopathic disorder requires or is susceptible to medical treatment. But marriage could be dissolved only by proving that the respondent was suffering from some form of mental disorder which was of such a kind and of such an extent that the petitioner could not reasonably be expected to live with the respondent. In other words, the petitioner must prove that because of such mental disorder, it was not reasonably possible to enjoy conjugal life with the respondent. The Court ought to be satisfied that the respondent's mental disorder is of such a nature and of such intensity that it would not be reasonable to compel the petitioner to endure or suffer the same. In a given case, if it is proved that because of the abnormally aggressive or seriously irresponsible conduct resulting from psychopathic disorder, it was not reasonably possible for the petitioner to live with the respondent, the Court may dissolve the marriage under Section 13 (1) (iii) of the Hindu Marriage Act.

10. We have already pointed out that the respondent husband had presented his petition under Section 13 of the Hindu Marriage Act within a period of little more than six months from the date of marriage. On 3rd March, 1976 their marriage took place and the following day the petitioner and the respondent wife had come to the former's residence at 47, Rajani Mukherjee Lane, Behala. The petitioner had pleaded that on 5th March, 1976 when the Boudhat ceremony was performed it appeared that Smritikana had mental infirmity. According to the petitioner, she was found completely of unsound mind and became extremely aggressive and violent in nature. As already stated, that the alleged particulars of such mental disorder of the respondent were sought to be given by amending the petition under Section 13 of the Act. The petitioner husband claimed that on 11th March, 1976, Dr. A. Chakraborty, a psychiatrist, had examined her and had prescribed medicines. But she had continued to suffer from mental disorder. On 14th April, 1977 the husband got his wife Smritikana examined by Dr. D. N. Nandi, who was described as an eminent psychologist. According to the petitioner, as his relations were left with no peace by his wife,

he had hired a flat at Tollygunge Circular Road and took her there on 19th of April, 1976. On 27th May, 1976, the petitioner's father-in-law had visited him and she had abused him and he had fainted and had to be removed to a hospital. Being unable to bear, the husband claimed to have sent his wife to his father-in-law's house, on 11th July, 1976 on return from his office, the petitioner found the respondent in the house. She continued to abuse and misbehave. With the help of Sri Madan Mondal, the petitioner got her admitted in the Hospital for Mental Diseases at Gobra on 14th of July, 1976. While she was still an indoor patient in the said hospital, on 21st Sept., 1976 the present husband had filed the petition under Section 12 and in the alternative under Section 13 of the Hindu Marriage Act. As already stated, he did not either plead or prove his exceptional hardship or depravity on the part of his wife. His original petition did not give particulars of the alleged mental illness of his wife, Smritikana. No doubt, he had filed his petition for amendment after expiry of more than one year from the date of the marriage. But he did not thereby plead or thereafter prove by evidence that even after expiry of the period of one year, the respondent wife had continued to be either incurably of unsound mind or that she was still suffering from mental disorder of such a kind and such an extent that the petitioner could not be reasonably expected to live with the respondent. The petitioner had amended his petition by only giving particulars of her alleged mental disorder between 4th of March, 1976 and 14th of July, 1976. He did not even wait for completion of his wife's treatment in the Hospital for Mental Diseases, Gobra.

11. The respondent husband in para 9 of his petition under Ss. 12 and 13 of the Hindu Marriage Act as originally filed in the Court below, inter alia, merely averred that after marriage his wife "was found completely of unsound mind and became extremely aggressive and violent in nature and actions..." He further alleged that she had been admitted in the Hospital for Mental Diseases, Gobra on 14th of July, 1976 and there was absolutely no chance of recovery. The respondent husband in para 12 (b) of the amended plaint made a slightly different case by averring that at the time of the marriage his wife had been subject to recurrent attacks of insanity. The respondent in para 12 (c) of the plaint purported to give alleged particulars of her conduct which he described as "unbecoming and aggressively violent". The

respondent had been incurably of unsound mind and has been suffering continuously or intermittently from a mental disorder of such a kind and to such an extent that he could not reasonably be expected to live with her. The respondent in paras 12(e) and 12(f), inter alia, submitted that his wife, the present appellant, ought to be examined by a competent psychiatrist for the purpose of ascertaining her insanity and mental disorder and for this purpose her detention in the hospital for a period of 10 days was necessary.

12. We have already observed that the evidence adduced by the parties was not sufficient for adjudging that the appellant wife was either of incurably unsound mind or was suffering from any mental disorder of such a kind and to such an extent that the appellant husband cannot reasonably be expected to live with her. Dilip Kumar Bag, the petitioner respondent, was examined as P. W. 4. There was practically no corroboration of his evidence that they had begun to suspect about the unsoundness of her mind on 4-3-1976 as she did not take bath, nor she had slept and had unnatural appearance. According to Dilip. P. W. 4, on 5th of March, 1976, i.e., the date of Boubhat ceremony, her appearance appeared to be unnatural. Dilip himself admitted that he and his wife did not spend together the nights of 4th and 5th of March, 1976 according to their custom. It is common knowledge that in case of a negotiated marriage, among Bengali Hindus till the ceremony of Phoolsajjya, the bride and bridegroom live separate from each other and the bridegroom has hardly any chance to become familiar with his bride during this period. The respondent petitioner did not examine his mother, sister and other members of his family except his father as witnesses, in the case. Therefore, it would not be safe to rely upon the interested testimony of Dilip, P. W. 4, that on the 4th and 5th of March, 1976 his wife had behaved abnormally by refusing to dress up or had received gifts with her left hand and had even thrown away all of them. Haricharan Bag, the father of Dilip, P. W. 5, himself admitted that on the wedding day he was present only for a short time and rest of the time he was looking after the visitors. He did not notice the bride quite well at the time of wedding. Although, P. W. 5 during his cross-examination claimed that on 4th of March, 1976 he himself, his wife and all the inmates had realised that Smritikana was of unsound mind and had discussed among themselves about her un-

soundness of mind, it is improbable that P. W. 5 did not immediately tell anything to her father but he was told about it in the night of Boubhat ceremony. If really on the 4th and 5th of March, 1976 Smritikana had behaved unnaturally and had acted in irresponsible manner in the presence of the relations and the guests, there was no reason why the mother-in-law of the bride or his uncle and also other relations were not produced as witnesses to testify. During cross-examination P. W. 5 claimed that all his relations were told and they had said that the bride was of unsound mind. Smritikana in her evidence totally denied the allegation that she had behaved in unnatural or irresponsible manner as alleged by the petitioner husband. It was not probable that if on the 4th and 5th of March, 1976 she had behaved in the manner alleged by her husband, Smritikana had willingly gone through the Boubhat and Phoolsajjya ceremonies. On her behalf several photographs taken during the marriage ceremony were exhibited (vide Ext. C series). Although Dilip had admitted that during ceremonies in his house, photographs were taken, he did not produce the said photographs. None of the photographs (Ext. C series) indicated anything unusual or unnatural in the appearance of Smritikana. Therefore, the evidence given by the petitioner husband about his wife's conduct and behaviour on the 4th and 5th of March, 1976 do not appear to be credible.

13. Both Dilip, P. W. 4 and his father, Haricharan, P. W. 5, claimed that they got Smritikana treated by Dr. Amiya Chakraborty and he prescribed certain medicines. But Dr. Amiya Chakraborty was not examined as a witness and, therefore, the contents of his prescription (Ext. 5) were not admissible. For the same reason, no reliance can be placed upon the prescription granted by Dr. D. N. Nandi (Ext. 5-A), who also did not depose in the case. Thus, there was no corroboration of the evidence of P. Ws. 4 and 5 that the present appellant was under medical treatment of the aforesaid two doctors during the months of March and April, 1976.

14. Dilip, P. W. 4, had claimed that from 18th April, 1976 he had begun to live separately with his wife in a different house with a view to cure her. It was somewhat unusual that although Smritikana was of unsound mind, she did not sleep, she could not take food and used to become angry, her husband with Smritikana had shifted to Tollygunge Circular Road flat. Even if they employed a servant, it was not reasonable

and probable that Smritikana who was described as a mental patient used to be left alone in the said flat when Dilip went to his office. Again there was no corroboration of the evidence of Dilip that also during her stay at Tollygunge Circular Road flat Smritikana used to become extremely violent and abusive. She would call the passers-by and go to the roof and dance. Neither the neighbours nor the landlord of the Tollygunge Circular Road flat were examined as witnesses to corroborate the evidence of Dilip about his wife's alleged behaviour during their stay up to 14th of July, 1976. The same observations applied with regard to the alleged incident on 11th of July, 1976 when on return from office Dilip allegedly saw his wife sitting on the road near his house and the landlord on enquiry had allegedly told Dilip that she would not go inside in spite of requests.

15. The medical evidence given on the side of the petitioner husband also did not establish that Smritikana was either incurably of unsound mind or suffered from mental disorder of such a kind and to such an extent that the petitioner husband could (not?) reasonably be expected to live with her. At this stage, it may be pointed out that Dilip in his petition under Sections 12 and 13 of the Hindu Marriage Act had described Smritikana, the present appellant, as a person of unsound mind represented by her father. But she herself appeared in the Court below which rejected the petitioner husband's prayer for appointing a guardian ad litem for her. The learned Additional District Judge in his Order No. 26 dated 30th Nov., 1977 recorded that on examination in Court there was nothing *prima facie* to suggest that she was of unsound mind. The trial Court allowed her as *sui juris* to contest the case. She herself deposed as a witness and was subjected to lengthy cross-examination. The Court below did not record anything unusual about her demeanour. On perusal of her evidence, we find also that Smritikana gave intelligent and sane replies. We shall hereinafter refer to the evidence given by Dr. K. P. Chatterjee of Sarkarpole Institute of Mental Health where she was admitted as an indoor patient under orders of the trial Court. According to the said hospital report, and the oral evidence of Dr. K. P. Chatterjee, no mental abnormality in her was detected.

16. The petitioner got his wife, the present appellant, admitted into the Hospital for Mental Diseases Gobra on 14th of July, 1976. Dr. Ajit Sankar Mukherjee (P. W. 1)

Superintendent of the said Mental Hospital in course of his cross-examination had admitted that he did not personally examine Smt. Smritikana Bag and he had been summoned by the Court to produce the hospital report. When admittedly Dr. Ajit Sankar Mukherjee had no personal knowledge, the petitioner husband cannot rely upon his testimony for proving that his wife was incurably of unsound mind or suffered from a mental disorder of such a kind and of such an extent that it was reasonably impossible for him to live with her. Dr. Ranjan Sen, Deputy Superintendent of Hospital for Mental Diseases, Gobra, (P. W. 2) who was examined by the petitioner husband, had stated that Smt. Smritikana Bag was an indoor patient and was under his treatment. The petitioner did not examine as witness Dr. Arun Prakash Bhattacharjee, a clinical psychologist of the said Hospital, who had examined her and who had also written a part of the treatment sheet (Ext. 2). He was not subjected to cross-examination with reference to his said writing. Therefore, the endorsement by Dr. A. P. Bhattacharjee upon the said treatment sheet (Ext. 2) were clearly inadmissible. Dr. Ranjan Sen (P. W. 2) in his oral evidence stated that the present appellant was suffering from schizophrenia of the paranoid type. But on the basis of the said opinion of Dr. Ranjan Sen, P. W. 2, we are unable to hold that the appellant wife was either incurably of unsound mind or was suffering from mental disorder of such a kind and to such an extent that the petitioner could not reasonably be expected to live with her. In fact, Dr. Sen did not depose that her illness was incurable or state about the extent of her mental disorder. In course of his cross-examination, Dr. Sen admitted that the symptoms noted by him on the treatment-sheet might be developed by temporary mental shock. He further stated, "it may be that husband of Smt. Smritikana Bag has got her forcibly admitted or her father later complained to me and got her discharged". We are not prepared to accept the submission of Mr. Bakshi that the above expression "forcibly admitted" did not mean that although she was a normal person she was compelled by her husband to take admission in the hospital. Both Dr. Mukherjee and Dr. Sen had been examined on this point; while Dr. Mukherjee had denied that a patient could be forcibly admitted, Dr. Sen did not deny the said suggestion. Further, Dr. Sen stated that Smt. Bag was a patient not of psychoneurosis but of psychosis which meant complete madness. But his said opin-

ion was not consistent with his further statement that he would not be surprised if Smt. Bag was reported to be a normal woman by Sarkarpole Mental Hospital. According to the last endorsement made in the treatment sheet (Ext. 2), at the time of her discharge she had improved and was manageable at home.

17. Dr. A. P. Banerjee (P. W. 3), who was Medical Officer of Hospital for Mental Diseases, proved the writing (Ext. 4) which consisted of an endorsement on the back of Ext. 1 to the effect that on 5th Nov., 1976 one Gopal Chandra Das had taken the patient Smt. Smritikana Bag on her discharge from the hospital. This witness did not testify about the mental condition of Smt. Bag.

18. We already referred to the fact that the appellant had appeared before the trial Court, the trial Court did not appoint any guardian ad litem and had recorded that there was nothing prima facie to suggest that she was insane. She herself testified as a witness and her statements did not indicate that she was suffering from any mental infirmity. We have also referred to the evidence of Dr. K. P. Chatterjee, Visiting Psychiatrist, Sarkarpole Institute of Mental Health, who had examined her under the orders of the trial Court. She was an indoor patient for seven days in the said institute and Dr. Chatterjee who had opportunity to examine her, arrived at the conclusion that she was hale and hearty and was absolutely normal. We are not prepared to reject the opinion of Dr. Chatterjee on the ground that neither Dr. Pal was examined as a witness nor his report referred to in the hospital record was produced. The appellant wife did not also rely upon the said report of Dr. Pal. The learned Additional District Judge presumably on the basis of the evidence given by Dr. Sen came to the conclusion that the appellant wife was suffering intermittently from schizophrenia ever since her admission in Gobra Mental Hospital on 14th July, 1976. The Court overlooked that Dr. Bhatiacharjee, who also examined the appellant wife did not depose. Therefore, only on the basis of the alleged symptoms noted in the treatment sheet the Court below was not entitled to find that her symptoms included 'irrelevant talk, delusion of poison, the suspicion against all members of the family, a belief that they were jealous of her, hallucination, passivity phenomenon and harbouring strong paranoid ideas against her in-law'. We have already stated that the

petitioner husband did not examine as witness his mother and sister or the landlord of Tollygunge Circular Road house. The father of the petitioner husband did not have any personal knowledge about her alleged symptoms. Even if it is assumed that the appellant wife had exhibited certain symptoms of mental disorder, there was no cogent evidence that her said alleged illness was of a kind and of such an extent that it was reasonably not possible for the petitioner husband to live with her. We have already pointed out that at the date of its filing, his petition for divorce under S. 13 (1) (iii) of the Hindu Marriage Act was not entertainable. The parties had also only lived together for little over four months. Even before the hospital authorities had completed her treatment and had made any final pronouncement about her mental health, the petitioner husband rushed to Court. On this state of evidence we are unable to hold that he has satisfactorily proved the kind and the extent of the alleged mental disorder of the appellant-wife or that it was not reasonably possible to live with her. Not only Section 14 of the Hindu Marriage Act was a bar to his petition under S. 13 (1) (iii) but also the evidence produced by the petitioner-husband indicated that he had filed the said petition without ascertaining whether it was reasonably possible to live with his wife. The trial Court had overlooked the provisions of Section 14 of the Hindu Marriage Act and also did not consider the evidence in the light of the relevant provisions of law. Therefore, we set aside the findings of the trial Court regarding the ground of dissolution of marriage under S. 13 (1) (iii) of the Act. We hold that the petitioner-husband was not entitled to a decree for dissolution on the said ground.

19. The learned Additional District Judge refused the prayer of the petitioner-husband for annulling the marriage of the parties on the ground that the same contravened clause (ii) of S. 5 of the Hindu Marriage Act. We agree with the said findings of the trial Court. We have already held that the petitioner-husband has not satisfactorily proved that at the date of the presentation of his petition his wife was incurably of unsound mind or was suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner could not reasonably be expected to live with her. The petitioner or his father themselves had no personal knowledge about the state of mental health of the appellant-wife before marriage. He did not at all

prove his allegations made in para (8) of his petition under S. 12, in the alternative under Section 13 of the Hindu Marriage Act. The statement made by the petitioner-husband regarding what they had allegedly heard about her treatment for mental disease before her marriage were entirely hearsay. There was no evidence that she had ever become insane or mentally unbalanced before her marriage or that she had assaulted her neighbours as alleged in paras 12 (g) and 12 (h) of the amended petition. We have already observed that there was no cogent evidence that at the time of marriage or during the other ceremonies which followed the appellant-wife had behaved like a person of unsound mind or showed that she was suffering from mental disorder of such a kind or to such an extent as to make her unfit for marriage and procreation of children. There was also no evidence that before her marriage she had suffered from recurrent attacks of insanity. We have already observed that the ladies of the petitioner's household or the friends and relations, who had attended the marriage and ceremonies, which took place in the petitioner-husband's house were not examined to corroborate that the appellant-wife's behaviour was unnatural or that even then she appeared to be suffering from mental disorder. It was improbable that the marriage of the parties was finalised without the ladies of the petitioner's house at all seeing her and finally approving her selection as a bride. On this point the case of the appellant appears to be much more trustworthy. Usually, in case of negotiated marriages among middle-class Bengali families, the ladies of the bridegroom's family visit, not only once but on several occasions, the prospective bride's house before finally selecting her. There was no special circumstance in this case which would warrant an assumption that there was any departure from such usual practice. The petitioner-husband did not examine Sri Madan Mondal, who had negotiated the marriage. It is difficult to accept the explanation for not examining Sri Madan Mohan Mondal, who was a colleague of the petitioner-husband's father.

20. In our view, the Court below rightly held that the petitioner-husband has failed to adduce any evidence that at the time of the marriage the appellant-wife was of unsound mind or was suffering from any mental disorder. Therefore, the husband-petitioner's prayer for annulling the marriage under Section 12 of the Hindu Marriage Act must fail.

21. Mr. Bakshi, learned advocate for the respondent, has submitted that in case we hold that the respondent-husband's petition under S. 13 (1) (iii) of the Hindu Marriage Act was hit by S. 14 of the said Act and, therefore, not maintainable, the Court may be pleased to pass a decree for judicial separation on the ground of mental disorder of the appellant-wife. Even to obtain a decree for judicial separation the respondent-husband must establish any of the grounds specified in sub-section (1) of S. 13 of the Hindu Marriage Act. In other words, in case he fails to prove that she had been incurably of unsound mind or has been suffering continuously or intermittently from any mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent and the Court refuses to dissolve the marriage by decree of divorce, the Court cannot grant the petitioner-husband alternative relief by way of decree of judicial separation founded on the same grounds. Question of passing a decree for judicial separation instead of a decree of divorce might arise only when the ground on which the petition for dissolution of marriage is founded is proved but having regard to the circumstances of the case the Court considers it just to pass a decree for judicial separation. But when the petitioner-husband could not substantiate a ground on which he founded his petition for dissolution of marriage, we cannot grant him decree for judicial separation by way of alternative relief.

22. Before we close this judgment, we make it clear that the petitioner-husband (the respondent herein) had adduced evidence about the mental condition of his wife (the appellant) from date of marriage up to the date of the filing of his petition under Sections 12 and 13 of the Hindu Marriage Act. Therefore, our findings and observations in this judgment are mainly confined to the petitioner's case covering the said period of time. We have not recorded any finding about the present mental condition of the appellant and we express no opinion as to whether or not either of the parties would be now entitled to any relief under the provisions of the Hindu Marriage Act or under any other law.

23. For the foregoing reasons, we allow this appeal, set aside the judgment and decree of the learned Additional District Judge and dismiss the respondent-husband's petition under Ss. 12 and 13 of the Hindu Marriage Act. We also dismiss the cross-

objection preferred by the respondent. In the circumstances of the case, there will be no order as to costs.

R. K. SHARMA, J.:— I agree.

Appeal allowed.

AIR 1982 CALCUTTA 555

SABYASACHI MUKHARJI AND C. K.

BANERJI, JJ.

Prasant Chandra Sen, Appellant v. United Commercial Bank and another, Respondents.

Appeal No. 140 of 1980, D/- 5-11-1981.

(A) Letters Patent (Calcutta), Cl. 15 — 'Judgment' — Order refusing amendment of written statement seeking to plead defence that defendant stood discharged from liability under guarantee because of alleged conduct of plaintiff — Order amounts to judgment. Case law discussed. (Paras 4, 7)

(B) Civil P. C. (5 of 1908), O. 6, R. 17 — Amendment of written statement — Inconsistent pleading — Inconsistent claim can be made in written statement by amendment. AIR 1953 Cal 15, Rel. on; AIR 1977 SC 680, Distinguished; Order D/- 27-4-1980 passed by Salil K. Roy Chowdhury, J., Reversed. (Para 8)

Cases	Referred :	Chronological	Paras
AIR 1981 SC 1786			4
AIR 1977 SC 680			8
AIR 1974 SC 1719			5
AIR 1972 Cal 449 (FB)			4
AIR 1956 Cal 630			5
AIR 1953 Cal 15			8
AIR 1917 Mad 350			7

S. N. Mukharji with S. Sarkar, for Appellant; S. Sinha, for Respondents.

SABYASACHI MUKHARJI, J.:— This appeal is arising out of an order passed and judgment delivered by Mr. Justice Salil K. Roy Chowdhury on the 27th April, 1980 dismissing an application for amendment of written statement filed by defendant No. 2. It appears that a suit was filed in this case by the United Commercial Bank, the plaintiff on the 22nd June, 1970 against the principal debtor, which was a company being wound up by the Company Court by an order dated the 23rd July, 1979. Subsequently the plaintiff had obtained leave under Section 446 of the Companies Act, 1956 to continue the suit against the Official Liquidator, so far as defendant No. 1 was concerned which was the company in liquidation and by an order dated 3rd Dec., 1979 such

leave was granted and the plaintiff took out an application under Chap. 13A of the Original Side Rules of the Calcutta High Court for summary judgment. The defendant No. 2, the present appellant also took out an application for particulars of the plaint as well as leave to file the written statement. Both these applications had appeared before the learned trial Judge and by an order dated the 15th Feb., 1980 the hearing of the suit was expedited and the defendant No. 2 was directed to file its written statement within one week from date, cross order was given for discovery. Direction was given for inspection forthwith thereafter and the suit was directed to appear in the list for hearing irrespective of part heard on the 5th March, 1980 at the top of the list. The suit duly appeared in the list but the defendant No. 2 had asked for time on that occasion as he could not discover the documents and the time was granted. On the 31st March, 1980, an application, resulting in the order of the learned trial Judge, was made by defendant No. 2 asking for leave to amend the written statement. In this connection, it would be appropriate to state, as we have mentioned, that the suit was against two defendants, viz., defendant No. 1 which was a company in liquidation and the defendant No. 2 who was the guarantor. The suit was for money claim against the company in liquidation and it was alleged that the defendant No. 2, the present appellant had guaranteed the repayment, in writing furnished to the plaintiff, of the outstanding dues of the plaintiff from the defendant No. 1 in the account. We may incidentally point out that it appears that initially perhaps the plaintiff had contemplated to institute the suit against four defendants because in para 2 of the plaint it was stated: "The defendants Nos. 3 and 4 were at all material times and are the Directors of the defendant-company." It was thereafter stated that the defendant No. 2 too was a Director of the defendant-company. But the suit as filed does not contain any allegations, as appearing from the Paper Book, against defendants Nos. 3 and 4, who were described to be the other Directors of the company. Be that as it may, the suit was filed for certain money in cash credit account against the defendant No. 1 and defendant No. 2 as guarantor. In the written statement filed by the defendant No. 2 it was stated in para 8 as follows:

"8. With reference to para 12 of the plaint, the defendant denies that this defendant has guaranteed the repayment of the outstanding dues of the plaintiff in the said

accounts either duly or at all or that there is any question of this defendant failing or neglecting to pay to the plaintiff as alleged or at all. This defendant disputes that any demand was made on this defendant, as alleged or at all. Save as aforesaid, this defendant denies each and every allegation contained in para 12 of the plaint."

In para 10, it was pleaded that further and/or in the alternative and/or in any event, the defendant No. 2 took certain defences which were stated in various clauses in sub-para (i) to (ix). In sub-clause (vi) of paragraph 10 the defence was as follows:

"(vi) The alleged provision in the contract of guarantee which purports to affect the rights conferred on this defendant as guarantor under Ss. 133, 134 and 135 of the Contract Act is illegal, contrary to law, null and void and no effect can be given thereto."

2. In the amendment which the defendant No. 2 was seeking in the application before the learned trial Judge, the defendant No. 2 wanted to plead as follows:

"At the time when the alleged guarantee was offered by this defendant one Mr. Satya Bhusan Chakraborty, an Industrialist and the owner of Dragon Engineering Works, who carries on business at 457, Grand Trunk Road, Howrah-2, had guaranteed for the repayment of the dues of the bank to the extent of three lakhs in the presence of the then Bank Manager. It was agreed that the alleged guarantee offered by the defendant No. 2 will not come into effect unless all remedies were exhausted against the said Satya Bhusan Chakraborty. The plaintiff-bank agreed to such proposal and on such representation and the agreement made by the Bank through the then Manager this defendant offered his alleged guarantee to the extent of Rs. 2,00,000/- knowing full well that he will never be called upon to pay that money. It appears now that the plaintiff-Bank has compromised and/or exonerated Satya Bhusan Chakraborty from any liability. This defendant submits that in the circumstances the alleged guarantee offered by this defendant has come to an end and he is not liable to pay any amount having regard to the fact that the guarantee by Satya Bhusan Chakraborty has been released behind the back of this defendant and/or without his consent."

This application, as we have mentioned before, came up before the learned trial Judge and he had dismissed this application.

3. From the judgment, it appears, the learned trial Judge was of the view that this

application was made belatedly to defeat the claim of the plaintiff. Secondly, the learned trial Judge was of the view that this defence was inconsistent with the defence already taken by the defendant No. 3. It further appears that the learned trial Judge was of the view that version sought to be pleaded in the written statement was in the words of the trial Judge "tissue of lies thought out by the defendant No. 2 and his lawyers only to delay the matter as long as possible". The learned trial Judge was of the view that this was a frivolous application and if such an application was allowed no suit could be heard. The learned trial Judge further emphasised that as the company was in liquidation, the matter should be heard expeditiously. We may incidentally point out that it is true that the hearing in Company matters particularly the companies which are in liquidation should be done expeditiously but it is not a suit by a company, in liquidation, seeking to recover money from its debtor for liquidation of its debts. It is a suit against the company in liquidation and in respect of which the directors of the company, which is in liquidation, were being sought to be made liable as guarantors. The propriety of the said decision of the learned trial Judge refusing to allow the amendment is the subject matter of appeal before us.

4. It was firstly contended that the order appealed from was not appealable. It is quite evident and there is no dispute that under O. 43 of the Civil P. C. this is not an appealable order. The only question that arises is whether this is a judgment in terms of Cl. 15 of the Letters Patent. Whether a particular decision is a judgment in terms of Cl. 15 of the Letters Patent has been the subject matter of clarification and adjudication by several authorities both of the Supreme Court as well as the High Courts. It is not desirable, as the Supreme Court has emphasised, or possible to give exhaustive definition of what amounts to a judgment. It must depend primarily upon the facts and circumstances and the nature of the right adjudicated. In this connection we may refer to the observations of the Full Bench decision of the Calcutta High Court in the case of *Nurul Hoda v. Amir Hasan*, AIR 1972 Cal 449, where the Full Bench observed that:

"the following tests should be applied in considering whether a particular order amounted to a 'judgment' or not, namely (i) whether the order in question put an end to the proceedings so far as the Court deal-

ing with the proceeding was concerned, in which the order was sought and made, (ii) the order should involve determination of some right or liability affecting the merits of the matter, (iii) an adjudication or a decision, which was not anything more than a step towards obtaining the final adjudication on the merits of the dispute in the proceeding was not a judgment within the meaning of the Letters Patent, (iv) where the question involved an adjudication on the question of limitation or jurisdiction of the Court, in certain cases, such decision would amount to a 'judgment'."

In this case it was emphasised on behalf of the appellant that this involved determination of the right of the defendant to plead the immunity on the ground sought to be pleaded in the amended written statement and inasmuch as that right has been denied by the refusal of the amendment there has been an adjudication of that right, that is to say, the defence of being discharged from liability because of the alleged conduct of the plaintiff. In the Supreme Court case of *Shah Babulal Khimji v. Jayaben D. Kania*, AIR 1981 SC 1786 at pages 1828-29 of the report Mr. Justice A. N. Sen in a concurring judgment observed, *inter alia*, as follows:

"..... What kind of an order will constitute a judgment within the meaning of Cl. 15 of the Letters Patent and will become appealable as such necessarily depends upon the facts and circumstances of each case and on the nature and character of the order passed. The question whether a particular order constitutes a judgment within the meaning of clause 15 of the Letters Patent to be appealable under the provisions thereof has come up for consideration before the various Courts in a number of decisions. Very many decisions have been cited in the present case and they have been considered by my learned Brother, Fazal Ali, J. in his judgment. The question indeed is not free from difficulties and divergent views have been expressed by different Courts and by various learned Judges"

Mr. Justice A. N. Sen further observed that in several cases the Courts have viewed this question from different angles. But the test is, as emphasised by the Supreme Court, first in order to be a judgment it must involve a final pronouncement which would put an end to the proceeding so far as the Court dealing with that question was concerned. Secondly, the decision must involve the determination of some right or liability

though it might not be necessary that there must be a decision on merits and whether, as the Supreme Court emphasised, there has been a determination of liability has to be found out from the nature and from the facts and circumstances of the case. In this case the defence of the defendant No. 2 that they stood discharged from being liable under the guarantee because of the alleged conduct sought to be pleaded in the proposed amendment has been denied by the impugned order passed by the learned trial Judge.

5. Reliance was placed on certain observations of the Supreme Court in the case of *Shanti Kumar R. Canji v. Home Insurance Co., New York*. AIR 1974 SC 1719. Our attention was drawn to para 8 where the Court at page 1722 of report observed as follows:

"The view of the High Courts at Calcutta and Madras with regard to the meaning of 'judgment' are with respect preferred to meaning of 'judgment' given by the Rangoon and Nagpur High Courts. We are in agreement with the view expressed by the High Court at Calcutta in the *M. B. Sirkar* case, AIR 1956 Cal 630 (supra) as to when an order on an application for amendment can become a judgment within the meaning of clause 15 of the Letters Patent. If an amendment merely allows the plaintiff to state a new cause of action or to ask for a new relief or to include a new ground of relief all that happens is that it is possible for the plaintiff to raise further contentions in the suit but does not decide whether the contentions are right. Such an amendment does nothing more than regulate the procedure applicable to the suit. It does not decide any question which touches the merits of the controversy between the parties. Where, on the other hand, an amendment takes away from the defendant the defence of immunity from any liability by reason of limitation, it is a judgment within the meaning of clause 15 of the Letters Patent. The reason why it becomes a judgment is that it is a decision affecting the merits of the question between the parties by determining the right or liability based on limitation. It is the final decision as far as the trial Court is concerned."

6. This passage was relied on behalf of the appellant in support that this could be construed as a judgment. On the other hand, the above passage was relied on to emphasise that these were only the illustrations which could be considered whether the order was appealable and it was sought to be

argued that anything beyond this meant not to be appealable under clause 15 of the Letters Patent. Even if we apply the above test that is to say that the amendment took away from the defendant the defence of immunity from any liability by reason of limitation, it would be a judgment within the meaning of clause 15 of the Letters Patent. In that case the Court was concerned with the amendment of the plaint. But in our opinion the same principles would apply where by an impugned order the defence of immunity is being deprived by refusal of the amendment sought for.

7. Reliance was placed on behalf of the respondent on certain observations of the Division Bench of the Madras High Court in the case of *Mahalingam v. C. Natesa Aiyar*, AIR 1917 Mad 350. There, though the Court held that an order refusing amendment would not be appealable the reason upon which the Court proceeded seems to be clear. Mr. Justice Seshagiri Aiyer observed that as the order was infructuous and could not affect the rights of the plaintiff in that case to litigate his claim, the plaintiff had no right of appeal against it. Quite apart from that, it appears to us that the meaning of the expression 'judgment' has been clarified in several decisions which we have referred to hereinbefore. It must depend upon the facts and circumstances of each case. Therefore, it appears to us that in view of the nature of the defence which was sought to be raised and which defence has been refused by the impugned order passed by the learned trial Judge by refusing to allow the amendment, in our opinion, in the facts and circumstances of the case this order amounts to a judgment in terms of clause 15 of the Letters Patent and as such is appealable.

8. The next aspect which calls for consideration is whether the learned Judge was right in refusing to allow the amendment. The learned Judge is right in so far as the learned Judge observed that if the application was mala fide in such a case the Court was not bound to allow such an application for amendment. The question, however, is whether the application in the instant case was mala fide or not. In the instant case, as we have mentioned before, the suit had appeared in the list from the 5th of March, 1980 though it was filed in June 1979 and the previous application under Chap. 13A of the Rules of the Original Side of this Court was refused and leave to file the written statement was given within certain time. It

is true that the suit has appeared in the list from the 5th March, 1980 and the application for amendment was made on the 31st March. The explanation given in the application for amendment was that there was a consultation on the 26th March with the learned lawyers appearing in the proceedings and as a result of the consultation it was felt that without the amendment the appellant would be estopped from pleading his case. In those circumstances the application was made. In the background of the facts and circumstances of the case and in the background of the loan given by the bank particularly in a case in which a director of the company was made a guarantor, in our opinion, it cannot be said that the application was so belated or frivolous as to merit dismissal on the ground of the abuse of the process of the Court. The learned Judge further relied on certain other grounds which we have mentioned before namely, that the ground was without merit and secondly this was inconsistent pleading. An inconsistent claim can be made in the written statement by amendment. Reliance in this connection may be placed on the observations of the Calcutta High Court in the case of *Nrisingh Paul v. Steel Products Ltd.*, AIR 1953 Cal 15. The learned advocate for the respondent however pleaded that a vested right of the plaintiff was sought to be dislodged by the proposed amendment and if such was the case, according to him, the amendment should not be entertained. He drew our attention to the observations of the Supreme Court in the case of *Modi Spinning & Weaving Mills Co. Ltd. v. Ladha Ram & Co.*, AIR 1977 SC 680. There the facts were entirely different. Firstly by the proposed amendment an attempt was sought to be made to retract from the original written statement and that too after 3 years from the filing of the written statement. That attempt might or might not constitute an amendment in the real sense. Here it is not such a case. In para 8 of the original written statement there is a complete denial of the claim by the bank against the appellant. In the amendment one of the additional grounds sought to be included was that a compromise was effected with the defendant No. 1 and the defendant No. 1 had been released by the bank behind the back of the appellant (sic). Therefore, we are of the opinion that on the merit also this amendment should have been allowed by the learned trial Judge. It was sought to be urged on behalf of the appellant that in making the observations the learned trial Judge expressed his views

about the falsity or otherwise of the version of the appellant and as such it raised a question of jurisdiction. We do not propose to pursue the matter on this aspect in the view we have taken on the other aspect of the matter. But in view of the fact that the appellant had made the application and the suit was appearing in the list we allow this appeal and set aside the order of the learned trial Judge but we direct that the appellant should pay the costs thrown away at the trial assessed at 30 GMS. within four weeks from date and the amendment is to be effected within six weeks thereafter on a signed copy of the minutes and the suit would appear in the appropriate list as expeditiously as possible thereafter.

9. Costs of this appeal will abide by the result of the suit. Leave is given to reverify the written statement.

10. Department and all parties to act on a signed copy of the minutes.

C. K. BANERJI, J.:— I agree.

Order accordingly.

AIR 1982 CALCUTTA 559

S. C. GHOSE, C. J. AND R. N. PYNE, J.

Smt. Laxmi Moni Basak and others, Appellants v. Kedar Nath Basak and others, Respondents.

Appeal No. 62 of 1980, D/- 16-7-1982.

W. B. Court-fees Act (10 of 1970), S. 7 (iv), Sch. II, Art. 15 (VI) — Court-fees — Valuation of suit for jurisdiction — Failure of plaintiffs to value reliefs — Value as determinable for the computation of court-fee and value for purposes of jurisdiction would be same. (Suits Valuation Act (1887), S. 8).

In the plaint it was alleged that for the purpose of jurisdiction the value of the suit exceeded Rs. 50,000. However, the plaintiffs paid the fixed court-fee as provided in Schedule II Art. 15 (IV) inasmuch as the reliefs could not be valued. The plaintiffs had asked for injunction and also claimed for accounts and a decree for amount to be found due upon such accounts. The plaintiffs had also claimed for administration of the trust estate which comes within the relief of accounts. In the plaint the plaintiffs had not stated the value of such reliefs.

Held that the reliefs fell within the Items (c) and (e) of Section 7 (iv). In respect of such reliefs courts-fees were to be paid ad valorem under Court-fees Act and

the value as determinable for the computation of court-fees and the value for purposes of jurisdiction would be the same, if the value for the purpose of computation of court-fee was a particular amount that particular amount would also be the value for the purpose of jurisdiction. Thus the court-fees would be payable on the amount of Rupees 50,000/- which was fixed for the purpose of jurisdiction. Case law discussed.

(Paras 21, 22)

Cases Referred: Chronological Paras
(1980) Suit No. 402 of 1979, D/- 11-2-1980
(Cal), Smt. Laxmi Moni Basak v. Kedar Nath Basak 2

AIR 1979 SC 989 15, 17, 19

AIR 1958 SC 245 14, 18

R. N. PYNE, J.:— A question concerning determination of the court-fees arises for consideration in this appeal which is directed against the judgment and order of Mrs. Khastgir, J. dated Feb. 11, 1980.

2. The plaintiffs-appellants filed Suit No. 402 of 1979 (Smt. Laxmi Moni Basak v. Kedar Nath Basak) concerning the trust property under a Deed of Settlement dated 9th Oct., 1934 executed by one Madhab Ballav Basak. The said Deed of Settlement was in respect of three properties namely, 350-A, 350-B and 350/1, Upper Chitpur Road (now known respectively Nos. 327/1, 327/2 and 325, Rabindra Sarani) Calcutta. It appears that by the deed of transfer dated 24th June, 1950 premises Nos. 350-A and 350-B, Upper Chitpur Road were transferred to and vested absolutely in the beneficiaries mentioned in the said deed. The trust is, however, still operating in respect of premises No. 350/1, Upper Chitpur Road (No. 325 Rabindra Sarani), Calcutta. It is stated in the plaint that the defendants Nos. 1, 3 and 4 are the present trustees. It is not necessary to refer in detail to the plaint. In the plaint the plaintiffs have made various allegations and charges against the trustee defendants regarding mismanagement and misappropriation of the trust property and/or funds as also for accounts. The prayers made in the plaint are as follows:

"(a) Leave under Clause 12 of the Letters Patent.

(b) The defendants Nos. 1, 3 and 4 be removed from acting as trustees of the Trust constituted by the Deed of Settlement dated October 9, 1934.

(c) Perpetual injunction restraining the defendants Nos. 1, 3 and 4 from further acting as trustees of the aforesaid trust.

(d) Decree directing the defendants Nos. 1, 3 and 4 to make full and faithful disclosure

of their dealings with the aforesaid trust property.

(e) Decree directing the defendants Nos. 1, 3 and 4 to render true, faithful and complete accounts of their dealings with the aforesaid trust property its income realisations and disbursements.

(f) Decree directing the defendants Nos. 1, 3 and 4 to pay the amounts found due on such enquiry to the persons entitled thereto in accordance with their respective shares or to the Trustees or Trustees to be appointed herein.

(g) Appointment of the trustees or trustees of the aforesaid trust and, if necessary, a direction vesting the trust property in them.

(h) Direction upon the new trustee or trustees, if appointed to apply the income of the said trust property for the benefit of all beneficiaries in accordance with directions contained in the said deed of settlement dated October 9, 1934.

(i) A Decree and/or order for sale of the aforesaid trust property and payment of the proceeds thereof to the persons entitled thereto in accordance with their respective shares after setting apart sufficient amounts for payment of annuity to the defendants Nos. 9 and 10 as mentioned in the plaint.

(j) Framing of a Scheme for proper administration of the trust and suitable directions therefor.

(k) Injunction.

(l) Receiver;

(m) Costs.

(n) Further or other reliefs."

3. In paragraph 31 of the plaint it is alleged that for the purpose of jurisdiction the value of the suit exceeds Rs. 50,000/-. In paragraph 32 of the plaint it is stated that inasmuch as the reliefs cannot be valued the plaintiffs pay the fixed court-fee of Rs. 15/- as provided in Art. 15 (VI) Sch. II of the West Bengal Court-fees Act, 1970 and the plaintiffs have further undertaken to pay additional court-fees, if required. Hence the fixed amount of court-fees of Rs. 15/- has been paid by the plaintiffs on the ground stated above.

4. The defendants Nos. 1, 3 and 4 have entered appearance in this suit. The time for filing of the written statement has, expired on 3rd August, 1979.

5. On 31st July, 1979 Kedar Nath Basak, Dilip Kumar Basak, Smt. Chhabi Basak, defendants Nos. 1, 3 and 4 as petitioners made an application for an order directing the plaintiffs to pay additional court-fees of

Rs. 2,347.50 within a fortnight from the date of the order to be made on the petition and in default of the plaintiffs' paying the additional court-fees as aforesaid within the time as may be directed, the plaint be taken off the file and the suit be dismissed with costs. The allegation in the petition is that although the plaintiffs have stated that for the purpose of jurisdiction the value of the suit exceeds Rs. 50,000/- yet they have paid court-fees of Rs. 15/- only. According to the petitioners, the proper court-fees payable is Rs. 2,362.50 p. on the valuation of the suit made by the plaintiff and therefore after deducting the amount already paid by the plaintiffs, the plaintiffs are liable to pay a further court-fees of Rs. 2,347.50.

6. In the affidavit-in-opposition filed on behalf of the plaintiffs-appellants it is stated that proper amount of court-fee of Rs. 15/- in accordance with the provisions of the West Bengal Court-fees Act, 1970 has been paid. Further, the plaint was presented to the Stamp Reporter and he was satisfied that the due and proper court-fees payable on the plaint was Rs. 15/-. Hence, according to the appellants, proper court-fees have been paid on the plaint.

7. In the Court of the first instance it was contended on behalf of the petitioners (the respondents herein) that court-fees must be paid on the basis of the valuation fixed by the plaintiff for the purpose of jurisdiction. As the suit was valued at Rs. 50,000/- proper court-fee payable was Rs. 2,362.50 p. It was further contended that if valuation for the purpose of court-fees was Rs. 15/- the valuation for the purpose of jurisdiction could not exceed Rs. 15/- and hence, the plaintiffs should have filed the suit in other Court. The contention of the respondents (the appellants herein) in the Court of the first instance was that inasmuch as it was not possible to estimate money value of the subject matter of dispute and as the same was not otherwise provided by the West Bengal Court-fees Act the fixed sum of Rs. 15/- was payable in respect of the suit under Sch. II Item 15 (vi) of the said Act. Further, the valuation of the suit for the purpose of jurisdiction should not be the value for the purpose of determination of court-fees.

8. The learned Judge of the Court of the first instance accepting the contentions of the petitioners and holding that the plaintiffs have valued the suit over Rs. 50,000/- made an order directing the plaintiffs to pay additional court-fees on the valuation made for the purpose of jurisdiction within a month from the date; in default there would be an

order in terms of prayer (b), that is, the plaint would be taken off the file and the suit should be dismissed with costs. It was further held that the plaintiffs paid only Rs. 15/- for the purpose of court-fees then naturally considering the relief asked for in the plaint for the purpose of jurisdiction would be dependent on the valuation of the court-fees as the plaintiff's case did not strictly come under Section 7 (iv) sub-section (b) of the Court-fees Act. By the order the learned Judge also extended the time for filing of the written statement.

9. Before proceeding further it would be convenient to set out the relevant provisions of the West Bengal Court-fees Act, 1970 and the Suits Valuation Act, 1887.

10. Section 7 of the Court-fees Act relevant for this case provides as follows:

"7. Computation of fees payable in certain suits. The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:

(iv) In suits—

(a) for movable property of no market value — for movable property where the subject-matter has no market value, as, for instance, in the case of documents relating to title.

(b) for declaratory decree and consequential relief — to obtain a declaratory decree or order, where consequential relief is prayed.

(c) for injunction — to obtain an injunction,

(d) for easement — for a right to some benefit (not herein otherwise provided for) to arise out of land, and

(e) for accounts — for accounts — according to the amount at which the relief sought is valued in the plaint or memorandum of appeal subject to the provisions of S. 11.

In all such suits the plaintiff shall state the amount at which he values the relief sought."

11. Section 11 of the West Bengal Court-fees Act provides as follows:

11. Inquiry as to valuation of suits— If the Court is of opinion that the subject matter of any suit has been wrongly valued, it may revise the valuation and determine the correct valuation and may hold such inquiry as it thinks fit for such purpose. Item 15 (VI) of Schedule II of the said Act provides as follows:

Number

Proper Fee

15. Plaint or memorandum of appeal in each of the following suits:—

(vi) every other suit where it is not possible to estimate at a money-value the subject-matter in dispute and which is not otherwise provided by this Act." Fifteen rupees.

12. Section 8 of the Suits Valuation Act, 1887 is as follows:

8. Court-fee value and jurisdictional value to be the same in certain suits.— Where in suits other than those referred to in the Court-fees Act, 1870 Section 7, paras (v), (vi) and (ix) and para (x), Clause (d), court-fees are payable ad valorem under the Court-fees Act, 1870, the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same.

13. The main question that arises for consideration in this appeal is whether correct amount of court-fee has been paid on the plaint in this suit.

14. It was contended on behalf of the appellants that Section 7 of the West Bengal Court-fees Act, 1970 provides for computation of court-fees payable in suits mentioned therein. Section 7 (iv) of that Act, inter alia, provides that in suits to obtain declaratory decree, injunction and for accounts court-fees shall be computed according to the amount at which relief sought is valued in the plaint and further that in all such suits the plaintiff shall state the amounts at which he values the relief sought for. It was further submitted that Sch. II Item 15 (vi) of the said Act specifically lays down that where it is not possible to estimate the money value of the subject-matter in dispute a fixed court-fee of Rs. 15/- shall be payable. It was also the submission on behalf of the appellants that the meaning of Section 7 (iv) read with Schedule II Art. 15 (vi) of the said Act is that the plaintiff is required to state the amount at which he values the suit provided of course it is possible for the plaintiff to estimate the money value of the subject matter in dispute. Any other meaning would render the specific provisions of Item 15 (vi) of Sch. II of the said Act superfluous. In the instant case, it is not the case of the defendants that it was possible for the plaintiffs to estimate the money value of the subject matter of dispute in the suit but the case in the petition is that as the plaintiffs have alleged that for the purpose of jurisdiction the value of

the suit exceeds Rs. 50,000/- court-fee was payable on Rs. 50,000/- being Rs. 2,362.50 p. It is further submitted that the plaintiffs have undertaken to pay additional court-fees if required. Counsel for the appellants also submitted that the judgment and order of the learned trial Judge is erroneous. The learned Judge proceeded on the basis that the plaintiffs have valued the suit over Rs. 50,000/- and payment of ad valorem court-fees of Rs. 15/- is therefore not in accordance with the said Act. Accordingly the learned Judge concluded that court-fee is payable on the plaintiffs valuation of the suit as Rs. 50,000/-. According to counsel the judgment and order of the learned trial Judge that the plaintiffs are obliged to pay court-fees on "the valuation given for the purpose of jurisdiction" is clearly contrary to the Supreme Court decision reported in AIR 1958 SC 245 (Sethappa Chettiar v. Ramanathan). Further, the finding of the learned trial Judge that the plaintiffs had incorrectly valued the suit for the purpose of Court-fees at Rs. 15/- is erroneous. It was further submitted that the plaintiffs did not value the suit for the purpose of payment of court-fees, the plaintiffs' case being that the plaintiffs are unable to value the subject matter of dispute in the suit and therefore, a fixed court-fee of Rs. 15/- has been paid in accordance with Item 15 (vi) of Sch. II of the said Act.

15. Referring to the case of Meenakshisundaram Chettiar v. Venkatachalam Chettiar, AIR 1979 SC 989 relied upon by the respondents' counsel it was submitted that the Supreme Court did not lay down that the plaintiff must in all cases value the subject matter of the dispute in the suit. Further, in that case the Supreme Court was not considering the case where the plaintiff was unable to put even a tentative value. According to counsel, there may be a case where the subject matter of the dispute is a declaration regarding right of way to a valuable property. Clearly this cannot be estimated in money value. Further Section 7 (iv) (e) which deals with accounts cannot be singled out from Section 7 (iv) (a), (b), (c) and (d). Different principle cannot apply with regard to the suit for accounts and suits for declaration and injunction. It is possible that the plaintiff is unable to value the subject matter of dispute in a suit even tentatively where declaration or injunction is prayed for.

16. On behalf of the respondents it was contended that in the instant case in view of the prayers of the plaint it cannot be said that the reliefs or the subject matter of the

suit cannot be valued or that there is no provision in the Act for valuation of the subject matter of this suit for the purpose of court-fees. It is submitted that the plaintiffs in the suit have claimed, inter alia, for injunction, accounts and administration of the trust estate.

17. It has been contended that those reliefs are to be valued according to S. 7 (iv) (c) and (e) of the Act. According to the said section, the plaintiff shall state the amount at which he values those reliefs. It is also stated that according to Section 8 of the Court-fees Act the value for determination of the computation of the Court-fees and the value for the purpose of jurisdiction shall be the same. It has been further submitted that if it is not possible for the plaintiffs to state the correct value about those reliefs they must state at least the tentative value of such reliefs. It has also been the submission of the counsel as only Rs. 15/- has been paid for court-fees this suit should have been filed in other Court and not in the High Court. It has been further contended that in the instant case since the reliefs claimed relate to the trust property, being the subject matter of this suit and the value whereof according to the plaintiffs is over Rs. 50,000/- the learned trial Judge has correctly determined the value of the suit for the purpose of court-fees as well as the amount of court-fees payable in respect of the suit. In support of his above contention reliance was placed on the case of Meenakshisundaram Chettiar v. Venkatachalam Chettiar, AIR 1979 SC 989.

18. In the case of Sethappa Chettiar v. Ramanathan Chettiar, AIR 1958 SC 245 Supreme Court construing Section 7 of the Court-fees Act and Section 8 of Suits Valuation Act observed as follows (at p. 251):

"If the scheme laid down for the computation of fees payable in suits covered by the several sub-sections of Section 7 is considered, it would be clear that, in respect of suits falling under sub-section (iv), a departure has been made and liberty has been given to the plaintiff to value his claim for the purposes of court-fees. The theoretical basis of this provision appears to be that in cases in which the plaintiff is given the option to value his claim, it is really difficult to value the claim with any precision or definiteness. Take for instance the claim for partition where the plaintiff seeks to enforce his right to share in any property on the ground that it is joint family property. The basis of the claim is that the property in respect of which a share is claimed is joint family property.

In other words, it is property in which the plaintiff has an undivided share. What the plaintiff purports to do by making a claim for partition is to ask the Court to give him certain specified properties separately and absolutely on his own account for his share in lieu of his undivided share in the whole property. Now it would be clear that the conversion of the plaintiff's alleged undivided share in the joint family property into his separate share cannot be easily valued in terms of rupees with any precision or definiteness. That is why legislature has left it to the option of the plaintiff to value his claim for the payment of court-fees. It really means that in suits falling under S. 7 (iv) (b) the amount stated by the plaintiff as the value of his claim for partition has ordinarily to be accepted by the Court in computing the court-fees payable in respect of the said relief. In the circumstances of this case it is unnecessary to consider whether, under the provisions of this section the plaintiff has been given an absolute right or option to place any valuation whatever on his relief."

* * * * *

"In other words, so far as suits falling under Section 7 sub-section (iv) of the Act are concerned, Section 8 of the Suits Valuation Act provides that the value as determinable for the computation of court-fees and the value for the purposes of jurisdiction shall be the same. There can be little doubt that the effect of the provisions of Section 7 is to make the value for the purpose of jurisdiction dependent upon the value as determinable for computation of court-fees and that is natural enough. The computation of court-fees in suits falling under Section 7 (iv) of the Act depends upon the valuation that the plaintiff makes in respect of his claim. Once the plaintiff exercises his option and values his claim for the purpose of court-fees, that determines the value for jurisdiction. The value for court-fees and the value for jurisdiction must no doubt be the same in such cases; but it is the value for court-fees stated by the plaintiff that is of primary importance. It is from this value that the value for jurisdiction must be determined. The result is that it is the amount at which the plaintiff has valued the relief sought for the purposes of court-fees that determines the value for jurisdiction in the suit and not vice versa."

19. In the case of *Meenakshisundaram Chettiar v. Venkatachalam Chettiar*, AIR 1979 SC 989 the Supreme Court has observed as follows (at p. 993):

"It is therefore necessary that the plaintiff should take care that the valuation is adequate and reasonable taking into account the circumstances of the cases. In coming to the conclusion that the suit is undervalued the Court will have to take into account that in a suit for accounts the plaintiff is not obliged to state the exact amount which would result after the taking of the accounts. If he cannot estimate the exact amount he can put a tentative valuation upon the suit for accounts which is adequate and reasonable".

20. On the basis of the said two Acts and the decision of the Supreme Court it has to be decided whether the payment of fixed amount of court-fees at Rs. 15/- under Item 15 (vi) of Sch. II is proper and correct. According to the plaintiffs as in the instant case it is not possible to value the reliefs claimed and it is also not possible to estimate at a money value of the subject matter in dispute and which is not otherwise provided for by the Act a fixed amount of court-fees is only payable in this case.

21. For determination of the question whether correct amount of court-fees has been paid or not, an analysis of the reliefs claimed by the plaintiff and the nature of the subject matter in dispute stated in the plaint is to be considered. In prayer (c) of the plaint, the plaintiffs have asked for injunction. In prayers (d), (e) and (f) of the plaint, the plaintiffs have claimed for accounts and a decree for amount to be found due upon such account. In prayer (j), the plaintiffs have claimed for administration of the trust estate and this comes within the relief of account. These reliefs, it appears, come within the Items (c) and (e) of sub-section (iv) of Section 7 of the Act. This being the position, according to Section 7 the plaintiffs shall state the amount at which they value the reliefs sought. In the plaint the plaintiffs have not stated the value of the said reliefs which according to Section 7 is mandatory for the plaintiffs to do. If it is not possible to give correct or accurate valuation in respect of the said reliefs at this stage then the plaintiffs will have to give at least tentative values of the same. According to Section 8 of the Suits Valuation Act the value given by the plaintiff for those reliefs would also be the value for the purpose of jurisdiction.

22. In the instant case, it appears that as the plaintiffs have not stated the value of the above reliefs or in other words have wrongly valued the reliefs and/or the subject matter of the suit the trial Court in exercise

of the power conferred by Section 11 of the Court-fees Act has corrected the value of the reliefs and/or the subject matter of the suit. The learned trial Judge has fixed the value for the purposes of court-fees at Rs. 50,000/-. The question is whether fixation of the amount of court-fees has been correctly made or not. In respect of the reliefs mentioned above court-fees are to be paid ad valorem under Court-fees Act and the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same. This being the position, the value for the purpose of jurisdiction will be the same as the value for the purposes of court-fees. Hence, if the value for the purpose of computation of court-fee is a particular amount that particular amount will also be the value for the purpose of jurisdiction. In other words both the amounts should be the same. In the instant case as the value for jurisdiction is fixed at Rs. 50,000/- and if this is dependent upon and be same as the value for the court-fees then naturally court-fees become payable on that amount. Apart from reliefs mentioned above the plaintiffs have also made other prayers as will appear from the plaint. In the above view of the matter, in our view, the learned trial Judge has correctly determined the amount payable as court-fees for this suit.

23. For the reasons aforesaid the appeal is dismissed. Time for payment of further court-fees as directed by the Court of first instance is extended by four weeks from date. In default of such payment the plaint shall be taken off the file and the suit will stand dismissed with cost. If further court-fee is paid then the time to file written statement will stand extended by two weeks from the time fixed for payment of court-fees and in that event the cost of this appeal will abide by the result of the suit.

S. C. GHOSE, C. J.:— I agree.

Appeal dismissed.

AIR 1982 CALCUTTA 564

ANIL K. SEN AND

B. C. CHAKRABARTI, JJ.

Nakul Chandra Dutta, Petitioner v. Ajit Kumar Chakrabarty and others, Opposite Parties.

C. R. No. 2130 of 1980, D/- 26-3-1982.

Civil P. C. (5 of 1908), O. 21, R. 90 —
**Setting aside of sale — Limitation for —
Misstatement as to valuation of property by**

FZ/GZ/C407/82/BNP/DVT—H

decree-holder — Sale of property at too low a price — Decree-holder purchasing the property — Purchaser cannot raise bar of limitation — Limitation Act (1963), Sec. 17. (Limitation Act (1963), S. 17).

In the case of an application to set aside a sale on the ground of fraud, under O. 21, R. 90, C. P. C. limitation runs not from the date when the applicant has some hearsay knowledge of the factum of sale, but when he has a clear and definite knowledge of the facts constituting the fraud. (Para 8)

The facts proved in the case indicated that the process had not been duly served on all the judgment-debtors. The applicant judgment-debtor was not served. It was also proved that the sale proclamation contained a deliberate misstatement as to the value of the encumbrance. It was further proved that the valuation put by the decree holder in the sale proclamation was shockingly low. The evidence of the applicant that he had no knowledge of the execution sale prior to the date claimed by him was acceptable. The decree-holder or for the matter of that the person who has subsequently purchased the property from the decree-holder for a paltry sum of Rs. 25,000/- only could not show that the applicant had knowledge at an earlier date. From the conduct of the decree-holder and the purchaser it could be easily inferred that they were acting in concert to defraud the other co-sharers. When the circumstances are such that fraud may be presumed as in this case, the burden is on the defendant who sets up limitation to show that the applicant had clear knowledge of the facts constituting the fraud at a time which is too remote to allow him to bring the action.

(Para 19)

Where there is a non-compliance with R. 67 of O. 21, such irregularity taken in conjunction with the other irregularities such as failure to furnish the particulars required under R. 66 and the deliberate act of undervaluation so far as the property is concerned, and misstatement so far as the value of encumbrance is concerned, gives a totally different complexion to the case. They together show and establish fraud on the Court and also the attempt to fraudulently conceal the relevant facts from the judgment-debtor applicant. Such being the position and there being nothing to indicate that the applicant had clear knowledge of the facts constituting the fraud at a time which is too remote, the applicant is entitled to invoke Section 17 of the Limitation Act for the purpose of extending the period of limitation.

AIR 1945 PC 67; AIR 1973 SC 2593 and
AIR 1950 Mad 509, Foll. (Para 23)

Cases Referred:	Chronological	Paras
AIR 1974 SC 1331		17
AIR 1973 SC 2593		21
AIR 1971 SC 2337		14, 23
AIR 1971 Cal 87 : 74 Cal WN 469		20
ILR (1968) 1 Cal 43		20
(1967) 71 Cal WN 649		20
AIR 1964 SC 1300		13
AIR 1956 Cal 59		20
AIR 1954 Cal 604		16
AIR 1951 SC 16 : 1951 All LJ 8		18
AIR 1950 Cal 520		16
AIR 1950 Mad 509		23
AIR 1945 PC 67 : 1945 All LJ 276		20, 21, 23
AIR 1935 PC 85 : 62 Ind App 80 : 1935 All LJ 578		18
AIR 1934 Cal 205 : 37 Cal WN 1054		16
AIR 1921 Cal 251 : ILR 48 Cal 119		8
(1912) 16 Cal WN 894		15

B. C. Dutt, Maloy Kumar Bose and Nanda Dulal Nayek, for Petitioner; Sakti Nath Mukherjee, Pradipto Roy (for No. 1) and Bimal Jyotsna Chatterjee (for No. 3), for Opposite Parties.

B. C. CHAKRABARTI, J.:— This Rule was issued at the instance of the petitioner/decree-holder and is directed against an appellate order passed in Misc. Appeal No. 62 of 1979 reversing the order of the trial Court in Misc. Case No. 48 of 1976 arising out of an application under Order 21, Rule 90 of the Civil P. C. The application under O. 21, R. 90 of the Code was filed by the opposite party No. 1 on 22-9-1976 for setting aside a sale held on 1-7-1968.

2. The facts leading to the filing of the application under O. 21, R. 90 of the Civil P. C. may be briefly stated thus.

3. One Gopal Chandra Chakraborty was the owner of 3½ cottahs of land with a three storeyed building standing thereon, being premises No. 372/5, Russa Road South, subsequently renumbered as 3, Deshapran Sashmal Road. Gopal Chandra obtained a loan of Rs. 30,000/- from Metropolitan Insurance Company Limited. The decree-holder Nakul Chandra Dutta instituted Suit No. 459 of 1952 against opposite party No. 3 Panchanan Chakraborty for recovery of a loan of Rs. 6,000/- with interest in the original side of this Court and obtained a decree for Rs. 9,000/- inclusive of interest. Gopal Chandra, father of Panchanan was impleaded as a co-defendant in this suit and as such was a co-judgment-debtor. Metropolitan Insurance Company Limited instituted Title

Suit No. 79 of 1953 in the 3rd Court of the learned Subordinate Judge at Alipore for recovery of the principal sum of Rs. 30,000/- together with interest and obtained a decree on 7-5-1953 for Rs. 39,165.34. Gopal Chandra Chakraborty died in 1955 leaving behind his widow and 3 sons, opposite parties 1, 2 and 3. In 1960 Nakul Chandra got the decree passed by the High Court in his favour transferred to the 3rd Court of the learned Subordinate Judge, Alipore for execution and Money Execution Case No. 38 of 1960 was started. Life Insurance Corporation which had taken over the business of Metropolitan Insurance Company after nationalisation, started Title Execution Case No. 23 of 1960 in the same 3rd Court of the learned Subordinate Judge. In this Execution Case No. 23 of 1960, the widow and sons of Gopal Chakraborty deposited Rs. 30,000/-. In the execution case at the instance of Nakul Chandra Dutta, the property namely, No. 3, Deshapran Sashmal Road was attached and put to sale by auction. In the sale that followed Nakul Chandra Dutta, the decree-holder purchased the property for Rs. 9,000/- and odd on 1-7-1968. The widow of Gopal Chandra acting through Panchanan filed an application for setting aside the same on 29-7-1968 claiming that the property was worth Rs. 1,50,000/-. The application, however, was dismissed for default on 19-8-1972. The sale in favour of Nakul was confirmed on 4-12-1972. It is significant, however, that such confirmation was obtained only when the opposite party No. 1 Ajit Kumar Chakraborty (who had filed the application under O. 21, R. 90 of the Code) one of the sons of Gopal Chandra had started Title Suit No. 71 of 1972 for partition of the self-same property, namely, No. 3, Deshapran Sashmal Road. This suit was contested by his mother and his brother Panchanan who in their defence denied plaintiff's title but did not disclose the auction sale already held. The suit was eventually decreed in a preliminary form on 20-2-1974. The appeal filed by the mother and Panchanan against the preliminary decree for partition being Title Appeal No. 503 of 1974 was dismissed on 13-2-1975. Though the sale was confirmed in 1972, the auction-purchaser took no steps for taking delivery of possession until 1974. He took out the sale certificate in March, 1974 and applied for delivery of possession under O. 21, R. 95 on 20-6-1974. Faked possession was taken when opposite parties 2 and 3 along with their mother continued to remain in possession and shortly thereafter when Panchanan's appeal against the parti-

tion decree failed in July 1976 he purchased the disputed property from the decree-holder Nakul for a sum of Rs. 25,000/-. The opposite party No. 1 Ajit Kumar Chakraborty thereupon filed an application under O. 21, R. 90 of the Code for setting aside the auction sale held on 1-7-1968 which was registered as Misc. Case No. 48 of 1976. In this application Ajit claimed that he had not been duly served with the processes in the execution case, that he had no knowledge of the execution case or of the sale that took place and that he came to know of the sale long thereafter in August 1976, when he was informed by a tenant of the disputed premises that Nakul had sold it to Panchanan and that the tenant had been asked to attorn and that the property was sold at a shockingly low value. The application under Order 21, Rule 90 of the Code was contested by Nakul and Panchanan.

4. The learned subordinate Judge did not accept the contention that the processes had not been properly served or that there was any irregularity in publishing and conducting the sale. He did not agree that the price fetched at the sale was shockingly low. He also found that the petitioner before him, namely, Ajit had failed to make out any case of fraud or fraudulent concealment so as to ask for extension of limitation. In that view of the matter, the learned Subordinate Judge dismissed the misc. case on contest. Being aggrieved, the opposite party No. 1 Ajit Kumar Chakraborty preferred an appeal. The learned appellate Judge substantially affirmed the findings arrived at by the learned Subordinate Judge but found upon a consideration of the materials on record that the failure of the Court in not mentioning in the sale proclamation the value put by the judgment-debtor was a material irregularity and that the petitioner had by reason of such irregularity sustained substantial injury. In that view of the matter, the appeal was allowed with the result that the execution sale was set aside.

5. The decree-holder Nakul Chandra Dutta has thereupon preferred the present revisional application on 25-6-1980. In September 1980, Ajit Kumar Chakraborty obtained a Rule against Nakul Chandra Dutta and others restraining them from demolishing any portion of the disputed premises or causing any damage thereto and changing the nature and character of any portion of the property and also from letting out the same to others till the disposal of C. R. No. 2130 of 1980, namely, the present revisional application.

6. Mr. Dutt appearing in support of the revisional application contended that there was no irregularity in publishing and conducting the sale, that the application for setting aside the sale filed nearly 8 years after the sale cannot be entertained, that the petitioner Ajit has failed to make out any case of fraud in the matter of publishing and conducting the sale so as to invoke extension of limitation with the aid of S. 17 of the Limitation Act. He also argued that the price fetched at the sale could not be said to be shockingly low and that has not been the finding of either of the Courts below.

7. Mr. Mukherjee appearing to oppose the revisional application on the other hand argued that the processes in the execution case had been deliberately suppressed and/or not properly served so that the petitioner Ajit had no knowledge of the execution case or of the sale that followed. He also complained that the decree-holder Nakul Chandra Dutta had joined hands with Ajit's brother Panchanan and they together actively contrived to keep the petitioner Ajit in the dark in regard to the sale. It is also his contention that Panchanan caused the property to be sold for a song in execution of a decree against himself and then entered into an unfair deal with the decree-holder and purchased the property for Rs. 25,000/- only so as to deprive the petitioner Ajit and his other brother with a view to grab the property entirely to his own benefit. According to Mr. Mukherji the fact that Panchanan allowed the earlier application for setting aside the sale to go by default and the auction-purchaser obtained a faked delivery of possession allowing Panchanan to remain in possession clearly indicate that as between the auction purchaser and Panchanan there was a clear understanding to effect a fraudulent sale solely with the object of depriving the other co-sharers of their share in the property. It was also contended by Mr. Mukherji that the value of the property was not less than Rs. 1,50,000/- on the date of sale and that the sale of the property for a sum of Rs. 9,000/- and odd only was certainly a sale at a shockingly low valuation. This, it was argued amounted to fraud on the Court and, as such, admitted of no bar of limitation.

8. It is clear from the recital of facts that the application for setting aside the sale was filed more than 8 years after the sale actually took place. The material question for our consideration, therefore, is whether the petitioner Ajit had knowledge of the execution proceedings and whether he was kept

out from such knowledge by reason of fraud practised by the decree-holder. If fraud is proved the applicant is entitled to the benefit of Section 17, that is to say, the period of limitation in that case would run from the date when the fraud first became known to the applicant. The initial onus is on the applicant to show that he had no knowledge of the same until within 30 days of the application. This onus, the applicant, namely, Ajit tried to discharge by referring to certain facts, namely, that he was not served with the processes in the execution case, that there was positive and deliberate misstatement in the execution case as also in the sale proclamation regarding the value of the property, that the value was many times more than what was actually shown in the sale proclamation, that the value suggested by one of the judgment-debtors in an application filed in the Court was not put in the sale proclamation in compliance with the provisions of Order 21, Rule 66 of the Code, that the sale had been adjourned from time to time without service of fresh sale proclamation and without any indication that fresh sale proclamation had been waived by the judgment-debtors and that throughout there was positive endeavour between the auction-purchaser and Panchanan to suppress the factum of sale from the opposite parties 1 and 2. On the first point, it appears upon a reference to Ext. 1 that the notice under O. 21, R. 22 of the Code was served upon Panchanan alone. The process-server's report indicates that except Panchanan none of the judgment-debtors were found and that Panchanan received notice after putting his signature on the return. Ext. 1 no doubt shows that Panchanan had been duly served but it does not appear that he had so received the notice on behalf of all the judgment-debtors. That the acceptance of the notice by Panchanan alone cannot be treated as sufficient, would be evident from the subsequent conduct of Panchanan which we shall have occasion to refer to later on. It also appears that in the execution case Panchanan alone entered appearance by filing a Vakalatnama. We see no reason why the other judgment-debtors whose property was intended to be sold in execution of the decree would not appear if they were properly served. The fact that Panchanan was acting in collusion and in collaboration with the decree-holder would be evident from his conduct in the partition suit filed by the applicant, Ajit. That suit was contested by Panchanan. Panchanan has been examined as witness No. 2 for the

opposite party in the misc. case. He has stated in his cross-examination that at the time when he filed the written statement in the partition suit he knew that Nakul Dutta had purchased the property in auction-sale and that he or for the matter of that his brothers had no subsisting interest therein. Yet this fact was not disclosed in the written statement and Panchanan has frankly confessed that he could not say why the fact was not so disclosed. We can, therefore, take it that even at that time Ajit had no knowledge of the execution sale. Mr. Dutt, however, drew out attention to two letters Exhibits A and A/1, both dated 30-3-1976 and contended that they indicate that at least at that time Ajit had knowledge of the execution sale. These letters were written by the applicant Ajit and there is a reference therein to some hearsay that Panchanan with the aid of his brother-in-law had purchased the house or is trying to do so. It is also stated that Panchanan and his brother-in-law had previously tried to misappropriate a considerable sum of money by forging the signatures of the applicant and his elder brother. It is also complained in the letters that those two persons of late are moving too frequently to Court. Mr. Dutt contends that the knowledge of the applicant about the sale of the property is attributable to the applicant at least with reference to these two letters. We are, however, unable to accept the contention. The letters at most indicate some hearsay knowledge about an intended purchase by Panchanan. There is nothing in these letters to suggest that the applicant had any knowledge of any Court sale. In the case of an application to set aside a sale on the ground of fraud, under O. 21, R. 90 of the Code limitation runs not from the date when the applicant has some hearsay knowledge of the factum of sale, but when he has a clear and definite knowledge of the facts constituting the fraud (See *Bhusan Mani v. Prafulla* (1921) ILR 48 Cal 119 : (AIR 1921 Cal 251)).

9. The evidence of the applicant is that after the appeal in the partition suit filed by him had been dismissed while he was contemplating filing an application for appointment of a Commissioner he came to learn from one of the tenants in the suit house, Sri R. K. Mehera, that the latter had received a notice from an advocate engaged by Nakul Chandra Dutta intimating that the house was sold to Panchanan and that arrears of rent, if any, should be paid to Panchanan. It is also his evidence that this put him into enquiry whereupon he learnt

about the execution sale to Nakul Chandra Duita and the subsequent sale by Nakul to Panchanan. The letters received by the tenant R. K. Mehera and those written by him have been exhibited. They substantially support the case of the applicant.

10. Mr. Mukherji also drew our attention to the fact that in the execution petition as also in the sale proclamation Ext. 7, the value of the property is shown as Rupees 36,000/- with a remark that it is subject to the balance of mortgage dues of Rs. 26,000/- approximately in Title Execution Case No. 23 of 1960. It is complained by Mr. Mukherji that not only the valuation was under-stated, the encumbrance, namely, the balance of mortgage dues to the tune of Rs. 26,000/- was a deliberate mis-statement. We have already indicated that the total dues of the Life Insurance Corporation for which the execution case was filed was Rs. 39,000/- and odd out of which Rs. 30,000/- had been paid. This sum was admittedly paid from out of the compensation received by the applicant and his co-sharers on account of certain land acquisition proceedings. Therefore, there could not have been such outstanding balance as stated in the execution petition. This was obviously done with a motive, namely, to scare away possible buyers.

11. Then again the valuation of Rupees 36,000/- as shown in the sale proclamation was definitely an under-valuation even according to Panchanan and his mother Prafulla Bala, since deceased. Prafulla Bala had earlier filed an application for setting aside the sale in which she claimed the valuation of the property to be about Rs. 1,50,000/-. Panchanan also filed an application (Ext. 4) in May 1961, claiming that the value of the property was Rs. 1,50,000/- or so.

12. We get some indication as to the nature of the property from the evidence on record. The land comprised is $3\frac{1}{2}$ cottahs. The building standing thereon is a three storeyed building. Panchanan in his cross-examination concedes that the house is close to the lakes intervened by one or two houses and the railway line. He could not deny the suggestion that the value of the house at the time of the auction sale was about Rs. 2,50,000/- or so. He has admitted that the house stands on the main road and the area is connected with about 10 bus routes besides the tram line. It is, therefore, clear that it is situated in a rather important residential area. It is common knowledge that with the partition of the country

and the influx of refugees from erstwhile East Pakistan the value of lands and buildings in and around Calcutta has been steadily rising. The fact is so patent and notorious that we can legitimately take judicial notice of it. We are unable to accept that Rs. 36,000/- was a proper value of the building in dispute. We further find that even according to Panchanan as far back as in 1961, value was about Rs. 1,50,000/-. It must have gone further up in 1968, when the sale took place. It is also significant to note that in the sale proclamation this value was not put. In the result valuable property was sold for a song and the co-sharers other than Panchanan suffered substantial injury.

13. Mr. Dutt appearing in support of the revisional application argued upon a reference to the case of *Dhirendra Nath v. Sudhir*, AIR 1964 SC 1300 that where a judgment debtor refrains from attending at the drawing up of the proclamation and does not object to the non-compliance with S. 35 of the Bengal Money Lender's Act, and where no substantial injury is caused to the judgment-debtor, the sale is not liable to be set aside under Order 21, Rule 90. In this case, however, it appears that the judgment-debtor had entered appearance and filed an objection but did not attend at the drawing up of the sale proclamation. In the case before us, we have found that the judgment-debtors were not all duly served and that one of them, namely, Panchanan had at one stage pleaded that the property was under-valued.

14. Mr. Dutt next referred to the case of *Radheshyam v. Shyam Behari*, AIR 1971 SC 2337 and argued that in order to set aside a sale mere proof of a material irregularity such as the one under R. 69 and inadequacy of price is not enough. What has to be established is that there was not only inadequacy of price but that inadequacy was caused by reason of the material irregularity or fraud. A connection between the inadequacy and the material irregularity has to be established. In this case, the lower Court's view that the applicant had been prejudiced as the sale realised was only Rs. 8,000/- although the value of the appellant's share was Rs. 20,000/-. This estimate was made by an Amin appointed by the Court without giving any opportunity to the respondent to be heard and the report of the Amin was filed in the Court below without notice to the respondent. In these circumstances, it was held that the report could not be relied upon and that inadequacy of price and material irregularity had not been established.

15. Mr. Dutt then referred to the case of *Narayan Sahoo v. Mohant Damodar Das*, (1912) 16 Cal WN 894 and argued that mis-statement of value, even if it can be described as fraud does not constitute fraudulent concealment and would not by itself bring the case under Section 18 of the Limitation Act (now Section 17) unless it is shown that the judgment-debtor by means of fraud has been kept from the knowledge of his right.

16. Reference was also made to the case of *Mujibar Rahman v. Raha Bux*, AIR 1954 Cal 604 and *Mihirlal v. Panchkari*, AIR 1950 Cal 520. In these cases, it has been held that mere under-statement in the valuation of sale proclamation does not amount to such fraudulent concealment as would bring the case within the scope of Section 18 of the Limitation Act. It was further observed that before any extension of time can be granted in an application for setting aside a sale it must be proved that the auction-purchaser — a person not claiming through the decree-holder — was either guilty of fraud or accessory to the fraud that prevented the judgment-debtor from knowing of the sale. It is significant that in the case before us the auction-purchaser is none other than the decree-holder. And he was the lone bidder at the sale. Mr. Dutt also referred to the case of *New Birlhum Coal Company Limited v. Surendra Nath*, (1933) 37 Cal WN 1054 : (AIR 1934 Cal 205). This decision lays down that although the value set forth in the sale proclamation may have been grossly low and the sale, as a result thereof may have been for a price which caused substantial injury to the judgment-debtor, still if the latter having had knowledge of the under-valuation did not appear at the settlement of price, he cannot afterwards have the sale set aside on the ground of such under-valuation. What happened in this case was that the judgment-debtors were proved to have known of the under-valuation years before the actual sale while they stood by and took various other objections. It was only after the sale was effected that they made a grievance of the under-valuation and it was held that in such circumstances the judgment-debtors could not be permitted to take a stand that they had suffered by reason of under-valuation.

17. Finally Mr. Dutt referred to the case of *Kayjay Industries v. Asnew Drums*, AIR 1974 SC 1331 to show that mere inadequacy of price cannot demolish every Court sale. The facts of this case, however, were different. There the properties to be sold comprised lands, buildings, factory, plant and machinery

of the judgment-debtor. The auction was adjourned on many occasions to secure a better and fairer price. At one stage the bid went up to Rs. 11,10,000. The decree-holder got the properties valued by a private valuer whose estimate of the value was above Rs. 17,00,000/-. The auction sale held thereafter fetched the highest offer of a little less than Rs. 11,00,000. The Court persuaded the buyer to raise the offer to a gross sum of Rs. 11,50,000/- and the Court approved the sale at that price. It was proved that there was no material irregularity in publishing or conducting the sale. Every effort was made to have the property sold to the highest offerer. Well-known industrialists in the public and private sectors knew about the sale and turned up. Yet offers reached a stationary level. In such circumstances, it was held that it could not be said that the executing Court committed any material irregularity in the conduct of the sale in accepting the highest offer.

18. Relying on these authorities Mr. Dutt contended that at the most it could be said that the property was sold at some under-value and that no case of fraud or irregularity in publishing or conducting the sale could be established. It was also contended that unless fraud is established the application for setting aside the sale filed so many years after the actual sale could not be allowed in view of the bar of limitation provided by the Limitation Act and that outside the limited discretion conferred by the Act in certain cases the Court has no general discretion to relieve a suitor from the operations of its provisions — the statute of limitations being statute of repose. (See AIR 1951 SC 16, (1935) 62 Ind App 80 : (AIR 1935 PC 85)).

19. In the instant case the facts proved indicate that the process had not been duly served on all the judgment-debtors. The applicant judgment-debtor was not served. It is also proved that the sale proclamation contained a deliberate mis-statement as to the value of the encumbrance. It is further proved that the valuation put by the decree-holder in the sale proclamation was shockingly low. The value could not be Rupees 36,000/- considering the extent of the property and its locational advantages. Even according to the estimate of one of the judgment-debtors the value was in the vicinity of Rs. 1,50,000/- in 1961. We have accepted the evidence of the applicant that he had no knowledge of the execution sale prior to the date claimed by him. The decree-holder or for the matter or that Pan-

chanan who has subsequently purchased the property from the decree-holder for a paltry sum of Rs. 25,000/- only could not show that the applicant had knowledge at an earlier date. From the conduct of the decree-holder Nakul Chandra Dutta and Panchanan Chakraborty it can be easily inferred that they were acting in concert to defraud the other co-sharers. When the circumstances are such that fraud may be presumed as in this case, the burden is on the defendant who sets up limitation to show that the applicant had clear knowledge of the facts constituting the fraud at a time which is too remote to allow him to bring the action.

20. In the case of *Marudanayagam v. Manicka Vasakam*, AIR 1945 PC 67 it has been held that where the low valuation of the property to be sold in the sale proclamation was based on a misstatement by the decree-holder as to the amount due under a prior encumbrance and the sale took place at a serious under-value due to the failure on the part of the decree-holder and the Court to carry out their obligations under Rule 68, the judgment-debtor must be taken to have sustained substantial injury. It was further held that if the decree-holder knew the true value of the property but deliberately under-valued it and himself purchased the property at what he knew was too low a figure based on an upset price accepted by the Court owing to his own initial misrepresentation, his conduct would amount to fraud on the Court and he would not be allowed to take advantage of his own fraud whatever the conduct of the judgment-debtor might have been. This decision of the Judicial Committee has ever since been considered as a ruling authority on the subject. It has been followed in many cases where the Court found the decree-holder to be guilty of non-compliance with the provisions of Rule 66 of Order 21 of the Code and of deliberately putting a low value which is shocking to the conscience. (see *P. C. Mukherji v. P. Mukherjee*, (1967) 71 Cal WN 649, *Sisir Kumar Mukherji v. Kanhaiyalal*, (1970) 74 Cal WN 469 : (AIR 1971 Cal 87), *Pankaj Kumar Pakhira v. Nanibala*, ILR (1968) 1 Cal 43; *Manmatha Nath v. Sachindra Kumar*, AIR 1956 Cal 59).

21. Apart from the shockingly low value put in the sale proclamation it is apparent that the provisions of R. 66 of O. 21 have not been duly observed. Rule 66 requires the proclamation of sale to contain and specify as fairly and accurately as possible, the property to be sold, any encumbrance to which the property is liable, the amount for

the recovery of which the sale is ordered and every other thing which the Court considers material for a purchaser to know in order to judge the nature and value of the property. Sub-rule (4) says that for the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters. In this case before us the Court acted mechanically in publishing the sale proclamation with the particulars as furnished by the decree-holder. It did not satisfy itself as to whether the particulars were fair and accurate. It is true that in most cases the Court has no means of checking the information supplied but nevertheless the Court ought, as far as possible to bring its mind to bear upon the contents of the application. The power conferred upon the Court by sub-rule (4) for the purpose of ascertaining the matters to be specified in the sale proclamation shows that the Court is not intended to act blindly on information supplied by the parties (See AIR 1945 PC 67 (supra); *Gajadhar Prasad v. Babu Bhakta Ratan*, AIR 1973 SC 2593). In this case the Court could gather some information upon a reference to the records of Title Execution Case No. 23 of 1960 of his own Court. A look into the same would have at once revealed that the judgment-debtor of that case valued the property at more than Rs. 2,00,000/-.

22. We are satisfied that the Court had failed to look into these matters.

23. Mr. Mukherji also complained that there was violation of the provisions of R. 69 of O. 21. That Rule enables the Court in its discretion to adjourn any sale to a specified day and hour and that when a sale is adjourned for a longer period than 7 days, a fresh proclamation under R. 67 shall be made unless the judgment-debtor consents to waive it. In the instant case there were several adjournments for a period longer than 7 days and there was no fresh sale proclamation. It appears, however, that Panchanan had on all such occasions waived service of fresh sale proclamation. We have already indicated that the records show that Panchanan alone was served and that he alone entered appearance in the execution case. Therefore, the waiver by Panchanan could bind Panchanan but not the other judgment-debtors who had not waived fresh sale proclamation. Mr. Dutt, however, in this context referred to the case of *Radheshyam v. Shyambehari* (AIR 1971 SC 2337) (supra) to contend that mere proof of an

irregularity such as non-compliance of R. 69 is not enough to entitle a judgment-debtor to have the sale set aside. It has already been indicated that the facts of that case were different. This part had the applicant's case rested on this irregularity alone it might possibly be contended that this was not a material irregularity in publishing and conducting the sale but this irregularity taken in conjunction with the other irregularities such as failure to furnish the particulars required under R. 66 and the deliberate act of under-valuation so far as the property is concerned, and mis-statement so far as the value of encumbrance is concerned, gives a totally different complexion to the case. They together show and establish fraud on the Court and also the attempt to fraudulently conceal the relevant facts from the judgment-debtor applicant. Such being the position and since we have found that there is nothing to indicate that the applicant had clear knowledge of the facts constituting the fraud at a time which is too remote, the applicant is entitled to invoke S. 17 of the Limitation Act for the purpose of extending the period of limitation (See *Venkanna v. Venkanna*, AIR 1950 Mad 509). Though the findings of the learned Judges of the Courts below in regard to service and knowledge of sale were against the applicant we must accept the contention of Mr. Mukherji that such findings were not arrived at on actual consideration of the material documents and evidence on record. Hence Mr. Mukherji is entitled to support the order made by the appeal Court in favour of the applicant by successfully assailing such findings. Alternatively, we must uphold the view of the Court of appeal below that in this case the sale having been effected on a fraudulent under-valuation, there was fraud on the Court resulting in substantial injury to some of the co-sharers-judgment-debtors and the decree-holder himself having purchased in such a sale, he cannot take advantage of his own wrong. Such a sale is liable to be set aside by the Court irrespective of the question of limitation as held by the Privy Council in the case of *Marudanayagam v. Manicka* (AIR 1945 PC 67) (supra) and the line of decisions of this Court based on the above decision of the Privy Council referred to hereinbefore.

24. Hence upon a consideration of all the materials we are satisfied that the applicant Ajit Chakraborty has succeeded in making out a good case for setting aside the sale. The decree-holder or for the matter of that the subsequent purchaser Panchanan

has failed to establish any circumstance to entitle them to invoke the bar of limitation particularly when the facts proved establish a clear case of fraud on the Court. In that view of the matter, the order impugned in this revisional application, namely, the appellate order passed in Misc. Appeal No. 62 of 1979 is not required to be interfered with.

25. The revisional application accordingly fails and is hereby dismissed. The Rule is discharged.

26. The connected application giving rise to C. R. No. 3315 of 1980 arising out of an application by Ajit Chakraborty, the applicant under O. 21, R. 90 of the Code for injunction is allowed and the Rule is made absolute. There will be no order for costs. Let the records be sent down forthwith.

ANIL K. SEN, J.:— I agree.

Revision dismissed.

AIR 1982 CALCUTTA 571

CHITTATOSH MOOKERJEE AND RAM-KRISHNA SHARMA, JJ.

Radheshyam Agarwalla (deceased by L. Rs.), Appellant v. Maharaj Bahadur Singh and others, Respondents.

A. F. O. D. No. 376 of 1973, D/- 31-8-1981.*

(A) Transfer of Property Act (4 of 1882), S. 41 — Benami transaction — Proof — Matters to be taken into consideration — Burden of proof. (Evidence Act (1872), Sections 101-104). (Benami — Benami transaction).

The burden of showing that a particular transaction is benami and the owner is not real owner always rests on person asserting it to be so. The decision of Court should not rest on suspicion but upon legal grounds established by legal testimony. Although motive may not be decisive for determining whether a transaction is benami but when direct evidence is wanting, the reasonable probabilities and legal inferences arising from admitted and true facts, surrounding circumstances, position of parties, their relation, motive, subsequent conduct, dealing and enjoyment of property are certainly to be taken into consideration. AIR 1977 SC 796 and AIR 1977 SC 409, Rel. on.

(Paras 7, 10, 13)

(B) Transfer of Property Act (4 of 1882), S. 41 — Civil P. C. (1908), S. 11 — Suit

*Against decree of N. Sarkar, Judge, 10th Bench, City Civil Court, Calcutta, D/- 31-1-1973.

CZ/DZ/B135/82/VSS/LGC-H

against benamidar — Decision therein would bind real owner unless it is shown that benamidar could not and did not in fact represent interest of real owner in that suit. (Benami — Benamidar — Suit against). AIR 1969 SC 316, Rel. on. (Para 14)

Cases	Referred :	Chronological	Paras
AIR 1977 SC 409			7
AIR 1977 SC 796 : 1977 Cri LJ 566			7
AIR 1974 SC 171			7
AIR 1969 SC 316			14
AIR 1924 Cal 467 : 28 Cal WN 131			7
AIR 1918 PC 140			14

S. C. Mitter and Moti Lal Agarwal, for Appellant; Bijitendra Mohan Mitra, for Respondents.

CHITTATOSH MOOKERJEE, J.:— This appeal is at the instance of the plaintiff whose suit, inter alia, for declaration that he was a real monthly tenant under the respondent No. 1 according to the Hindi calendar in respect of room in the first floor of 6, Banstala Gali and for permanent injunction has been dismissed by the learned Judge, 10th Bench, City Civil Court at Calcutta.

2. Admittedly, one Nemkumar Raniwalla, was a tenant under the defendant No. 1 in respect of the said room in the first floor of the premises No. 6, Banstala Gali. It can no longer be disputed that before the commencement of the West Bengal Premises Tenancy Act, 1956 the said Nemkumar Raniwalla had created a sub-tenancy in respect of the suit room in the name of Hariram Agarwalla, who was a son of the original plaintiff, Radheshyam Agarwalla. Hariram had made an application under S. 16 (3) of the West Bengal Premises Tenancy Act and on 25th May, 1957 the Rent Controller, Calcutta had declared Hariram as a direct tenant under the defendant No. 1 at a rent of Rs. 30/- per month according to Hindi calendar. The defendant No. 1 had granted receipts in the name of Hariram Agarwalla up to Phalgun 2022 S. Y. According to the plaintiff, the defendant No. 1 did not grant any receipt from Chaitra 2022 S. Y. to Jaistha 2023 S. Y. on various pretexts. After the defendant No. 1 had refused to accept the rent remitted by the plaintiff by money-order, Radheshyam Agarwalla claiming to hold the tenancy in the name of Hariram began to deposit rents to the credit of the defendant No. 1 in the office of the Rent Controller. The defendant No. 1 did not withdraw the said rents and he filed in the City Civil Court at Calcutta Ejectment Suit No. 825 of 1967 against Hariram Agarwalla for evicting him from the suit premises.

3. On 18th July, 1967 the plaintiff Radheshyam had filed an application for permission to contest the said Ejectment Suit No. 825 of 1967 inter alia, on the ground that he was the real tenant of the suit premises. He had also made an application under Section 17 (2) of the West Bengal Premises Tenancy Act alleging that the rent was Rs. 30/- and not Rs. 33/- per month. On 21st Sept., 1967 the learned Judge of the City Civil Court rejected the plaintiff, Radheshyam's prayer for impleading him in the said ejectment suit, inter alia, holding that in a suit for recovery of possession against a tenant, the questions of title and benami could not be decided. He further held that Radheshyam had miserably failed to show any prima facie document regarding his alleged tenancy and it was open to him to institute a proper suit for declaration of his tenancy right and other consequential reliefs. The learned Judge, 4th Bench, City Civil Court by his subsequent order dated 28th Sept., 1967 had also rejected Radheshyam's petition under S. 17 (2) of the West Bengal Premises Tenancy Act. Thereafter, Hariram, who was the defendant in the said ejectment suit, appeared and on 16th Nov., 1967 obtained leave from the Court to contest the said ejectment suit. He had also filed a petition under S. 17 (2) of the West Bengal Premises Tenancy Act and also under Ordinance V of 1967. Hariram had filed his written statement but on 4th June, 1968 his petition under S. 17 (2) was dismissed *in default*. On 25th July, 1968 he had obtained adjournment of the peremptory hearing of the suit. In the meantime, on 24th Aug., 1968 the plaintiff, Radheshyam, instituted the instant suit, inter alia, for declaring that his son, Hariram, the defendant No. 2, was his benamidar and that the plaintiff was the real monthly tenant in respect of the suit premises and for further declaration that the decree passed in the aforesaid Ejectment Suit No. 825 of 1967 was not binding or executable against the plaintiff. He also prayed for permanent injunction to restrain the defendants 1 and 2 from proceeding with the said ejectment suit and also for restraining them from interfering with the plaintiff's possession of the suit premises.

4. After the ad interim order obtained by the plaintiff, Radheshyam, was modified, we understand that the Ejectment Suit No. 825 of 1967 brought by Maharaj Bahadur Singh was *ex parte* decreed against Hariram Agarwalla but Maharaj Bahadur Singh was restrained from executing the said ejectment decree till the disposal of the present case.

5. The defendant No. 1 alone contested the suit brought by Radheshyam, inter alia, denying that the latter was the real tenant and that Hariram was his benamdar. He also denied the allegations of collusion and conspiracy himself and Hariram Agarwalla, who had been joined as defendant No. 2 in the said suit. Hariram did not appear or contest. The learned Judge, 10th Bench, City Civil Court, as already stated, dismissed the suit brought by Radheshyam Agarwalla. Radheshyam having died, his heirs and legal representatives were substituted in his place.

6. Two questions arise for decision in the present appeal. In the first place whether or not Hariram Agarwalla was a benamdar of his father, Radheshyam Agarwalla, and whether the latter was the real tenant of the disputed room. Even if Radheshyam succeeds in establishing that he was holding the said tenancy in the benami of his son, Hariram, he must further prove that his son, Hariram Agarwalla acted against the interest of his father, Radheshyam and had colluded with his landlord and, therefore, the ejectment decree obtained by the defendant No. 1 against the defendant No. 2, was not binding upon the plaintiff, Radheshyam Agarwalla.

7. Undisputedly, the burden of showing that the defendant No. 2, Hariram Agarwalla, was a benamdar of his father, the plaintiff, Radheshyam Agarwalla, and Radheshyam was the real tenant of the disputed room rested upon the plaintiff. Mr. Mitter, learned advocate for the appellant, has submitted that benami transactions being very common in India, even slight quantity of evidence may be sufficient to show that a transaction was a sham one. But, Mookerjee and Chofzner, JJ., in *Bhubanmohini Dasi v. Kumudbala Dasi*, (1924) 28 Cal WN 131 : (AIR 1924 Cal 467), upon which Mr. Mitter relied, pointed out that the decision of the Court in these class of cases should not rest on suspicion but upon legal grounds established by legal testimony. Our attention has been also drawn to the recent decision of the Supreme Court in *Krishnanand Agnihotri v. State of M. P.*, AIR 1977 SC 796. Bhagwati, J., who delivered the judgment of the Court referred to the earlier decision of the Court in *Jaydayal Poddar v. Mst. Bibi Hazra*, AIR 1974 SC 171, and laid down :

"The burden of showing that a particular transaction is benami and the owner is not the real owner always rests on the person asserting it to be so, and this burden has to

be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami to establish circumstances unerringly and reasonably raising an inference of that fact. The essence of benami is the intention of the parties and not unoften, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of the serious onus that rests on him, nor justify the acceptance of mere conjecture or surmise as a substitute for proof. It is not enough merely to show circumstances which might create suspicion, because the Court cannot decide on the basis of suspicion. It has to act on legal grounds established by evidence."

Upon considering the pleadings and the evidence on record, we agree with the learned Judge of the Court below that the plaintiff has failed to prove his case that his son, Hariram, the defendant No. 2, was his benamdar and the plaintiff himself was the real tenant of the disputed shop room. The plaintiff did not examine Nemkumar Ranwalla, who was previously the tenant of the first degree and had created a sub-tenancy in the name of Hariram Agarwalla. No other person came forward to corroborate the interested testimony of the plaintiff that in the name of his son Hariram who was then alleged to be a minor, he had taken the said sub-tenancy under Nemkumar Ranwalla. Radheshyam, the plaintiff, in his evidence claimed that he with his family used to reside at 31-B, Basantala Street. As there was scarcity of accommodation, he had taken the room in suit on rent. Although motive may not be decisive for determining whether a transaction is benami but when direct evidence is wanting, the reasonable probabilities and legal inferences arising from admitted and true facts, surrounding circumstances, position of parties, their relation, motive, subsequent conduct, dealing and enjoyment of the property are certainly, to be taken into consideration (see *Bhubanmohini Dasi's case* (supra) and in *Union of India v. Mokash Builders and Financiers Ltd.*, AIR 1977 SC 409). In the instant case, no motive has been suggested for Radheshyam taking a tenancy in the benami of his son, Hariram. It was also somewhat improbable that Nemkumar had agreed to create a tenancy in the name of Hariram, who was allegedly minor and not in the name of Radheshyam, who was to pay the rent.

8. The Court below has also held that the plaintiff, Radheshyam, failed to satis-

factorily prove that on the date of the creation of the sub-tenancy under Nemkumar Raniwalla, Hariram was still a minor. The admission form and the admission register of Sharashwat Kshitriya Vidyalaya were produced by the plaintiff to prove that Hariram Agarwalla was aged 10 years 4 months on 5th March, 1949. The Court below has pointed out that only the signature of the plaintiff in the admission form (Ext. a (a)) was marked as an exhibit. Therefore, the said school records cannot be used as corroborative evidence of the plaintiff's interested testimony about the age of Hariram. The plaintiff's own evidence regarding the date of birth of Hariram was full of inconsistencies. According to Radheshyam, P. W. 1, Hariram was his son by his first wife, who died in the year 1939 and according to Radheshyam by his first wife he had two other sons, both younger to Hariram. Therefore, even according to Radheshyam, his elder son by his first wife could not have been born later than the year 1937.

9. Although, according to the plaintiff, his son, Hariram, had attained majority in the year 1959, in the year 1957 Hariram as sui juris had made an application under Section 16 (3) of the West Bengal Premises Tenancy Act for declaring him as a direct tenant under the defendant No. 1. The plaintiff did not adduce any evidence to corroborate his claim that he had caused the said application to be filed in the name of Hariram. Presumably, through a lawyer the said application under S. 16 (3) of the Act for declaring Hariram as a direct tenant was filed. We do not get any evidence as to the circumstances under which the plaintiff who was allegedly the real tenant had obtained declaration under S. 16 (3) not in his own name but in the name of his son, Hariram. Even after the creation of the said direct tenancy throughout rent receipts were granted in the name of Hariram, who was then living jointly with his father Radheshyam, the plaintiff. Therefore, so long both Radheshyam and Hariram occupied the suit room the possession must be deemed of the person who had legal title to the tenancy i.e. Hariram. In this case, the plaintiff, Radheshyam having failed to prove that he was the real tenant, he cannot be considered to be in possession of the room.

10. We have already remarked that the plaintiff, Radheshyam Agarwalla, neither pleaded nor proved his intention, if any, for taking a benami tenancy in the name of his son. Merely because the rent receipts granted by the defendant No. 1 and the subse-

quent rent control challans came from the custody of the plaintiff, we are unable to hold that the plaintiff himself used to pay rent to the defendant No. 1. After the defendant No. 1 had refused the money-order remittance, the plaintiff began to deposit rent in the office of the Rent Controller claiming that he was holding the tenancy in the name of his son, Hariram. After the defendant No. 1 had refused to recognise him as the real tenant, such assertion by the plaintiff was not relevant. Although the plaintiff claimed to be a businessman he admitted that he did not keep accounts of rents allegedly paid by him previously to Nemkumar Raniwalla and, thereafter, to the defendant No. 1. In the absence of any corroboration, we are not prepared to believe that the P. W. 1 himself used to pay the rent. The plaintiff claimed that his son, Hariram, at the relevant time had no income and, therefore, was not in a position to pay the rent. But the plaintiff has failed to prove that he used to pay the rent. We have already observed that mere fact that the rent receipts came from his custody does not establish that the plaintiff had been paying the rent.

11. According to the plaintiff himself, Hariram used to live with him up to early of the year 2023 S. Y. and had thereafter shifted to 43, Upper Chitpur Road. We cannot rule out the possibility that after Hariram, who was the tenant of the suit room, had left, the plaintiff tried to grab the tenancy by setting up a plea of benami. At this stage, we may point out that the plaintiff has not given any cogent reason why his son, Hariram had become inimical towards him and had colluded with the defendant No. 1. On the other hand, having regard to the relationship between the plaintiff and the defendant No. 2, possibility of collusion between them was much more probable.

12. We have already mentioned that after the defendant No. 1 filed Ejectment Suit No. 825 of 1967 against Hariram Agarwalla, as the sole defendant, the present plaintiff had unsuccessfully tried to contest the said suit. The Court had refused to allow him to contest the ejectment suit, inter alia, on the grounds that the complicated questions of title and benami could not be decided in the said suit and prima facie Radheshyam had failed to show his alleged tenancy. Although, as early as 21st Sept., 1967 his application for impleading him in the ejectment suit had been rejected, Radheshyam had instituted the instant suit for declaration

and injunction only on 24th Aug., 1968. In the meantime, Hariram, who was the defendant in the ejectment suit, had made belated appearance therein and had purported to file applications under S. 17 (2) of the West Bengal Premises Tenancy Act and also under the West Bengal Ordinance V of 1967. We are not prepared to accept the suggestion of the learned advocate for the appellant that thereby it was proved that there was collusion between the defendant No. 1, who was the plaintiff in the ejectment suit and Hariram. On the other hand, presumably Hariram had obtained leave to contest the ejectment suit in order to prolong the proceedings which could be only for the benefit of his father, Radheshyam, who was occupying the disputed room. We have also mentioned that Hariram had filed a written statement in the ejectment suit and had continued to take steps. Hariram had ceased to contest near till about the time the plaintiff, Radheshyam, filed the instant suit and obtained an order of temporary injunction restraining the landlord from proceeding with the ejectment suit. Therefore, we concluded that there was nothing to show that Hariram did not bona fide contest the ejectment suit against him.

13. For the foregoing reasons, we hold that Radheshyam, the plaintiff, failed to prove that he was the real tenant of the suit room and that his son, Hariram, was his benamdar in respect of the said tenancy. There was no reliable direct evidence and no legal inference or benami could be also made from the proved facts, surrounding circumstances, position of parties, their motive and subsequent conduct.

14. The plaintiff's case of benami having failed, it is no longer very much necessary to consider the other question whether or not in the previous ejectment suit the defendant No. 2, Hariram, had acted against the interest of his father, Radheshyam. Mr. Mitter, learned advocate for the appellant, had fairly placed before us the decision of the Judicial Committee in *Ch. Gur Narayan v. Sheolal Singh*, AIR 1918 PC 140: 46 Ind App 1 which, *inter alia*, laid down that the bulk of judicial opinion in India was in favour of the proposition that in a proceeding by or against the benamdar, the person beneficially entitled, is fully affected by the rules of *res judicata*. It is open to the latter to apply to be joined in the action; but whether he is a party or not, a proceeding by or against his representative in its ultimate result is fully binding upon him. The Supreme Court in *Ragho Prasad Gupta v. Krishna*

Poddar, AIR 1969 SC 316, after quoting a passage from the decision in *Ch. Gur Narayan's case* (supra), had laid down that the decision in a proceeding brought by or against the benamdar would bind the real owner unless it is shown that the benamdar could not and did not in fact represent the interest of the real owner in that proceeding. The Supreme Court in *Ragho Prasad Gupta's case* (supra), after examining the facts of the case held that the appellant who claimed to be the real owner was bound by the decree passed in the earlier suit and the decree could be executed against him. Upon consideration of the evidence adduced in the present case, we have already rejected the plaintiff, Radheshyam Agarwalla's case of benami and we may also add that the plaintiff did not show that Hariram could not or did not represent the interest of the alleged real owner in the previous ejectment suit.

15. For the foregoing reasons, we dismiss this appeal without any order as to costs.

R. K. SHARMA, J.:— I agree.

Appeal dismissed.

AIR 1982 CALCUTTA 575

ANIL K. SEN AND

S. N. SANYAL, JJ.

Patel Roadways Pvt. Ltd., Petitioner
v. Bata India Ltd., Opposite Party.

Civil Order No. 549 of 1982, D/- 16-6-1982.

(A) Civil P. C. (5 of 1908), S. 20 — Entrustment of goods at P for carriage to 'O' — Breach of contract — Institution of suit at 'A' having jurisdiction over 'D' — Maintainability — Term in contract providing jurisdiction to 'B' court in respect of all claims — Suit would not be maintainable at 'A' court. (Contract Act (9 of 1872), S. 28.)

Where the plaintiff had delivered certain goods to the company at their 'P' head office for carriage to 'D' against certain consignment notes which provided that 'B' court alone would have jurisdiction in respect of all claims arising under the consignment or with regard to the goods entrusted for transport, the plaintiff on breach of contract for carriage could not institute his money suit at 'A' on the ground that 'A' court had jurisdiction to entertain the suit since the goods being deliverable at 'D' within the jurisdiction of the said court as he could not resile from the terms of contract which he accepted as binding between

GZ/HZ/D181/82/PGS/MVJ

the parties. Though the parties by mutual agreement cannot confer jurisdiction upon a court which it does not possess nor can oust the jurisdiction of a court otherwise possessed by it, they can however, choose between them one out of several courts having concurrent jurisdiction. Such an agreement does not violate S. 28 of the Contract Act, nor is it opposed to public policy. Therefore when both the courts at 'B' where lay the head office of the company and the court at 'A' did have concurrent jurisdiction to entertain a suit of such nature, the parties to the contract having chosen by mutual agreement the 'B' forum, the suit should be filed there and not at 'A'. (Paras 5, 9)

(B) Sale of Goods Act (3 of 1930), S. 2 (4) — Bills of Lading Act (1856), S. 1 — Consignment — It is not bill of lading — S. 1 would not be applicable in case of endorsement.

Though the term "bill of lading" has not been defined by the Bills of Lading Act, 1856, yet each and every document of title in respect of goods is not a bill of lading nor can the same be equated with a bill of lading for all purposes. Such documents of title in respect of goods are assimilated to bills of lading for certain limited purposes provided for by the Sale of Goods Act and the Contract Act, and not for other purposes. Therefore, it could not be said that a consignment note stands on the same position as a bill of lading so that S. 1 of the Bills of Lading Act would be made applicable in case of endorsement of any and every document of title in respect of goods as enumerated in S. 2 (4) of Sale of Goods Act as it is applicable to a bill of lading. AIR 1916 PC 7 and AIR 1934 PC 246, Rel. on. (Para 8)

Cases Referred : Chronological Paras
 AIR 1934 PC 246 : 61 Ind App 416 8
 AIR 1916 PC 7 : 43 Ind App 164 8

Satyendra Prosad Sen, for Petitioner;
 Hirak Mitra with Sumit Kumar Chakraborty, for Opposite Party.

ANIL K. SEN, J.:— In this revisional application, which is being heard as a contested one, a short point arises for our consideration as to whether a stipulation in a contract for carriage of goods to the effect that Bombay court alone would have jurisdiction in respect of claims with regard to goods entrusted for carriage would oust the jurisdiction of the Alipore Court to entertain a suit for damages for non-delivery of such

goods at the instance of an assignee of a consignment note, though such court has otherwise jurisdiction to entertain the suit.

2. According to the plaintiff/opposite party certain textile goods valued at Rs. 29,842.91 were delivered to the defendant company, a common carrier, at their Pondicherry Office for carriage to Batanagar against 3 consignment notes. The defendant having failed to deliver the goods so entrusted to them, the plaintiff as the assignee of the consignment notes instituted Money Suit No. 20 of 1976. In the plaint, the claim was laid on 3 alternative grounds, namely. (1) damages on the ground of non-delivery of the goods so entrusted, (2) damages for breach of the contract for carriage and (3) damages for wrongful detention and/or conversion of such goods to their own use or purpose. The suit was instituted in the 1st Court of the learned Subordinate Judge at Alipore, 24 Parganas. It was claimed that Alipore court had jurisdiction to entertain the suit since the goods being deliverable at Batanagar within the jurisdiction of the said court, a part of the cause of action arose within the said jurisdiction.

3. The defendant in contesting the suit by filing a written statement raised an objection that the court of the learned Subordinate Judge cannot entertain the suit in view of Cl. 17 of the contract for carriage printed on the reverse of the consignment note which provided that Bombay court alone will have jurisdiction in respect of all claims arising under the consignment or with regard to the goods entrusted for transport.

4. A preliminary issue on the point of jurisdiction of the Court at Alipore was raised and the learned Subordinate Judge by an order dated January 5, 1982, decided the issue in favour of the plaintiff and against the defendant. According to the learned Subordinate Judge when a part of the cause of action arose within the jurisdiction of his court, a term in a contract as incorporated in Cl. 17 referred to hereinbefore would not oust the jurisdiction of his court to entertain or try such a suit. Feeling aggrieved, the defendant has now preferred the present revisional application challenging the said order.

5. The view taken by the learned Subordinate Judge particularly having regard to the reasons given therefor is

apparently erroneous as the learned Judge had failed to consider the true effect of such a stipulation in a contract. The learned Judge has failed to take note of the legal position that though the parties by mutual agreement cannot confer jurisdiction upon a court which it does not possess nor can oust the jurisdiction of a court otherwise possessed by it, they can however, choose between them one out of several courts having concurrent jurisdiction. Such an agreement does not violate S. 28 of the Contract Act, nor is it opposed to public policy; it is, therefore, enforceable as between the parties to the agreement. There is uniformity of judicial opinion on the point and the principle is now so well settled that it needs no support with reference to any precedent. Therefore, if—as in the present case—both the courts at Bombay where lay the head office of the defendant company and the court of the learned Subordinate Judge at Alipore do have concurrent jurisdiction to entertain a suit of the present nature, the parties to the contract having chosen by mutual agreement the Bombay forum, the suit should be filed there and not at Alipore.

6. Mr. Mitter appearing on behalf of the plaintiff/opposite party without disputing the legal position referred to hereinbefore has raised an interesting point for our consideration. According to Mr. Mitter, the contract for carriage was not with the plaintiff nor by virtue of endorsement of the consignment note in their favour did the plaintiff become an assignee of the contract. By virtue of the endorsement of the consignment note the plaintiff became the assignee and, as such, the owner of the goods entrusted with the defendant and the claim of the plaintiff is based not on the privity of contract but on damages for non-delivery of the goods or the conversion thereof. Since the contract or the rights thereunder had not been assigned to the plaintiff, he is not bound by the agreement incorporated in clause 17 between the defendant and the original consignor referred to hereinbefore. Reliance has been placed by Mr. Mitter on a Bench decision of this court in the case of Commissioners for the Port of Calcutta v. G. T. Corporation 68 CWN 410 and a decision of the Bombay High Court in the case of Union of India v. Ali Esaji Bohari, ILR 56 Bombay 600.

1982 Cal./37 XII G—17

7. Mr. Sen appearing on behalf of the defendant/petitioner relied upon Section 1 of the Indian Bills of Lading Act, 1856, for repelling this contention of Mr. Mitter. Section 1 of that Act provides as follows:

"Rights under bills of lading to vest in consignee or endorsee. Every consignee of goods named in a Bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

Relying in particular on the last part of this provision, namely "be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself", it is contended by Mr. Sen that the plaintiff even as an endorsee of the consignment note is bound by all the covenants incorporated in the said contract of carriage as if the contract had been made with the endorsee.

8. We have carefully considered the rival contentions put forward before us. In our considered opinion, the contention of Mr. Sen is based upon a misapprehension. His contention proceeds on the basis that a consignment note stands on the same position as a bill of lading so that S. 1 of the Indian Bills of Lading Act, 1856, would be made applicable in case of endorsement of any and every document of title in respect of goods as enumerated in S. 2 (4) of the Sale of Goods Act, as it is applicable to a bill of lading. Though the term 'bill of lading' has not been defined by the Indian Bills of Lading Act, 1856, yet each and every document of title in respect of goods is not a bill of lading nor can the same be equated with a bill of lading for all purposes. Such documents of title in respect of goods are assimilated to bills of lading for certain limited purposes provided for by the Sale of Goods Act and the Indian Contract Act, and not for other purposes. As pointed out by this court in the case of Commrs. for the Port of Calcutta v. G. T. Corporation, this position has been made clear by the Privy Council by the two decisions in the cases of Ramdas Vithaldas Darbar v. S.

Amirchand & Co., 43 Ind App 164: (AIR 1916 PC 7) and Official Assignee of Madras v. Mercantile Bank of India Ltd., 61 Ind App 416: (AIR 1934 PC 246). Such being the position in law, we would have found ample merit in the contention of Mr. Mitter only if we could agree with him that on the plaint the suit had been filed not on the contract but as the owner of goods by virtue of endorsement of the consignment note.

9. Reading the plaint as a whole, we are unable to accept the contention of Mr. Mitter that the suit is not based on the contract but is based solely on the ownership of goods by virtue of endorsement of the consignment note. Whatever the position of plaintiff in law, as we have indicated hereinbefore the plaintiff instituted the suit laying his claim on 3 alternative grounds. One of such grounds was damages for breach of the contract of carriage. Such a claim is laid necessarily as an assignee of the contract itself. Though Mr. Mitter has drawn our attention to the written statement of the defendant/petitioner wherein the defendant had specifically denied existence of any privity of contract between the parties to the suit, such a pleading in our view is wholly irrelevant. In our view, the jurisdiction of the court must be determined on the plaint itself and on the facts set out therein; where as in the present case the plaintiff lays his alternative claim on breach of the contract of carriage, he cannot resile from the terms thereof which he accepts as binding between the parties. One of the terms of such a contract as have pointed out hereinbefore incorporated in S. 17 was with regard to choice of forum as between several courts of concurrent jurisdiction. Such a contract, therefore, binds him and he cannot institute a suit in Alipore Court contrary to the said agreement.

10. In the result, this application succeeds. The impugned order of the learned Subordinate Judge being set aside, we decide the preliminary issue in favour of the defendant and hold that the court of the learned Subordinate Judge at Alipore has no jurisdiction to entertain the suit. We, therefore, direct the learned Subordinate Judge to return the plaint to the plaintiff for being filed before the appropriate court. There will be no order for costs in this application. Let the order be communicated to the court below.

11. Let operation of order remain stayed for six weeks.

S. N. SANYAL, J.:— I agree.

Application allowed.

AIR 1982 CALCUTTA 578

RAMENDRA MOHAN DATTA AND

C. K. BANERJI, JJ.

Paras Nath Dubey and another, Appellants v. Kedar Nath Kejriwal and another, Respondents.

A.F.O.O. No. 280 of 1977, D/- 11-5-1982.

(A) Arbitration Act (10 of 1940), S. 33 — "The Court shall decide the question on affidavits" — Award relating to certain motor vehicles in a hire purchase agreement — Opposite party claiming to have appeared before arbitrator on relevant date with advocate — Neither affidavit of party concerned nor that of advocate filed — Judge was justified in deciding the case on affidavits of parties as before him — Trial on evidence, not necessary. (Para 16)

(B) Arbitration Act (10 of 1940), Sections 35 (1), 34 — Relative scope of — Mere commencement of legal proceeding — Arbitration proceeding not rendered invalid.

The underlying object of S. 35 (1) is to stop the conflict of decisions between the private forum and the public tribunal. The section contemplates that mere commencement of the legal proceeding will not by itself render the arbitration proceeding invalid. To render it invalid the legal proceeding must be commenced upon the whole of the subject-matter of the reference: it must be between all the parties to the reference and a notice thereof has to be given to the arbitrators or umpire as the case may be. If all these conditions are satisfied the further proceeding in the arbitration from the time of the notice upon the arbitrators or umpire in the pending reference becomes invalid. This invalidity, however, can be removed as provided by S. 35 (1) as and when an application is made under Section 34 and an order is obtained thereon staying legal proceeding. (Paras 20, 22)

The court in granting the stay may under S. 34 in its discretion, depending on the facts of each case, consider to make an order for stay only with regard to that part of the legal proceeding which is covered by the arbitration

agreement but the position is not exactly the same when it comes to the operation of S. 35 (1). (Para 23)

The expression "whole of the subject matter of the reference" has a special significance of its own and it is only when this is strictly complied with that it might have the force to render the arbitration proceeding invalid. The principle behind this is to have the entire disputes decided in legal proceeding without leaving any part to be decided in the pending arbitration proceeding so that there might not be any possibility of conflict of decisions. Unlike S. 34, in applying S. 35 (1) there is no scope for exercising the discretion although it is in the negative form still it is mandatory in substance. Accordingly the section has to be strictly complied with.

(Paras 26, 24)

The reasons why the whole of subsec. (1) of S. 35 has been put in the negative form is to give only a limited right to the party commencing the legal proceeding. He cannot, by his own act by commencing the same, simpliciter render the arbitration proceeding invalid. He can effectively do so only upon fulfilling the three conditions laid down therein. AIR 1956 Cal 467 and AIR 1960 Cal 304. Foll.

(Para 27)

Cases Referred:	Chronological	Paras
AIR 1960 Cal 304		28
AIR 1956 Cal 467		19, 28
AIR 1949 Patna 393		14
AIR 1946 Nag 5		14
AIR 1941 Cal 527		14

Mr. Bhabra, for Appellants; S. K. Gupta, for Respondents.

RAMENDRA MOHAN DATTA, J.:—The appeal herein arises from the judgment and order of Subyasachi Mukharji, J. passed on May 18, 1977. The learned Judge has dismissed the application for setting aside the award and has, inter alia, passed a judgment in terms of the award.

2. The award was passed on Jan. 22, 1977 in respect of disputes arising out of a Hire-Purchase Agreement dated Nov. 25, 1972 in which there was an arbitration clause. The award read as follows:

"Whereas Messrs. Kedarnath Kejriwal, the claimant abovenamed referred to my arbitration all disputes and differences between them and the respondents pursuant to the Arbitration Agreement dated 9th day of October, 1972 between the parties and whereas I took

upon myself the burden of the said reference and whereas I have read and considered the papers filed before me and also heard the evidence:

Now I make my award as follows:—

1. I award and declare that the claimant namely Kedar Nath Kejriwal are the owners of the Tata Mercedes Benz Motor Vehicle bearing Police Registration No. BRJ 2741 and No. 312.978.86. 22850 on the Engine and No. 342.050.85. 22018 on the Chassis thereof and entitled to possession thereof.

2. I hold and award that the respondents, namely (1) Paras Nath Dubey and (2) Jairam Prasad Dubey do pay the Claimant a sum of Rs. 37,250 (Rupees Thirty-seven thousand two hundred and fifty) only.

3. I further hold and direct that should the respondents fail to give possession of the said vehicle to the claimant, they do pay to the claimant a sum of Rupees 16,000 (Rupees sixteen thousand) only in lieu of the Award made herein as to declaration and possession of the said motor vehicle.

4. I further hold and direct that the respondents do pay Rs. 850 (Rupees eight hundred and fifty only) as costs of this Arbitration."

3. The hire-purchase agreement relates to the motor vehicle bearing No. BRJ 2741. In March, 1972, the disputes were referred to arbitration by the respondent, Kedar Nath Kejriwal (hereinafter called Claimant Kejriwal). On April 24, 1975 the arbitrator wrote to the petitioners Dubeys (Paras Nath and Jairam Prasad) (hereinafter called Dubeys) to file counter-statement of facts. Thereafter on April 25, 1975 the Dubeys requested the arbitrator to grant 15 days' time. The claimant Kejriwal made an application on or about May 5, 1975 for appointment of a Receiver under S. 41 of the Arbitration Act, 1940 over the said vehicle. On or about July 17, 1975 Dubeys filed an affidavit-in-opposition to the said application. Dubeys also made an application in this Court under Ss. 5 and 33 of the Arbitration Act for determination of the validity and effect of the arbitration agreement. On Aug. 6, 1975 Dubeys filed a Title Suit being Suit No. 207 of 1975 in the Bhagalpur Court. In that suit Dubeys had asked for a decree that the petitioner Paras Nath Dubey was the absolute owner of vehicles Nos. BRF 3461 and BRJ 2741 and that the defendant therein, being Kedar Nath Kejri-

wal had no right, title and interest therein. Dubeys also asked for a declaration that the alleged hire-purchase agreement dated Oct. 9, 1972 relating to vehicle No. BRJ 2741 and the alleged hire-purchase agreement dated Nov. 24, 1972 relating to vehicle No. BRF 3461 were void and not binding on the Dubeys and for the delivery up and cancellation thereof. They also asked for a decree for accounts and for such amount as might be found due and payable and/or refundable by Kejriwal and also for a decree for Rs. 5,100. There was also a prayer for mandatory injunction restraining Kejriwal from taking any step and/or any further proceeding in respect of the said hire-purchase agreement. On Sept. 29, 1975 Dubeys obtained an ex parte order of injunction from Bhagalpur Court restraining Kejriwal from proceeding with the reference before the Arbitrator.

4. After the hearing of the said application under Ss. 5 and 33 was concluded, the judgment was reserved by the learned Judge Roy Chowdhury, J. on the prayer of the Dubeys to enable the petitioners Dubeys to settle the matter but instead of settling the matter, Dubeys obtained an order of injunction from Bhagalpur Court restraining the arbitrator from proceeding with the arbitration. The matter was thereupon mentioned before Roy Chowdhury J. in December, 1975.

5. On March 5, 1976 Roy Chowdhury J. delivered his judgment in the application under S. 41 of the Arbitration Act, 1940 and appointed a receiver therein. The said application under Ss. 5 and 33 of the Arbitration Act was dismissed by the learned Judge. Thereafter on Nov. 22, 1976 the Bhagalpur Court vacated the order of injunction. By an order dated Dec. 21, 1976 the time for making the award was extended till Feb 15, 1977.

6. On Dec. 23, 1976, the advocate Sri Abhijit Banerjee of the Dubeys gave a notice to the arbitrator under S. 35 of the Arbitration Act regarding the filing of the Title Suit No. 207 of 1975 in the Court of the Subordinate Judge at Bhagalpur. The said letter read as follows:

Dated 23rd December 1976.

To
Sri B. L. Sharma
Advocate
6, Old Post Office Street,
Calcutta-1.

Dear Sir,

Re: In the matter of:

Arbitration between Kedar Nath
Kejriwal claimant and Paras Nath
Dubey and Jairam Prasad Dubey
(Respondents)

My client: Paras Nath Dubey and Jairam Prasad Dubey.

Regarding; Notice under Section 35 of the Arbitration Act.

This is to inform you that Hon'ble Mr. Justice Salil Kumar Roy Chowdhury was pleased to extend the time till January 1977 for making the award on the Chamber Application moved on behalf of Kedar Nath Kejriwal which was opposed by my said client.

Please take notice that my clients instituted a suit being Title Suit No. 207 of 1975 in the Court of Subordinate Judge Bhagalpur impleading Kedar Nath Kejriwal for declaration and injunction regarding the hire-purchase agreement dated 9th October 1972 and 25th November 1972 and the said suit is still pending.

That the said suit is between the same parties and the whole of the subject matter of the reference is the same and identical with that of the pending suit.

In these circumstances I request you not to proceed with the reference.

Thanking you,

Yours faithfully,
Sd/- Abhijit Banerjee
(Abhijit Banerjee).

7. On December 27, 1976 the arbitrator Sri B. L. Sharma, Advocate fixed a meeting of the parties but Dubeys did not attend the same. The minutes of the said meeting held on December 27, 1976 read as follows:—

1st Matter.

In the Matter of Arbitration

Between

Kedar Nath Kajriwal

-And-

Paras Nath Dubey & another.

Minutes of the Meeting of the Arbitrator held on Monday, the 27th day of December, 1976 at 11 A.M.

Present:

1. Sri B. L. Sharma, Arbitrator.

2. Sri S. K. Ghosh of M/s. P. D. Himatsingka & Co. with Sri P. Ghosh of the claimant.

Mr. Ghosh— I do not find anybody present on behalf of the respondent.

The Arbitrator informed Mr. Ghosh that he has received a letter from the solicitor for the respondents intimating

to him about the filing of the suit in the Bhagalpur Court by the respondent.

Mr. Ghosh— In my view the pendency of the Bhagalpur suit does not affect the reference. The application of the respondents in the said suit restraining my client from proceeding with the reference has been dismissed. The Calcutta High Court has delivered judgment in the application under Section 41 of the Arbitration Act made by my client and the application made by the respondent under Section 33 holding that there is a valid and subsisting arbitration agreement between the parties and in fact a receiver has been appointed over the motor vehicle in dispute. In the circumstances I submit that this arbitration should proceed.

Arbitrator— I would like to know the view of the respondents as to the submissions made by Mr. Ghosh. I propose to send a copy of this Minutes to the respondents. I will consider the matter on the next date.

The next meeting will be held on Monday, the 17th January, 1977 at 4 P.M. No further notice will be given.

Sd. B. L. Sharma
Arbitrator."

8. On Dec. 28, 1976 the Arbitrator gave notice of holding the next meeting on January 17, 1977 and along with the said notice sent a copy of the aforesaid minutes of December 27, 1976 to the Dubey's at Bhagalpur. The said notice read as follows:

"B. L. SHARMA

ADVOCATE

6, Old Post Office Street,
Calcutta.

REGISTERED A. D.

December 28, 1976.

1. Sri Kedar Nath Kejriwal
 2. Sri Paras Nath Dubey
 3. Sri Jairam Prasad Dubey
- Dist. Bhagalpur.

Dear Sirs,

1st Matter

In the matter of Arbitration
Between
Kedar Nath Kejriwal
And

Paras Nath Dubey & Anr.

I send you herewith a copy of the minutes of the meeting held by me on the 27th instant, which will speak for itself.

Please note that I will proceed with the

reference on the next date. This notice is peremptory.

Yours faithfully,
Sd/- B. L. Sharma
Arbitrator."

9. It appears that on January 11, 1977 Messrs. P. D. Himatsingka & Co. on behalf of Kejriwal wrote to Sri Abhijit Banerjee advocate in reply to his letter dated December 23, 1976 addressed to the arbitrator. inter alia, disputing the validity of the notice under S. 35. The said letter read as follows:

"NH/238 January 11, 1977.
Shri Abhijit Banerjee,
Advocate,
Bar Association,
High Court,
Calcutta.

Re: Arbitration between
Kedar Nath
Kejriwal
Versus
Paras Nath Dubey
& Jairam Prasad
Dubey.

Our Client: Kedar Nath
Kejriwal

A copy of your letter dated 23rd December, 1976 addressed to Shri B. L. Sharma, the learned Arbitrator, was shown to us at the meeting held on 27th December, 1976.

We wish to place on record that by the order dated 21st December, 1976 the time for the learned Arbitrator to make his award was extended by his Lordship the Hon'ble Mr. Justice Salil K. Roy Chowdhury till 15th February 1977 and not till January, 1977 as alleged in your said letter. Further the said Chamber application of our client was not opposed by your clients at the time when it was moved although your clients had filed an affidavit-in-opposition thereto.

We have been instructed by our client to deny the validity, legality and propriety of your said notice alleged to be under Section 35 of the Arbitration Act. In the Title Suit No. 207 of 1975 instituted by your clients in the court of the Subordinate Judge at Bhagalpur, your clients have purported to deny the existence and validity of the hire purchase agreement and arbitration agreement in respect of the vehicle BRF-3461 and have prayed for inter alia declaration that the same are void and should be cancelled and/or mandatory (sic) against

our client amongst others from taking steps with regard thereto. The subject matter of the said suit therefore cannot and does not cover the subject matter of the reference. Further the parties to the suit and the reference are not the same. Hence the provisions of Section 35 of the Arbitration Act cannot be invoked in the instant case. There is no impediment to the learned Arbitrator proceeding with the reference in the instant case.

We deny that the said suit is between the same parties to the reference or that the whole of the subject matter of the reference is the same or identical with that of the pending suit. The contentions of your client in the said suit are barred by the principles of *res judicata* and principles analogous thereto in view of judgment and order dated 5th March, 1976 passed by his Lordship the Hon'ble Mr. Justice Salil K. Roy Chowdhury on your client's application under Sec. 33 of the Arbitration Act.

Please note that the learned Arbitrator by his letter dated 23rd December, 1976 has fixed 17th January, 1977 at 4-00 P.M. as the date for the next sitting of the reference. Please ask your client to attend.

Yours faithfully,

Sd/- P. D. Himatsingka
& Co.

Copy to: Shri B. L. Sharma,

Arbitrator 239.

10. It will be noticed from the above letter of the arbitrator dated Dec. 28, 1976 that the meeting was fixed at 4.00 P.M. and the same was peremptorily fixed on January 17, 1977. Dubey's case in the petition is that Jairam Prosad Dubey along with their advocate Sri Abhijit Banerjee attended before the arbitrator on January 17, 1977 at 4.00 P.M. The Arbitrator adjourned the meeting as nobody appeared before him on behalf of the claimant and the arbitrator personally expressed regret for causing inconvenience to Shri Abhijit Banerjee, the learned advocate." According to Dubey's they were not intimated any further by the arbitrator until a letter dated Feb. 15, 1977 was received from the arbitrator intimating, *inter alia*, that the award was made and published on Jan. 27, 1977. A copy of the minutes dated Jan. 17, 1977 was sent under cover of that letter. The said minutes read as follows:

"1st Matter
In the Matter of Arbitration
Between
Kedar Nath Kejriwal
And

Paras Nath Dubey & Anr.
Minutes of the Meeting of the Arbitrator held on Monday, the 17th January 1977 at 4 P.M.

Present:

1. Sri B. L. Sharma, Arbitrator.
2. Sri Dipak Dey of M/s. P. D. Himatsingka & Co. with Sri Binod Kejriwal of the claimant.

Mr. Dey: I find from the records that the learned Arbitrator duly forwarded a copy of the minutes of the meeting held on 27th December 1977 to the respondents by registered post with acknowledgement due. The postal acknowledgment receipt duly signed by and on behalf of the respondents are in the file of the learned Arbitrator. In spite of the said fact, I find that the respondents are absent.

As regards the letter of Sri Abhijit Banerjee, Advocate dated 23rd December 1976, a reply has been sent to the said Mr. Banerji by M/s. P. D. Himatsingka & Co. by their letter dated 11th January 1977 explaining the true legal position. I respectfully submit that the learned Arbitrator should proceed with the reference and allow me to adduce evidence.

Mr. Dey examines Mr. Kejriwal and adduces evidence in support of the claim of his client. Original papers are also filed by him. I will make my award in due course.

Sd/- B. L. Sharma
Arbitrator."

11. It would seem from the above that either Dubey's version is wholly incorrect or the minutes of the arbitrator dated Jan. 17, 1977 were untrue and manipulated.

12. The learned Judge has decided that question from the materials before him without taking any oral evidence of the parties. The learned Judge was of the view that since Sri Abhijit Banerjee was stated to have attended before the arbitrator on January 17, 1977 at 4 P.M. he should have come out with an affidavit particularly when the minutes speak differently of the happenings of that particular point of time. There is still another factor which weighed with the learned Judge in arriving at his con-

clusion. It was noticed that the petition had been signed by both Parras Nath Dubey and Jairam Prosad Dubey. It was Jairam Prosad Dubey who was supposed to have accompanied the learned advocate when they had been to the arbitrator: but strangely enough, although Jairam Prosad Dubey signed the petition yet he did not choose to verify the same as true to his knowledge and left it to Paras Nath Dubey who verified the material paragraphs as based on information received from Jairam Prosad Dubey. When the facts as stated in the petition were seriously disputed in the affidavit-in-opposition of Benod Kejriwal, Jairam Prosad Dubey along with Paras Nath Dubey this time affirmed the affidavit-in-reply but Jairam carefully avoided this time also, to state that what was stated in the relevant paragraphs of the petition dealing with the said facts were true to his knowledge. It is further to be noted that there was a supporting affidavit by Sri Dipak Dey who was appearing on behalf of Messrs. P. D. Himatsingka & Co. and who attended the meeting to say that the minutes of the said meeting held on January 17, 1977 were true and correct. In the affidavit-in-reply, that affidavit of Sri Dipak Dey was not at all dealt with although in the opening paragraph Dubey says that the affidavit of Sri Dipak Dey was also read over and explained to them and they understood the same. In the affidavit-in-reply Jairam Prosad Dubey does not state when he attended before the arbitrator and at which point of time.

13. In para 7 (b) of the affidavit-in-reply it is stated as follows:—

"We state that in view of the facts set out in paragraph 7 (a) (i) to 7 (a) (v) above it appears that though Jairam Prosad Dubey attended the office of the arbitrator on 17th January, 1977 the meeting was held behind our back at any suitable time after we left the office of arbitrator and the award is made *ex parte*."

The learned Judge also noticed that when the arbitrator forwarded the award along with the minutes of the meeting dated January 17, 1977 in the middle of February, 1977 Dubey kept silent and did not choose to point out that Jairam Prosad Dubey had attended on January 17, 1977 and was told by the arbitrator that there would be no sitting on that date. Under those circumstances, the

learned Judge after taking into consideration the previous conduct of the Dubey's came to the finding that Dubey's were not interested in proceeding with the reference and concluded that it must be accepted that Dubey's did not attend the meeting on January 17, 1977 and the arbitrator's minutes recorded the correct facts.

14. Mr. Bhabra contends that it is a matter involving facts as to what actually happened. It is true that Jairam Prosad Dubey did not affirm the affidavit verifying the petition but in the affidavit-in-reply he has stated the position. It may be that Sri Abhijit Banerjee, advocate did not affirm the affidavit but at the same time the learned Judge should have considered that the arbitrator also did not make any affidavit although he had been made a party herein. Mr. Bhabra contends that the minutes of January 17, 1977 had not been proved by the arbitrator and the copy thereof was not sent immediately after he made the award. It was sent sometime after February, 15, 1977 though the award was made on January 22, 1977. In his award he has stated that he has examined Sri Benod Kejriwal who adduced evidence in support of the claim of the claimant. The minutes also speak of original papers being filed by the said witness. Mr. Bhabra comments that no records have been produced and there is nothing to be found in respect thereto relating to the evidence of the witness or which documents had been filed by him. Therefore, the minutes of January 17, 1977 were not borne out by the records as true. Mr. Bhabra has also pointed out that there were two arbitration proceedings in connection with two hire purchase agreements in respect of two vehicles but the minutes in respect of both of them show that both were decided at 4 P.M. on that date. Mr. Bhabra contends that these are matters which could have been verified and tested on oral evidence and without such evidence the point could not have been decided by the learned Judge. It is contended that the learned Judge has not relied on correct materials to arrive at his decision. In support of his contention, Mr. Bhabra has relied on a decision in the case of *Deoki Nandan Dalmia v. Basantlal Ghanashyamdass*, AIR 1941 Cal 527 at p. 528 and the decision in the case of *Liladhar v. Firm Radha Kishan Ramsahaya*, AIR 1946 Nag 5 at p. 8 and also the decision in the

case of Jagdish Mahton v. Sundar Mahton, AIR 1949 Patna 393. Mr. Bhabra has also referred to S. 14 (2) of the Arbitration Act, 1940 whereby the arbitrator was required to file the award in the circumstances mentioned therein "together with any deposition and documents which may have been taken and proved before them.....". Mr. Bhabra contends that the learned Judge should not have taken into consideration the past behaviour or conduct of the Dubeys. It may very well be that they might have changed their mind at the very last moment and decided to contest the arbitration proceeding when all other remedies, they were seeking so far, had gone against them. Mr. Bhabra contends further that in the minutes dated December 27, 1976 it was recorded that the arbitrator wanted to hear the Dubeys on the question of notice under S. 35 as served by their lawyer and for that purpose he fixed the meeting on Jan 17, 1977. Accordingly, without hearing Dubeys evidence he should not have proceeded further to make his award.

15. Mr. S. K. Gupta appearing on behalf of the respondents herein contends that the successive steps which Dubeys have taken to thwart the arbitration proceedings will go to suggest that they had no intention to appear. The fact that they had served the notice under S. 35 of the Arbitration Act a few days prior to the said meeting would go to show that they did not intend to actually appear in the said meeting in any event. Admittedly they did not attend the meeting held on Dec. 27, 1976 and no grievance was made in respect thereto at any point of time even after the copy of the minutes thereof was sent to them by the arbitrator. There is no explanation in the petition even as to why they did not appear on Dec. 27, 1976. That being so, the learned Judge was justified in taking into consideration the past conduct of the Dubeys. Mr. Gupta contends that Jairam Prosad Dubey carefully avoided pledging his oath in the petition. Similarly, when pressed he affirmed the affidavit-in-reply herein but made statements therein in a very guarded manner. He did not mention about the time when he went there. He did not deal with the affidavit of Dipak Dey and thus he did not raise any dispute with regard to the correctness of the minutes of the meeting. He did not even give any explanation as to why his advocate Sri

Abhijit Banerjee did not come forward to make any affidavit in support of the statements in the petition or in the affidavit-in-reply. There is no explanation as to why he did not verify the petition by affirming an affidavit in that respect. It is most unusual that he did not choose to have his presence recorded in the minutes of the arbitrator even though he was accompanied by his advocate. Even in the grounds of appeal any point relating to the correctness of the minutes had not been taken nor even the attendance at 4 P.M. had been asserted therein. Mr. Gupta contends that it was not incumbent upon the arbitrator to take down the evidence or to make a note in respect thereto nor was it necessary for him to file the documents unless he is requested by the parties or directed by the court in that regard. That being so, it is contended by Mr. Gupta that there were sufficient materials before the learned Judge not to rely on the affidavit of Jairam Prosad Dubey.

16. In our opinion, there is no case in the petition on this point for the learned Judge to consider whether the matter under the circumstances was to be set down for trial on evidence in the absence of the affidavit of the persons who were said to have attended the meeting on Jan. 17, 1977. In the absence of such affidavit from Jairam Prosad Dubey or from Sri Abhijit Banerjee advocate, the court was not obliged to hear the case on evidence and could reject the allegations made in the petition as unreliable and untrue. It is unbelievable that Jairam Prosad Dubey would go before the arbitrator accompanied by his advocate and would come back without having it recorded at the meeting fixed on that date and the only conversation that would take place was that the arbitrator felt apologetic for causing inconvenience to the learned advocate. The learned advocate for Dubeys in the normal course was expected to have the same recorded in writing. Save and except that some vague allegations have been made in the petition by Paras Nath Dubey, who admittedly had not been present at the appointed time, there was no material whatsoever in the petition wherefrom the court would be in a position to entertain such allegations made in the petition. That being so, the affidavit of Jairam Prosad Dubey made in reply to the affidavit in opposition of Kejriwal lost its effect altogether. In

any event, Jairam Prosad Dubey, even then had not stated therein that he reiterated the statements made in the petition in connection with the said facts relating to the attendance before the arbitrator. In our opinion, the learned Judge was justified in deciding the case on the affidavits before him in the manner he has done. Accordingly, the points raised by Mr. Bhabra are bound to fail.

17. The only other point urged before us is the effect of the notice under S. 35 of the Arbitration Act, Mr. Bhabra contends that the award was invalid because it was made after notice under S. 35 was served on the arbitrator. The suit was filed on August 6, 1975 at Bhagalpur by Dubey, against (1) Bijay Kumar Kejriwal (2) Kedar Nath Kejriwal (3) M/s. General Investment Corporation and (4) Kejriwal Auto Dealers for the following reliefs:

(a) A declaration that the plaintiff No. 1 is the absolute owner of the vehicles BRF 3461 and BRJ 2741 and the defendants have no right, title or interest therein.

(b) A declaration that the alleged hire-purchase agreement dated 9th October, 1972 relating to vehicle No. BRJ 2741 and the alleged hire purchase agreement dated 25th November, 1972 relating to vehicle BRF No. 3461 are void, and not binding on the plaintiffs and the same are delivered up and cancelled.

(c) Accounts and decree for such amount as may be found due and payable and/or refunded by defendants to plaintiffs.

(d) A decree for Rs. 5,100/- against the defendants;

(e) Interim interest on the said sum of Rs. 5,100/- at the rate of 6 per cent per annum and future (interest).

(f) Mandatory injunction restraining the defendants, their assigns and/or agents from taking any steps and/or any further proceeding in respect of alleged hire-purchase agreements or arbitration agreement dated 9th October, 1972 and 25th November, 1972 in relation to vehicles Nos. BRJ 2741 and BRF 3461 or their execution of the said award cases.

18. It would appear from the above that two of the defendants in that suit are outsiders to the arbitration agreements and the proceedings in connection thereto. The said parties are Bijay Kumar Kejriwal and M/s. General Invest-

ment Corporation. The nature of the suit is such that there would be no existence of the arbitration agreement and that the plaintiff No. 1 Paras Nath Dubey was the absolute owner of the two vehicles Nos. BRJ 2741 and BRF 3461 and the defendants have no right, title or interest therein. Furthermore, the plaintiffs in that suit claimed a decree for Rs. 5,100/- against the defendants but that again is not within the scope of the arbitration proceedings. Prayer (f) is also outside the scope.

19. As stated hereinabove, the notice under S. 35 was dated Dec. 23, 1976 and the arbitrator intimated at the meeting held on Dec. 27, 1976 about the said notice to Kejriwal's advocate. Mr. Bhabra argues that the interpretation of Sec. 35 of the Arbitration Act requires some re-consideration. The expression "whole of the subject matter of the reference" should be restricted to the part of the claim in the plaint which would come within the scope of the arbitration agreement. Mr. Bhabra has referred to the decision of P. B. Mukharji, J. (as he then was) in the case of Banwarilal Garodia v. Joylal Hargulal, AIR 1956 Cal 467 and to passages from Sir N. N. Sircar's The Law of Arbitration in British India pages 330-334. Mr. Bhabra contends that Ss. 34 and 35 are to be read together to find out the meaning of the expression "whole of the subject matter of the reference" in S. 35. Mr. Gupta contends that the opening part of S. 35 is in the negative form because before the 1940 Act came into force the prevailing law in arbitration was that the filing of the suit by itself would render the arbitration proceedings invalid. Mr. Gupta has referred to the said decision in AIR 1956 Cal 467 and the passage at page 469 wherein the learned Judge has dealt with that point. In any event, Mr. Gupta contends that the claim in the suit is independent of the contract relating to hire purchase for which the arbitration clause has been provided. It is also contended that two of the parties in the Bhagalpur suit are not parties in the arbitration proceedings. The claim in the suit refers to two vehicles which are the subject matter of the two arbitration references in which two awards have been made. In the plaint Dubey is asking for delivery up and cancellation of the contract including the arbitration agreement. They have based their cause of action on forgery in re-

spect of the said hire purchase agreement. They are claiming title to the vehicles independent of any hire purchase agreement. Accordingly, S. 35 has no application. The pleading in the plaint in fact is based on misrepresentation, fraud, collusion and so on.

20. On the question of interpretation of S. 35 arguments have been advanced before us and to our mind the section has to be read as conferring some rights by the legislature on the parties to the arbitration proceedings but making it obligatory on the party filing the suit to fulfil certain conditions precedent in order that the arbitration proceedings might be rendered invalid by the filing of the suit.

21. Section 35 (1) of the Arbitration Act, 1940 reads as follows :

"35. (1) No reference nor award shall be rendered invalid by reason only of the commencement of legal proceedings upon the subject matter of the reference, but when legal proceedings upon the whole of the subject matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire, all further proceedings in a pending reference shall, unless a stay of proceedings is granted under S. 34, be invalid.

(2)"

22. By this section a machinery is provided under the Act to stop the arbitration proceeding not simpliciter by the filing of the legal proceeding but upon fulfilment of certain conditions. The underlying object is to stop the conflict of decisions between the private forum and the public tribunal. The section contemplates that mere commencement of the legal proceeding will not by itself render the arbitration proceeding invalid. To render it invalid the legal proceeding must be commenced upon the whole of the subject matter of the reference; it must be between all the parties to the reference and a notice thereof has to be given to the arbitrators or umpire as the case may be. If all these conditions are satisfied the further proceeding in the arbitration from the time of the notice upon the arbitrators or umpire in the pending reference becomes invalid. This invalidity, however, can be removed as provided by S. 35 (1) as and when an application is made under S. 34 and an order is obtained there-

on staying legal proceeding. This is how S. 34 comes into play. In other words, what was so long being done by the act of parties was thenceforward to be done by the court in the exercise of its discretion. This is how the two sections are inter-related and work together to reach a final decision on the point. There are conditions prescribed in both these sections and those are meant to be fulfilled. Section 34 of the Act enables the party-seeking the private forum for the decision of the disputes upon fulfilment of certain conditions as provided therein.

23. Under S. 34 legal proceeding commenced by a party to the arbitration agreement in order that the same may not be allowed to proceed, need not cover the whole of the subject-matter of the arbitration proceeding. The court in granting the stay may in its discretion, depending on the facts of each case, consider to make an order for stay only with regard to that part of the legal proceeding which is covered by the arbitration agreement but the position is not exactly the same when it comes to the operation of S. 35 (1).

24. In course of arbitration proceedings the party or parties may choose to commence legal proceedings in the Judicial forum and thereby may seek to stop the subject matter of the reference from being proceeding with in arbitration. But if that is sought to be done then the section provides that such legal proceedings must be commenced on the whole of the subject matter of the reference and must be between all the parties to the reference and the notice thereof has to be given to the arbitrators or umpire. There is no question of using any discretion on the part of anybody in rendering the arbitration proceedings invalid. The section, accordingly, has to be strictly construed and complied with in order that the arbitration proceeding which was being otherwise lawfully proceeded with has to be rendered invalid.

25. It is argued that in order to render the arbitration proceeding invalid the legal proceeding need not be upon the whole of the subject matter of the reference. It is contended that the first limb of the section speaks only of the "commencement of legal proceeding upon the subject matter of the reference" and not "upon the whole of the subject matter of the reference" which has been used in the second limb of the section. Accordingly, it is contended that when the

legal proceedings would be commenced upon any part of the subject matter of the reference then such part would be rendered invalid if the other conditions provided in the section are fulfilled. The further contention is that S. 34 does not contemplate of putting any such fetter by introducing such Expression as in S. 35 (1). Accordingly, the expression "whole of the subject matter of the reference" should be read harmoniously and the said expression should not be construed in any stricter sense.

26. In my opinion, this argument is fallacious. As observed hereinabove an arbitration proceeding which is not otherwise unlawful or invalid is sought to be rendered invalid by the act of parties to the arbitration proceeding by the commencement of the legal proceeding. It is the intention of the legislature to protect the interest of the parties to the arbitration proceeding by providing that in order that the arbitration proceeding might be rendered invalid, the legal proceeding so commenced must be on the whole of the subject matter of the reference and, if not, such commencement of legal proceeding would not be effective in rendering invalid any lawful arbitration reference. The expression "whole of the subject matter of the reference" has a special significance of its own and it is only when this is strictly complied with that it might have the force to render the arbitration proceeding invalid. The principle behind this is to have the entire disputes decided in legal proceeding without leaving any part to be decided in the pending arbitration proceeding so that there might not be any possibility of conflict of decisions. In short, the purpose is that either the "whole of the subject matter of reference" is put an end to or not at all. Unlike Sec. 34, in applying this section there is no scope for exercising the discretion although it is in the negative form still it is mandatory in substance. Accordingly the section has to be strictly complied with.

27. In my opinion the reasons why the whole of sub-sec. (1) of S. 35 has been put in the negative form is to give only a limited right to the party commencing the legal proceeding. He cannot, by his own act by commencing the same, simpliciter render the arbitration proceeding invalid. He can effectively do so only upon fulfilling the three conditions laid down therein.

28. This point under similar circumstances came up for consideration before P. B. Mukharji, J. (as he then was) sitting singly in the case of *Banwarilal Garodia v. Joylal Hargulal*, AIR 1956 Cal 467. The learned Judge discussed the principle of law involved in S. 35 (1) and under similar circumstances held that the award was not invalid under S. 35 of the Arbitration Act. I entirely agree with the principle decided in that case on that point. In the case before us also S. 35 has no application because the legal proceeding "commenced by the appellant" is not upon either the whole or part of the subject matter of the reference. Such was the case also before the Division Bench of this Court in *Rambilas Nandlal v. Imperial Oil Mills Ltd.*, AIR 1960 Cal 304 where it was held that under such circumstances the notice under Sec. 35 could not render the award invalid.

29. The result, therefore, is that the decision of the Court below must be upheld and the appeal must be and is hereby dismissed with costs.

C. K. BANERJI, J.:— I agree.

Appeal dismissed.

AIR 1982 CALCUTTA 587

BIMAL CHANDRA BASAK, J.

Debi Prasad Bagaria and another, Petitioners v. State of West Bengal and others, Respondents.

Matter No. 1891 of 1980. D/- 19-6-1981.

(A) Rules relating to constitution of Managing Committee of Aided Primary Schools in Calcutta, R. 6 — Constitution of Committee — Formal order approving or disapproving Committee is a must. (Education — School Managing Committee).

From R. 6 itself it is quite clear that as soon as a committee is constituted they have to seek approval of the District Inspector of Schools and in case of refusal to approve an appeal lies. This itself contemplates that the District Inspector of Schools concerned must apply his mind and that he should pass a formal order giving reasons and communicate the same because a right of appeal has been conferred by the statute. Unless a formal order is passed giving reasons, the provisions of preferring any appeal would be futile and ineffective. It is not open to the respondents to con-

HY/IY/D657/81/JHS

tend that merely because the authority was of the opinion that the committee was not properly constituted, R. 6 had no application and, therefore, no order need be passed under the said Rule.

(Para 12)

(B) Rules relating to constitution of Managing Committee of Aided Primary Schools in Calcutta, Rr. 6 and 7 — Improper constitution of committee — Not a ground for supersession. (Education — School Committee — Supersession).

Where the constitution of the committee is improper and not according to law it is the R. 6 which applied and it is open to the authority concerned in such a case not to give approval to the committee. In that case R. 7 has no application and an order of supersession cannot be passed thereunder. Rr. 6 and 7 must be read harmoniously. Rule 7 comes into play only when the committee is properly constituted and is approved under R. 6. When the D. P. I. is not satisfied by the management of the school by its properly constituted committee then he can act under R. 7. When the question is whether it is a properly constituted committee or not, it does not come within the scope of R. 7; only R. 6 is attracted in that case. (Para 15)

(C) Rules relating to constitution of Managing Committee of Aided Primary Schools in Calcutta, R. 7 — Order of supersession of Committee passed without giving opportunity to persons concerned of being heard — Order is bad in law. (Constitution of India, Art. 226 — Natural justice). (Para 17)

(D) Rules relating to constitution of Managing Committee of Aided Primary Schools in Calcutta, R. 7 — Power of supersession — Rule requires objective satisfaction and not subjective one. (Education — School Committee — Supersession). (Para 19)

Cases Referred : Chronological Paras
 AIR 1967 SC 1269 18
 (1967) 71 Cal WN 189 11
 (1967) 71 Cal WN 396 11

Bachawat, for Petitioners; Netai Bannerjee and A. P. Chatterjee, for Respondents.

ORDER :— The facts of this case as set out in the petition are as follows:—

The petitioners are the President and Secretary respectively of the Managing Committee of Savitri Pathashala, a pri-

mary school situated at No. 5/D, Muk'aram Babu Street, Calcutta-7 (hereinafter referred to as the said School). The petitioners state that since 1933 prominent members of the Marwari Community in Calcutta made and collected donations from various persons from time to time for, inter alia, to take charge of, maintain, manage and improve a Girls' School known as the Savitri Pathshala together with its properties and to take the control of or establish any other schools for Girls elsewhere as might be considered necessary or desirable and to spread education among and to promote the religious, moral and intellectual advancement of high caste Up-country Hindu Girls and particularly Marwari Girls belonging to Sat Grihastha as, that is to say, respectable families professing the Sanatan Hindu and Jain religion. The petitioners state that with some prominent members of the Marwari Community, i.e., Rai Bahadur Hozarimull Dudwe-wall, Rai Bahadur Badri Das Goenka, Rai Bahadur Ramdev Chokhani, Rai Bahadur Ramji Das Bajoria, Sri Gobardhan Das Shroff, Sri Ram Kumar Jhunjhunwala and Sri Surajmull Jalan constituted themselves trustees for carrying out the said purposes. The petitioners state that on 24th Apr. 1970, Savitri Educational, and Charitable Trust was executed and Mohanlal Jalan, Hari Krishna Jhajheria since deceased and Parmeshwar Lal Kedia were and except Hari Krishna Jhajheria, along with others still are the trustees of the said Savitri Educational and Charitable Trust. The petitioners state that the objects and purposes of the Trust as declared in the said Trust Deed are, inter alia, that the trustees would continue to allow the said Savitri Pathshala to be run in accordance with the object of the said Trust. The petitioners state that the said Savitri Pathshala have two sections, primary and secondary. Pursuant to the direction given by the respondent No. 3 a separate Managing Committee of Savitri Pathshala (Primary Section) in May, 1979, was constituted with two elected Guardians' representatives, two elected teachers' representatives and two members nominated by the Savitri Educational and Charitable Trust with the Head of the Institution as ex-officio member. Reports of the said constitution of the Managing Committee were duly submitted to the respondent No. 3 and

approval for the said constituted Managing Committee was sought for from the respondent No. 3 but it is alleged that the petitioners are not aware of what has happened to the fate of said prayers seeking approval of the said Managing Committee. After the said constitution of the Managing Committee, the members held office bearers election and started functioning for the well being of the said institution. Thereafter Sri Biren Mishra, Dy. Inspector of Schools attached to the office of the respondent No. 3 visited the said primary section of the school several months ago and enquired about the constitution of the Managing Committee and also of the procedure for holding election. At the time of the said enquiry by the said Dy. Inspector of Schools the Head Teacher explained everything to him in details and relevant papers and/or records were also shown to the satisfaction of the said Dy. Inspector of Schools. The petitioners state that thereafter the Managing Committee held several meetings and took some important decisions in the management of the said primary section of the school and started functioning for the better and well being of the said primary school. The teachers and staff also got their respective D.A. from the respondent No. 1. The petitioners state that one Mr. Biren Mishra, a Sub-Inspector of Schools attached to the office of the respondent No. 3 visited the school without prior intimation to the petitioners and without consulting the petitioners and/or the Managing Committee arbitrarily fixed the pay scale of the teachers of the said school. The petitioners state that the petitioner's school is an unaided primary school and the teachers and some non-teaching staff of the said school receive only D.A. from the Government of West Bengal. The petitioners state that the petitioners did not accept the said pay scale fixed arbitrarily by the said Sub-Inspector of Schools and the Managing Committee of the said School fixed the pay scales of the teaching and non-teaching staff of the schools which is higher than the pay scale fixed by the said Sub-Inspector of Schools and started paying them accordingly. The petitioners state that the said Sub-Inspector of Schools visited the school immediately following the day of payment of salary fixed by the Managing Committee of the school and became

very much annoyed after having learnt that the Managing Committee of the said school did not accept the pay scale fixed by him arbitrarily and without jurisdiction and asked the Head Teacher to increase the salary of Mr. Darp Narayan Rai, a teacher of the school. Inasmuch as according to the petitioners the said Sub-Inspector of Schools had no jurisdiction and/or authority under the law to order for the increase of salary of a particular teacher, the Managing Committee did not comply with his said order. It is alleged that Darp Narayan Rai was a teacher in the secondary section of Savitri Pathshala and due to his misbehaviour with a student, he was dismissed from the said Secondary Section but out of compassion and on humanitarian ground, the said Darp Narayan Rai was appointed as a teacher in the primary section. It is alleged that on the 18th May, 1980, the Head Teacher of the school convened a meeting of the teachers of the said school and in the said meeting requested the teachers to make the ensuing annual function of the said school a success. At the said meeting, the said Darp Narayan Rai passed highly defamatory and objectionable remark at Smt. Dhan Kumari Karmacharyya, a lady teacher of the said school who is also a teachers' representative on the Managing Committee of the said school. The said Darp Narayan Rai also attempted to assault the said lady teacher but fortunately the said attempt was foiled by the clerks of the said school and of special class. Immediately after the said incident Darp Narayan Rai was placed under suspension by the Head Teacher of the school. It is alleged that after said suspension, the said Darp Narayan Rai started bearing grudge upon the petitioners and went to the office of the respondent No. 3 and made some baseless and unfounded allegations against the Managing Committee of the said school. It is alleged that on the day following the day of making such representation and baseless and unfounded allegations against the management of the school, the said Sub-Inspector of School, Mr. Biren Mishra visited the said school and made certain enquiries and showed unusual interest in the affairs of Darpa Narayan Rai. It is stated that certain correspondence passed between the said Sub-Inspector Mr. Biren Mishra and the Head Teacher of the school re-

garding the said Darpa Narayan Rai. It is alleged that in the afternoon of 10th July, 1980, the petitioner No. 2 who is the Secretary of the Managing Committee of the school, received a Notice from the respondent No. 4 informing that the respondent No. 4 had been appointed as Administrator of the aforesaid school and that he would take possession and charge of the school at 9 A.M. on the 11th July, 1980. A copy of the said notice issued to the petitioner No. 2 by the respondent No. 4 is annexed to the petition. Thereafter the petitioner No. 2 by his letter dated July 11, 1980 informed the respondent No. 4 that the petitioner No. 2 did not receive any order of supersession of the Managing Committee of the school and also the appointment of the Administrator of the said school. The petitioner No. 2 also stated in the said letter that the Head of the institution was having no power and/or authority to hand over charge to the respondent No. 4 because the Head Teacher was not in charge of the Management of the said school and the petitioner No. 2 stated that the respondent No. 4 could not have any occasion to take over charge from the Head of the institution. In the said letter the petitioner No. 2 requested the respondent No. 4 to send a copy of the primary education memo No. 1656/1(4)S.C./P dt. 20/21st May 1980 immediately. A copy of the said letter is annexed to the petition. It is alleged that no reply has been received as yet. It is alleged that on the 11th July 1980, the respondent No. 4 purportedly took over charge of the school from the Head Teacher of the said School and the petitioner No. 2 sent a letter to the Head Teacher stating that the Head Teacher had no authority and/or power to hand over charge of the school on behalf of the Secretary of the school and it was stated in the said letter that the action of the Head Teacher in purportedly handing over charge of the school to the respondent No. 4 was unauthorised, illegal, void ab initio and prejudicial to the interest of the school. The petitioner No. 2 also asked for an explanation from the said Head Teacher for his said unauthorised and illegal conduct. A copy of the said letter dated July 11, 1980, issued by the petitioner No. 2 is annexed to the petition. It is alleged that no reply has been received as yet. It is alleged that at the said purported hand-

ing over and taking over charge of the school by the respondent No. 4, the said Darpa Narayan Rai, the suspended teacher was present in the school premises and he brought out school registers and several papers and documents of the school from the almirah and produced the same before the respondent No. 4. It is further alleged that the Head Teacher also handed over the keys of the almirah of the said school to Sri Darpa Narayan Rai who opened the said almirah and brought out the said records and/or registers of the school. It is stated that on 17th July, 1980, the petitioner No. 1 wrote a letter to the respondent No. 2. In the said letter the petitioner No. 1 stated that on the 10th July, 1980, the petitioner No. 2 who is Secretary of the school received a letter bearing No. 1 ADM dt. 8-7-80 written by the Dy. Assistant Inspector of School (S.E.) Calcutta. It was also stated by the petitioner No. 1 that in his said letter, the said Dy. Asstt. Inspector of School has referred to the Directorate of Primary Education Memo No. 1656/1(4) S.C./P dt. 20/21st May, 1980 but neither the petitioner No. 1 nor the petitioner No. 2 received any such memo or a copy thereof. In the said letter the petitioner No. 1 also stated that the Managing Committee of the said school was duly constituted and reports and/or information with regard to the said constitution of the Managing Committee was submitted to the authorities concerned. In the said letter the petitioner No. 1 stated that the purported supersession of the Managing Committee and the appointment of Administrator in the said school was illegal, unauthorised and against the principles of natural justice. The petitioner No. 1 also stated that no notice and/or hearing was given to the petitioner before passing of the said purported order of said supersession and appointment of Administrator. In the said letter, the petitioner No. 1 requested the respondent No. 2 to send the said memo bearing No. 1656/1(4) S.C./P dt. 20/21st May 1980 and a copy of the report of the respondent No. 3. A copy of the said letter is annexed to the petition. It is alleged that neither the documents asked for have been supplied nor any reply has been received as yet. The petitioners state that the clerk of the said school has supplied them with a copy of the said order of supersession and the

appointment of Administrator in the said school and from the said copy, the petitioners learnt that the respondent No. 2 in exercise of powers under Order No. 750/EDN dt. 21st Oct. 1970 superseded the Managing Committee of the said school and appointed respondent No. 4 as the Administrator of the said primary school with immediate effect. It was further stated in the said memo, that it appears, from the report of the respondent No. 3 that the present Managing Committee of the said school was not properly functioning and steps taken for reconstitution of the committee in May 19, 1970 suffered from gross procedural defects. A copy of the said memo is annexed to the petition.

2. The petitioners challenge the said order No. 750-EDN (1) dated 21-10-70 on various grounds.

3. An affidavit-in-opposition has been affirmed in this case by one Netai Banerjee on behalf of the respondents Nos. 1, 2, 3 and 4, which states inter alia as follows: It is stated that the primary school named Savitri Pathshala was accorded recognition in 1964 with effect from 1-1-64. Renewal of recognition has been accorded and till today the school is a recognised one. The teachers are being paid Government D.A. only from the Government. After introduction of Free Education Scheme in 1974, the school authority did not come under the scheme. To run the school the school authority collects fee from the public @ Rupees 10 per Class I to IV and Rs. 12 for Class V only. Besides tuition fees the school authority charges session fee @ Rs. 20 a year per capita. Up to June 1978 the primary school had been functioning in the same building and same time with the High School. At that time the school accounts were being maintained with Secondary section. Since July 1978 the primary section has been detached with its accounts and other activities as the Secondary section of the school has been taken over by the Government. It is admitted that a committee was formed but it is stated that it was not formed as per rules. Managing Committee of a primary school is formed as per Government Order No. 750-EDN. (P) dated the 21st October, 1970. An existing Managing Committee may also apply for special constitution as per part 10 of the above noted Government

order. There has been no approved Managing Committee of the School. The Trust Body was not granted special constitution so the committee constituted by the Trust Body is not regular and valid. Moreover the formalities for constitution of Managing Committee were not observed. It is stated that at the time of inspection of the school it was found by the Deputy Inspector of School, that the Managing Committee of the Savitri Pathshala 'Primary Section' suffered from gross procedural irregularities as such the said Managing Committee was not functioning properly. The Government in their Memo No. 381-EDN (P) dated 14-5-1980 desired that in the interest of school Sri P. M. Mediya, Deputy Inspector of School Calcutta be appointed the Administrator of the school. The Director of Primary Education by office Memo No. OP-3P-78 dated 20th, 21st May 1980 appointed him as Administrator of the said Primary School. It is denied that the said school (primary section) was functioning properly as alleged or at all. It is stated that the Managing Committee was not functioning properly as it was not formed in accordance with law. It is stated that the teachers were not getting salary regularly and at par with the scale prescribed for the primary teachers by the Government. It is stated that if the trust body agreed to come under the scheme of free education the teachers might not have suffered. It is stated that Sri Biren Mishra, Deputy Assistant Inspector of Schools, Calcutta visited the school as it is under his jurisdiction. He has the right to request the authority to pay the teachers as per rules to see whether the standard of education is maintained. Accordingly he had got jurisdictional authority to advise the management to fix up the pay of teachers as per rules. It is stated that in terms of Government Order No. 1366-Edn (P) dated the 28th Nov. 1977 it was decided that each D.A. getting school should pay their teachers as per scale laid down for the teachers of fully aided schools. It is denied that the Managing Committee of the school fixed the pay of the teacher as per Rules as alleged or at all. It is also denied that the Sub-Inspector of School fixed the pay of the teacher arbitrarily as alleged. It is stated that the Managing Committee pay the teacher as per their wishes and they do not follow the Rules

laid down by the Government to pay the salary of the teacher of the primary section. It is stated that the Deputy Inspector of School did not accept the payment of teachers fixed by the Managing Committee because it was found that the salary had been fixed arbitrarily. It is further stated that the Deputy Assistant Inspector of Schools has power and jurisdiction to suggest the payment of the teachers in accordance with the Rules if it is found that the salary has been fixed arbitrarily. It is stated that the Deputy Assistant Inspector of Schools did not order but requested the Committee to eradicate irregularity. It is a part of his duty to advise the Managing Committee to follow the departmental orders and rules. It is stated that the respondent No. 4 had been appointed administrator and he wanted to have possession of the charge of the school on 11th July 1980 at 9 a.m. with prior intimation. It is also stated that the Administrator of the School intimated the committee regarding taking over the charge. As such it is denied that the Managing Committee did not receive any order of appointment as alleged or at all. It is further stated that the Secretary and the Head Teacher had been sent copies of the appointment of the Administrator by the Director of Primary Education West Bengal by Memo No. 1656/1(4) S.C./P dated 20-5-1980. It is stated that at the time of taking over charge of the school by the Administrator four persons including the President of the unapproved committee were present and they did not object to taking over the charge by the Administrator. It is stated that Shri Darpa Narayan Rai helped the Head Teacher regarding taking over the charge of the school by the Administrator. It is stated that the Head Teacher told the Administrator that he received a letter in time regarding appointment of the Administrator and informed the same to the President and Secretary of the School (Primary) accordingly. It is also stated that they received a letter of supersession of the Managing Committee. In the said letter it was specifically mentioned that there were procedural defects in the constitution of the Managing Committee. On request of Mr. Bagaria, the Director of Primary Education again sent a letter bearing Memo No. 2425/13 S.C.P./P dated 24th July 1980 along with a copy of the letter 1656/14

S.C./P dated 20-5-80. During inspection it was found that the voters' list was approved by the Head Teacher only. The Head Teacher has no power as per rules to approve voters' list. The intention of the Government behind appointment of Administrator was that the Administrator will regularise the administration of the school and reconstitute the Managing Committee as per rules. It is stated that excepting the petitioners Nos. 1 and 2 there is none who is in the management of the school. It is stated that no recognised institution can be left to the charge of two persons only. As such the appointment of an Administrator was found necessary specially as the petitioner No. 1 Mr. Bagaria is neither a guardian nor a member of the Trust Body. It is denied that the said order of supersession and the appointment of the Administrator in the said school is without jurisdiction and without authority of law and illegal as alleged or at all. It is stated that as per Government Order No. 800-Edn (P) dated the 5th June 1974, the D.P.I. is empowered to supersede any Managing Committee if he thinks that the management of the school is not satisfactory and is also empowered to appoint Administrator or Ad-hoc Committee for the school. It is stated that the enquiry was made by the Deputy Assistant Inspector of School, Calcutta in presence of Mr. Bagaria and the Head Teacher and the report was written in their presence. The Head Teacher of the school and Mr. Bagaria know the report of the Deputy Inspector of Schools (Primary) Calcutta. It is stated that the Committee did not get approval from the appropriate authority as such the said managing committee cannot function in accordance with law. It is stated that there was sufficient material for passing the said order of supersession and appointment of Administrator when the Managing Committee was not functioning properly in accordance with law. It is denied that the appointment of Administrator and the order of supersession was made at the instance and machination of Mr. Darpa Narayan Rai as alleged. It is stated that the respondent had acted independently and not mechanically in passing the said order of supersession and appointment of Administrator which have already been stated in the foregoing paragraphs of this affidavit.

4. Another affidavit has been affirmed in this case by the Administrator Prasad Mohan Medya wherein he has relied on an affidavit affirmed before the Appeal Court in the Appeal preferred from the interim order passed by me. In the said affidavit it has been stated as follows:— Sabitri Pathshala, a registered society, was registered under the Societies Registration Act (Central Act XXI of 1860) on 26th Jan. 1933, the registration number being 7546/217 of 1932-33. The building in which the Sabitri Pathshala was housed was purchased by Sabitri Pathshala by a registered indenture of sale dated the 28th day of Dec. 1949. It will appear from the Memorandum of Association of the Society, namely, the Sabitri Pathshala that 31 persons constituted the first Executive Committee of the said Sabitri Pathshala and neither Mohan Lal Jalan nor Hari Krishna Jhajharia nor Parameshwarlal Kedia were members of the first Executive Committee. According to the Rules of the Society the Executive Committee shall consist of 31 members and shall be elected annually. On 24th April 1979, the aforesaid Mohanlal Jalan, Hari Krishna Jhajharia and Parameshwarlal Kedia purported to create a Trust falsely alleging that the Sabitri Pathshala was under a Trust and that the properties of Sabitri Pathshala were vested in and held by the Trustees of the said Trust and further that the aforesaid three gentlemen were the only trustees of the said Trust, whereas, according to the Memorandum of Association and the Rules and Regulations in respect of the registered society, namely, the Sabitri Pathshala, the administration of the affairs of the society shall be vested in the Executive Committee. The Sabitri Pathshala was at all material times conducting a primary section in the morning from 6-30 a.m. and integrated higher secondary section from 9 a.m. to 4-30 p.m. In 1978 one Kesardeo Jhunjunwalla made an application under Art. 226 of the Constitution challenging the order of the West Bengal Board of Secondary Education dated 25th Jan. 1978 appointing Shri Sudhindra Mohan Roy as the Administrator of the school giving rise to Civil Rule 6196 (W) of 1978. The said Rule was disposed of by Mr. Justice Amiya Kumar Mookherji

on 24th Jan. 1979 directing the Administrator of the school to hold the election by 30th April 1979. Thereafter, an application was made on behalf of the said Administrator praying for extension of the date for holding the election, whereupon Mr. Justice Mookerji passed an order on 18th April 1979 extending the time of holding the election till 31st Aug. 1979. On 25th April 1979 the Administrator of the West Bengal Board of Secondary Education passed another order in view of the fact that the tenure of office of Shri Sudhindra Mohan Roy expired on 4th February 1979 and further that Shri Roy declined to continue and further that a vacuum had, therefore, arisen in the administration of the school, appointing Shri P. M. Medya, the deponent, as Administrator of the school. On 30th July 1979 the Administrator of the Board issued an order withdrawing the approval of the special constitution for the School. It is alleged that due to circumstances beyond his control, the deponent could not hold the election on 31st Aug. 1979, but, when he was taking steps to hold the election of the Managing Committee on or about 10th March 1980 Mohanlal Jalan and others moved an application under Art. 226 of the Constitution against the Administrator of the Board and others including the deponent before T. K. Basu J. praying for an appropriate writ to cancel, rescind, revoke and/or withdraw the order of the respondent No. 1 withdrawing the approval of the Special Constitution and not to enforce the general rules relating to the formation of the Managing Committee of Sabitri Pathshala whereupon Basu J. issued a rule in terms of the prayer and granted an interim order to maintain a status quo till the disposal of the Rule. The said Rule is still pending. In the meantime, on or about 21st Dec. 1979 the appellant No. 2 purporting to sign as trustee of Sabitri Educational and Charitable Trust threatened the deponent that their Durwan will prevent him from holding secondary classes and from discharging of official activities in the school premises in the morning from 6-30 a.m. to 10-30 a.m. claiming that the premises at 5D, Mukhtaram Babu Street were Trust premises and that the Trust had allowed the premises to be used in the morning during the said period for holding classes I to V of the Primary

Section. It is stated that in fact at all material times, as stated above, the Sabitri Pathshala Higher Secondary Section had been holding secondary classes in the morning even before 10-30 A.M. in the said premises and accordingly he wrote a letter on 2nd Jan. 1980 to Shri P. L. Kedia, the appellant No. 2 pointing out that students, employees and teachers of the Secondary School were prevented from entering into school premises during the hours 6-30 a.m. to 10-30 a.m. The deponent also protested that an unauthorised class VI in the secondary section had been started by some persons in the school premises without the permission and approval from him as Administrator of the Secondary School and the deponent pointed out that the primary school had no authority to open class VI in addition to its own recognised classes. On 20th/21st May 1980, the deponent was appointed as Administrator of Primary Section under memo of the Director of Primary Education bearing No. 1656/1/4/SC/P dated 20/21st May 1980 and he assumed charge of the Primary Section on 11th July, 1980. It is alleged that even before he assumed charge another unauthorised Class VII was started in the said school premises between 6-30 a.m. and 10-30 a.m. and after he assumed charge of the primary section not only did the appellants and/or their agents and/or their men forcefully continue holding classes VI and VII but started another unauthorised Class VIII. In that state of affairs, the deponent made a complaint to the Director of Secondary Education with copies to different authorities asking to issue necessary instruction to the Police Authority to see that the main gate of Sabitri Pathshala of Primary and Secondary Schools is not closed to prevent the entry of students, teachers and staff of management of the school and to see that the recognised schools run smoothly. On 16th Sept. 1980 the appellants moved this Hon'ble Court against his appointment as the Administrator of the primary section for an appropriate writ against his appointment as such Administrator whereupon a Rule was issued in Matter No. 1891 of 1980 by me and, on an application for interim order being made, I made an order on 1st Oct. 1980, restraining the respondents and the deponent as Administrator from taking any

steps to convert the unaided Primary School as an aided one. It is alleged that the Sabitri Pathshala was never administered by any Trust Body and that it has at all material times been a registered society since 1933 and the premises in which the Sabitri Pathshala holds its primary and secondary school were purchased by the said Sabitri Pathshala as a registered society on 20th Dec. 1949. The Trust purported to have been created in 1970 has not or cannot have any relevance or application to the said Sabitri Pathshala and the terms of the pretended Trust Deed are not binding upon the school, and the Trustees have no legal right to manage the affairs of Sabitri Pathshala. It is also stated that no part of the assets of the school has vested or could at all vest in the Trustees. Neither the appellants nor any of the so-called Trustees have any right to interfere in the affairs of either the primary section or the integrated higher secondary section of Sabitri Pathshala. It is also stated that anti-social elements and goondas have been sent to the school to create disturbances in the school premises by assaulting the teaching staff and students. In fact, a large number of guardians made an application to the Education Minister of the Government of West Bengal asking for immediate help to stop the raise (raid?) by the hooligans who visit the school daily at the instance of the appellants. It is stated that as stated above the Managing Committee of the said Sabitri Pathshala (hereinafter referred to as the said school) was superseded as early as 20/21st May 1980 and the petitioners cannot therefore claim to be the President and Secretary of the Managing Committee of the said school. It is stated that the said school has never been managed by a body of trustees and the Trust alleged in the said paragraph was constituted in 1970, the said school having been established as early as 1905 and having been constituted into a registered society in 1932-33. The school premises were also purchased by the said school in 1949. The Trust that was constituted was so formed for the mala fide purpose of capturing the school and appropriating its assets and, in any event, the said Trust does not extend to the said school in its operation and effect. The existence and continuance of the said school does not depend on the will and desire of the

so-called Trustees and, therefore, the declaration, if any, to the effect that the trustees would continue to allow the said school to be run in accordance with the object of the Trust is irrelevant as well as motivated. It is stated that the said school had two sections, primary and secondary. It is stated that the deponent was appointed Administrator of the Primary Section also on 20/21st May 1980 and that he assumed charge as such on 11th July 1980. It was submitted that there is nothing in law to prevent the Managing Committee of a school from paying more than what the Government may pay according to Rules and, therefore, the Managing Committee could pay to the teachers sums in excess of the sums paid by the Government in accordance with the Rules and the scale of pay of the teachers determined. It is also submitted that the Managing Committee of the Schools often mala fide decline to accept aid from the Government in order that they may keep the teachers under their thumb and control and may treat them almost as domestic servants.

5. It is submitted that there was no valid reason, except the aforesaid mala fide purpose, for the Managing Committee not to have accepted aid from the Government.

6. It is stated that the deponent has learnt from the said Shri Darpa Narayan Roy that the allegations that he misbehaved with a student in the secondary section or that he passed defamatory and objectionable remarks against Smt. Dhan Kumari Karmacharyya, or that he bore any grudge against the appellants or that he went to the Office of the Respondent No. 3 and made some baseless and unfounded allegations against the Managing Committee of the School are false. It is stated that the deponent took over charges as the Administrator of the Primary Section on 11th July, 1980. It is denied however, that Shri Darpa Narayan Roy brought out School register, papers and documents of the school from the almirah and produced the same before the deponent or that the Head Teacher handed over the keys of the almirah of the school to Shri Darpa Narayan.

7. It was denied that the Managing Committee was properly functioning or that there was no material or basis for

passing the order of supersession and appointment of an Administrator. It is stated that the appellants are holding unauthorised classes VI, VII and VIII in the premises of the said school even though the Management of the Secondary Section of the school has been superseded and it is continuing under the Management of me as Administrator. Any Secondary Class held in the school premises without the permission and consent of the Administrator is unauthorised. Admittedly, the appellants are holding and/or causing to be held unauthorised classes. It is denied that the premises at 5D, Muktaram Babu Street belong to the Trustees of Sabitri Educational and Charitable Trust. It is stated that the premises were purchased in 1949 by Sabitri Pathsala, a registered society. It is also stated that no coaching classes can also be held in the school premises without such permission and consent of the Administrator.

8. It is further stated that in the premises, there are five rooms in the ground floor including one class room, one general office room, one Headmaster's office, one staff room and one room illegally locked by unauthorised persons at the instance of the appellants. On the first floor there are six class rooms and one room for work Education. On the second floor there are six rooms, one library room and one room for Home Science. On the 3rd floor there are six class rooms and one Doctor's room. On the 4th floor there are four rooms for Higher Secondary Classes XI and XII including one room for optional class and one library room. Because of shortage of space in the school premises the school has rented two rooms at 5D, Muktaram Babu Street opposite to the School premises. The Primary Section consists of thirteen sections. The Primary Section is held from 6.30 A.M. to 10.30 A.M. Twenty one Secondary Section Classes are held from 10.45 A.M. to 4.30 P.M. and four Higher Secondary Classes XI and XII are held from 9 A.M. to 4 P.M. In the circumstances, it is submitted that the unauthorised special classes held on the 3rd floor of the said premises are not only illegal but also encroached upon the space for primary classes, secondary classes and higher secondary classes. The Secondary School has twenty-one sections and the Higher Secondary has two sections. It is stated

that as an Administrator of the school both in its primary and secondary sections, the deponent is in-charge of the school premises as well as the administration in the affairs of the school and classes held without my sanction and permission are unauthorised and illegal.

9. On behalf of the petitioners various contentions have been raised. However, in view of the prima facie case made out by Mr. Bachawat appearing on behalf of the petitioners before he completed his submissions I called upon Mr. A. P. Chatterjee, learned counsel appearing for the State-respondents to satisfy me regarding the validity of the impugned order. The contentions of Mr. Chatterjee are as follows:— He has firstly submitted that the order in question has been made under R. 7 of the Rules relating to the constitution of the Managing Committee of all aided Primary schools including the junior basic school situated in Calcutta and other places. The said rules provide as follows:—

"2. The Managing Committee of an aided Primary (including Junior Basic) School in Calcutta or other Municipal area or an area constituted by the State Government as a notified area under S. 934 of the Bengal Municipal Act, 1932, or cantonment area shall be constituted as follows:—

(1) President — to be nominated by the Director of Public Instruction, West Bengal in case of schools located in Calcutta, and elsewhere, by the District Magistrate in consultation with the Sub-Divisional Officer and the District Inspector/Inspectress of Schools,

(2) two persons interested in education of whom at least one should be a woman — to be nominated by the Chief Inspector of Primary Education, West Bengal in case of schools located in Calcutta, and elsewhere by the Sub-Divisional Officer,

(3) two guardians if the number of pupils in a school be not less than one hundred; otherwise, one guardian — to be elected from among themselves by the guardians,

(4) the Corporation Councillor or the Municipal Commissioner of the Corporation/Municipal ward in which the school is situated : or if the school is situated in (a) a notified area — a nominee of

the notified Area Authority and (b) a Cantonment area — a nominee of the Cantonment Officer,

(5) the Head Teacher of the school-Ex-officio, and

(6) two teachers if the school has not less than 6 full time teachers; otherwise one teacher — to be elected by the full-time teachers from among themselves.

EXPLANATION:—

(a) The term "guardian" means father, or in his absence mother; or if neither of the parents is alive or if the ward is not living with any of the parents in the place where the school is situated, any other relative with whom and under whose custody the ward is actually residing. But no one shall be a guardian if he has not attained the age of 21 years.

(b) A teacher who is also a guardian shall not be eligible for election to the Committee as a guardian.

3. The Committee shall elect one from among themselves as the Secretary. But no member of the teaching staff other than the Head Teacher shall be eligible for such election.

4. Fifty per cent of the total number of members of the Committee shall form the quorum in a meeting.

5. The term of the members of the Committee shall be total of three years commencing from the first meeting of the Committee; provided that notwithstanding the expiration of the said term, the members shall continue to hold office until the new members filling the vacancies take office in accordance with the provisions of this order.

6. (1) Every Committee shall, as soon as constituted, seek and obtain the approval of the District Inspector/District Inspectress of Schools.

(2) (a) If the District Inspector/District Inspectress disapproves any Committee, he/she shall communicate the reasons thereof in writing.

(b) (i) An appeal may be preferred to the Director of Public Instruction, West Bengal against the decision of the District Inspector/District Inspectress disapproving a Committee.

(ii) The decision of the Director of Public Instruction, West Bengal shall be final.

(c) If the Committee is disapproved, it shall be reconstituted in accordance with the provisions of this order and in the

light of the observations made by the District Inspector/Inspectress of Schools or the Director of Public Instruction, West Bengal.

7. In case the Director of Public instruction, West Bengal is not satisfied with the management of a school by its Committee, he shall have the right to supersede the Committee and appoint an Administrator in its place."

10. Mr. Chatterjee has submitted that R. 7 confers a subjective satisfaction on the Director of Public Instruction. In any event sufficient reasons have been indicated. It was further submitted that it was not necessary to give an opportunity of showing cause. He has submitted that the principle of natural justice has no application in this case because it is an administrative order and confers subjective satisfaction on the Director of Public Instruction. He has further submitted that the order shows that it has been passed on the ground of various irregularities regarding the constitution of the managing committee. He has submitted that the petition itself shows that it was not properly constituted in accordance with law. On the question of the absence of any order under Rule 6, he has submitted that in this case it would appear from the petition itself that the committee was not constituted in accordance with law and accordingly R. 6 did not apply. There was no question of making any formal order of approval or disapproval in this case. In any event it was submitted that the impugned order itself amounts to rejection of approval under R. 6.

11. In support of his contentions Mr. Chatterjee has relied on two decisions of this Court which are as follows:— *Panchanan Jash v. Board of Secondary Education, West Bengal*, (1967) 71 Cal WN 189; (Paras 27, 31 and 32); *A. K. Maity v. President, West Bengal Board of Secondary Education*, (1967) 71 Cal WN 396, (Para 25).

12. From R. 6 itself it is quite clear that as soon as a committee is constituted they have to seek approval of the District Inspector of Schools and in case of refusal to approve an appeal lies. In my opinion this itself contemplates that the District Inspector of Schools concerned must apply his mind and that he should pass a formal order giving reasons and communicate the same because

a right of appeal has been conferred by the statute. Unless a formal order is passed giving reasons, the provisions of preferring any appeal would be futile and ineffective. It is not open to the respondents to contend that merely because the authority was of the opinion that the committee was not properly constituted R. 6 had no application and, therefore no order need be passed under the said Rule. There cannot be any preconceived notion about the validity or invalidity of the constitution of the committee even before an application is made under R. 6. Even if such an opinion is held it is a duty on the part of the authority concerned to apply his mind afresh and either to give his approval to such application or to reject the same. In my opinion it is far-fetched to suggest that merely because according to the opinion of the appropriate authority, the committee was not properly constituted, it was not necessary to pass any order in that event under R. 6. In this particular case the allegation that such application for approval has in fact been made has not been disputed. The admitted position is that no formal order has even been passed under R. 6.

13. Mr. Chatterjee has then sought to contend that such application has been rejected and that it would appear from the order of supersession dated the 21st May, 1980 itself. In my opinion this contention is not only far-fetched but also inconsistent. Mr. Chatterjee's client cannot be allowed to blow hot and cold at the same time. He cannot be allowed to contend that no order was needed to have been passed under R. 6 and at the same time argue that the order of supersession and appointment of an administrator under R. 7 is also an order under R. 6 rejecting the prayer for approval made under R. 6. The impugned order is an order under R. 7 and it cannot be treated at the same time as an order under R. 6. Apart from anything else an order under R. 6 has to be passed by the District Inspector of Schools and the order under R. 7 is to be passed by the Director of Public Instruction. Therefore apart from anything else the impugned order cannot be treated as composite order of disapproval required to be passed by the Inspector of Schools under Rule 6 and at the same time an

order of supersession passed by Director under R. 7.

14. In that view of the matter I reject the contention of Mr. Chatterjee that Rule 6 need not be applied in the facts and circumstances of this case. I also reject the contention of Mr. Chatterjee that the impugned order is also an order under R. 6.

15. Further in my opinion this order of supersession is also bad inasmuch as in my opinion where the allegation is that the constitution of the committee is improper and not according to law (which is the case of the respondents herein) it is the R. 6 which applies and it is open to the authority concerned in such a case not to give approval to the said committee. In that case R. 7 has no application and the same cannot be invoked. In my opinion Rules 6 and 7 must be read harmoniously.

An inconsistent or overlapping interpretation must not be resorted to unless there cannot be any other interpretation. In my opinion following the well known canons of interpretation of statute it must be held that the question of irregularity of constitution of a committee is the subject matter of and can be dealt with only under the provisions of R. 6 and on that ground application for approval may be rejected. Rule 7 comes into play only when the committee is properly constituted and is approved under R. 6. Rule 7 on the other hand contemplates that when the D.P.I. is not satisfied by the management of the school by its properly constituted committee then he can act under R. 7. When the question is whether it is a properly constituted committee or not, it does not come within the scope of R. 7; only R. 6 is attracted in that case. In that view of the matter in my opinion this order is bad when it says that the reconstitution of the committee made in 1979 suffers from gross procedural irregularity. This mixes up R. 6 with R. 7. An order under R. 7 has been made taking an extraneous matter into consideration viz., alleged irregularity in respect of the constitution of the committee.

16. This order under R. 7 also suffers from another defect. This order is vague and not clear. It mentions that the Committee is not properly functioning. No particulars have been given of the same. It also mentions that the steps taken

suffer from gross procedural irregularity without giving any particulars. In that view of the matter in my opinion this is not a proper order under R. 7.

17. This order suffers from another vice also. This order has been passed admittedly without giving an opportunity to the person concerned of being heard. It is now well settled that when an order is passed which affects the civil right of a person, he must be given an opportunity. Right to hold office is a civil right. If that right is sought to be taken away, the persons concerned must be given an opportunity of showing cause. It is now well settled that there is very little difference between quasi-judicial and administrative order so far as the question of principles of natural justice is involved. When it affects the civil rights of any person, he must be given an opportunity. The petitioners concerned claim to be a properly constituted Managing Committee of the School. They are sought to be removed on certain allegations without giving them an opportunity of being heard. In my opinion this cannot be supported in law and it violates the principles of natural justice. It is also well settled that the principle of natural justice would apply to administrative orders since the concept of natural justice cannot be put into a straight-jacket. It has to be kept in mind that the persons concerned should be given a reasonable opportunity of showing cause and that the administrative authority concerned should act fairly, impartially and reasonably. Even if an Act is silent to that effect having regard to the nature of the right enjoyed, principle of natural justice must be followed unless it is impliedly overruled by the statute.

18. The cases cited by Mr. Chatterjee in support of his contention need not be dealt with in detail because the principle of law has now been well settled by the decisions in Binapani's case (AIR 1967 SC 1269) and all the decisions cited were decided prior thereto and to that extent they are no longer good law.

19. In respect of the contention of Mr. Chatterjee that R. 7 confers a subjective satisfaction on the authority concerned, I need not go into the same in details. If it is contended that it confers subjective satisfaction and not objective one, in the sense that there need not be any

material at all, in my opinion then it would amount to conferring naked or arbitrary power without any guiding policy and in that any event R. 7 will be ultra vires the Constitution being violative of Art. 14 of the Constitution of India. However, it is now well settled that when two interpretations are possible, the Court should accept that interpretation which makes it constitutional in preference of that interpretation which makes it unconstitutional. In that view of the matter I must proceed on the basis that the R. 7 does not confer any naked or arbitrary power or subjective satisfaction but an objective test has to be made out.

20. I should also point out that not only no reasons have been given but also some vague grounds have been set out in the order. No clear case has been made out in the affidavit affirmed on behalf of the State. Various inconsistent statements have been made. Further the submissions made are not only inconsistent with the order but they are also inconsistent with the averments made in the affidavit.

21. In that view of the matter I allow this application and make the Rule absolute. There will be a writ of Mandamus restraining the respondent from giving any effect or further effect to the impugned order bearing No. 1656/1 (4) S.C./P dated the 20th/21st May, 1980, being annexure 'E' to the petition. The respondent-administrator is restrained from further acting as administrator of the said School. He is directed to hand over possession of the School to the petitioner immediately.

Prayer for stay of the operation of this order is rejected on the ground that this case shows gross irregularity and lack of responsibility on the part of the Officers on whom statutory powers have been conferred. As I have stated in my judgment, they have ignored the rules and they have acted improperly, unreasonably and unfairly.

22. There will be no order as to costs.

Rule made absolute.

AIR 1982 CALCUTTA 599

CHITTATOSH MOOKERJEE AND
SACHINDRA NATH SANYAL, JJ.

Alok Kumar Aich, Appellant v. Asoke Kumar Aich and others, Respondents.

A. F. O. D. No. 137 of 1980, D/- 7-6-1982.*

(A) Succession Act (39 of 1925), S. 63 — Evidence Act (1 of 1872), Ss. 101-104 — Will — Proof — Mode of — Onus of proof.

The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirements of attestation prescribed in case of a will by S. 68 of the Succession Act. It is also settled law that the onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. The propounder is called upon to show by satisfactory evidence that the will was signed by the testator and the testator was in sound and disposing of state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own will. AIR 1959 SC 443, Rel. on. (Para 8)

(B) Evidence Act (1 of 1872), S. 3 — Chance witness — Person attending chamber of Advocate who had advised the testator in the matter of preparation of Will — Cannot be called as mere chance witness. (Para 9)

(C) Evidence Act (1 of 1872), S. 3 — Witnesses — Credibility of — Witnesses attesting to will deposing in Court four years after attestation — Minor discrepancies in their evidence are not unusual and the same do not really affect the credibility of the witnesses. (Para 10)

(D) Succession Act (39 of 1925), Ss. 74, 63 — Will — Construction — Due execution of Will and testamentary capacity of testator proved — Court is not entitled to consider the terms of will for deciding whether testator was justified in disinheriting his eldest son and his family.

*Against Decree of S. Maity, Addl. Dist. J., 9th Court, Alipore of Zillah, D/- 17-12-1979.

Where there was overwhelming evidence both internal to the will and external about the testamentary capacity of the testator and it was proved that with full knowledge and free will the testator had executed the said testamentary document and the propounder by examining three of the attesting witnesses had proved due execution and attestation of the will, it was not necessary for the court to decide whether or not the testator was justified in disinheriting his eldest son and his family. AIR 1933 Cal 769, Foll. (Para 13)

It is not permissible to a court of probate to consider aliunde the terms of the will to consider whether the relations who had natural and legitimate claim on the testator's bounty have been cut off altogether or not. In the instant case, due execution of the will was proved. It was also proved that the testator had full testamentary capacity. Thus, the onus probandi had been discharged. The probate of the will could not therefore, be refused on the ground that the reasons given by the testator in his will for excluding his eldest son and his family, had not been satisfactorily established. (Para 13)

(E) Succession Act (39 of 1925), Ss. 61, 63 — Evidence Act (1 of 1872), Ss. 101-104 — Will — Undue influence — Burden of proof — Will proved to be executed with due solemnity by a person of competent understanding — Burden of proving that it was executed under undue influence is on the party who alleges it, AIR 1955 SC 363, Rel. on, (Para 14)

(F) Succession Act (39 of 1925), Sections 299, 284 — Appeal against rejection of caveat — Plea of undue influence against propounder of will — No specific allegation in written statement to that effect by caveator — No particulars of alleged undue influence given — Plea cannot be allowed to be raised in appeal for the first time, (Para 15)

(G) Succession Act (39 of 1925), S. 61 — Will — Undue influence — What constitutes — Elements of, (Contract Act (1872), S. 16).

It is not every influence which is brought to bear on a testator that can be characterised as "undue". It is open to a person to plead his case before the testator and to persuade him to make a

disposition in his favour. And if the testator retains his mental capacity, and there is no element of fraud or coercion — it has often been observed that undue influence may in the last analysis be brought under one or the other of these two categories — the will cannot be attacked on the ground of undue influence. There must be pleading and evidence to prove that the person against whom allegation of undue influence is made, was in a position to dominate the will of the testator. Secondly, the said influence was actually exercised and the amount of influence even if exercised, must be proved to be undue. In the instant case, the caveator-appellant has failed to prove these elements constituting undue influence, AIR 1955 SC 363. Rel. on, (Para 15)

Cases Referred :	Chronological	Paras
AIR 1977 SC 74		8, 11
AIR 1965 SC 354		8
AIR 1964 SC 529		5, 8
AIR 1960 Cal 551		4
AIR 1959 SC 443		8
AIR 1955 SC 363		14, 15
AIR 1933 Cal 769 : 57 Cal LJ 246		13
AIR 1929 Cal 290 : ILR 56 Cal 55		4
AIR 1919 PC 132		14

M. N. Ghosh, D. Bhattacharjee, G. C. Pal and P. K. Mukherjee, for Appellant; Saktinath Mukherjee, Madhusudan Banerjee, Bhaskar Ghosh (for No. 1), S. P. Roy Chowdhury, Dipak Ghosh, (for No. 3), Rabindra Nath Mitra and Mrs. Manjuli Chowdhury (for No. 4), for Respondents.

CHITTATOSH MOOKERJEE, J. :—
The learned Additional District Judge, 9th Court, Alipore by his judgment and decree complained of has rejected the caveat filed by the appellant and has directed that the probate be issued in favour of the respondent No. 1, Alok Kumar Aich, in respect of the alleged will of late Amarendra Chandra Aich, who died on 29th Dec. 1975. The appellant and the respondent No. 1 are respectively the eldest and the youngest sons of the deceased testator, Amarendra Chandra Aich, the respondent No. 2 is his widow and the respondents 3 and 4 are his daughters.

2. Mr. M. N. Ghosh, learned advocate on behalf of the appellant, has submitted that the respondent No. 1 who propounded the aforesaid will of deceased Amarendra Chandra Aich, could not

and did not prove the due execution and attestation of the said will and also could not and did not explain the suspicious circumstances relating to the probate in respect of the said alleged will of Amarendra and therefore he ought to be refused probate on the ground that by exercising undue influence upon the testator, Amarendra, Alok, the respondent No. 1, the propounder had procured the said will under which the propounder himself was the principal beneficiary.

3. Having given our anxious consideration to the matter, we find no substance in the above submissions made on behalf of the appellant and we hold that the learned Additional District Judge has rightly granted probate in respect of the said will whose execution and attestation were satisfactorily proved and that the appellant's case regarding undue influence cannot be accepted.

4. The aforesaid will (Ext. 1) was in Bengali language undisputedly written by the deceased testator, Amarendra Chandra Aich, who had signed on each page and also put his signatures on its last page. Mr. Ghosh, learned advocate for the appellant, himself fairly conceded that the law makes a great presumption in favour of the genuineness of such a holograph will (vide *Ajit Chandra v. Akhil Chandra*, AIR 1960 Cal 551 (paragraph 9); *Santashila v. Narendra Nath* (1929) ILR 56 Cal 55; (AIR 1929 Cal 290).)

5. The Supreme Court in *Shashi Kumar Banerjee v. Subodh Kumar Banerjee*, AIR 1964 SC 529, had observed that the will undisputedly was a holograph will admittedly in the handwriting of the testator. In the last paragraph of the will the testator had stated that he had signed the will in the presence of the witnesses and the witnesses had signed in his presence and in the presence of each other raised strong presumption of its regularity and it being duly executed and attested.

6. The appellant neither pleaded nor proved that at the time of the execution of the will the testator, Amarendra Chandra Aich, did not possess testamentary capacity. Although Amarendra was an aged person and suffered from some kind of heart ailment, the same did not impair his mental capacity to make a will. Sailendra Nath Mitra, was

the husband(?) of Amarendra Nath Aich's wife, (DW 3), testified that when he met him last Amarendra was not keeping physically fit. He would not go out for long walks. He would only move about very little but DW 3 claimed that after Durga Puja in the year 1975 he had visited Amarendra to offer Vijaya greetings. At that time, Amarendra was ailing and had discussion with DW 3 over worldly affairs.

7. We have no reason to disbelieve the evidence of PW 4, Amiya Kumar Sen, that the testator Amarendra had consultations with him after he had come to PW 4 with notes regarding the will. PW 4 further testified that the testator was in a fit mental condition. After interval of about two months towards early December, the testator had come to PW 4 with the will engrossed and had told Amiya Sen, PW 4, that he had intended to have the will registered as early as possible. PW 4 also deposed about the attestation of the will by him and also about the registration of the will. DW 3, Sailendra, also claimed that he and Amarendra had discussion about making of a will by the latter. Therefore, it was only reasonable and probable that the testator, Amarendra, who was not in good health had decided to make a will and for this purpose had consulted Amiya Kumar Sen, PW 4. On the materials on record we are unable to accept the submission of the learned advocate for the appellant that said Amiya Kumar Sen, PW 4, had done anything improper or unprofessional in the matter of giving advice to the testator regarding the formalities of making of a will. In course of his cross-examination of Amiya Kumar Sen, PW 4, or in his own evidence the appellant Alok did not allege that there was any collusion between PW 4 Amiya Kumar Sen, and the propounder, Asoke Kumar Aich. Merely because the PW 4 had admitted acting as Asoke's lawyer, only after his signature on a petition filed in the court was proved, we cannot reject evidence of PW 4 regarding preparation of the will (Ext. 1) and its execution and attestation should be discarded. Three out of the four persons who had signed as attesting witnesses deposed. Asoke Banerjee, whose name was first among the attesting witnesses, did not testify, although he had affirmed an affidavit at the time of the filing of the

application by Asoke for granting probate to the said will. Alok DW 1, admitted that he was not in bad terms with Rabindra Nath Dutta (PW 1) although he happened to be the elder brother of one of the friends of Asoke, the propounder. Alok, DW 1 further stated that he had no enmity with Asoke Nath Banerjee and DW 1 claimed that Asoke Nath Banerjee knew the real background of the will and he had been withheld. Alok, himself did not take any step to examine Asoke Nath Banerjee as a witness. The appellant Alok did not also make any specific allegation against Amiya Kumar Sen except stating that Amiya Babu was not his father's friend. He admitted that Amiya Babu happened to be a neighbour and, therefore, we refuse to believe DW 1 that Amiya Babu was not acquainted with the testator. We prefer to accept the testimony of Amiya Sen, PW 4 on this point.

8. It has been repeatedly held that the mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirements of attestation prescribed in case of a will by S. 68 of the Succession Act. It is also settled law that the onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. The propounder is called upon to show by satisfactory evidence that the will was signed by the testator and the testator was in sound and disposing state of mind that he understood the nature and effect of the dispositions and put his signature to the document of his own will. The aforesaid observations of Gajendragadkar, J. in *H. Venkatachala Iyengar v. Thimmajamma*, AIR 1959 SC 443, has been consistently followed and applied by the Supreme Court in their later decisions (vide *Shashi Kumar Banerjee's case* (AIR 1964 SC 529) (supra); *Ramchandra Ram-bux v. Champabai*, AIR 1965 SC 354; *Sm. Jaswant Kaur v. Sm. Amrit Kaur*, AIR 1977 SC 74).

9. We agree with the trial court that there was no reason to disbelieve at least Rabindranath Dutta, PW 1 and Animesh Roy Chowdhury, PW 2 about the attestation of the will of Amarendra

Chandra Aich. Rabindranath Dutta is a medical practitioner and a close neighbour. Nothing has been suggested by the appellant against the impartiality of Rabindranath Dutta, PW 1. We believe his statement that Amarendra Babu had come to his chamber with the will and had requested Rabindra, PW 1, to put his signature. Rabindra claimed that at first he was reluctant but Amarendra Babu had pressed for his signature. Then he agreed. Amarendrababu, according to Rabindra, put another signature on the will in his presence and thereafter, PW 1 had put his signature on it. Thus, Rabindranath, PW 1, had testified that Amarendra had acknowledged his first signature in the will and also had signed again in his presence. Thereupon, Rabindranath Dutta, PW 1, put his signature as an attesting witness. Animesh Kumar Roychowdhury, PW 2, cannot be called a mere chance witness. PW 2, Animesh, from time to time used to attend the chamber of Amiya Kumar Sen, who had advised the testator in the matter of the preparation of the will. Animesh, PW 2, deposed that Amarendra had told him that he had himself written the will and had put his signature in all the sheets. Thereupon, PW 2 signed in the presence of Amarendra. According to PW 2, the signature was obtained in the chamber of Amiya Kumar Sen. PW 2 stated that Amiya Kumar Sen and two other witnesses had signed before he put his signature on it. There was no material on record to prove that Animesh Roychowdhury was not a witness of truth. It is true that there was some discrepancies in the evidence of Amiya Kumar Sen regarding the attestation of the will. The endorsement by Amarendra in the will that he had put his signature in the presence of all the attesting witnesses is also not consistent with the evidence of Rabindra, PW 1, that he had signed as an attesting witness in his chamber.

10. The witnesses had deposed in court nearly four years after they had acted as attesting witnesses. Therefore, some minor discrepancies in their evidence were not unusual and the same did not really affect the credibility of the witnesses, they appear to be otherwise disinterested and respectable persons. Since Amarendra had obtained the advice of Amiya Kumar Sen, PW 4, it

was not unusual for PW 4 to take steps in the matter of attestation of the will by his fellow lawyer, Animesh, PW 2 and also in helping Amarendra in having the will registered. But there is no reason to hold that PW 4 "was the real brain behind the entire thing" because the defendant neither pleaded nor proved that he had colluded or conspired with Alok, the propounder, in the matter of making the will (Ext. 1) by the testator, Amarendra Chandra Aich. We agree with the trial court that the propounder satisfactorily proved that Amarendra had signed the will and that it was duly attested at least by three witnesses Rabindranath Dutta, P.W. 1, Animesh Roy Chowdhury, P.W. 2 and Amiya Kumar Sen, P.W. 4.

11. Undoubtedly, in cases where the execution of a will is shrouded in suspicion, the propounder must lead evidence to remove such suspicions and satisfy the conscience of the court that the will was duly executed by the testator (vide the observations in paragraph 9 of the Supreme Court decision in *Sm. Jaswant Kaur's case* (AIR 1977 SC 74) (supra).) In the present case both in the trial Court and in this court the defendant appellant strenuously endeavoured to establish that there was no cogent evidence of bad relationship between him and his father, and therefore, it was most unnatural to exclude not only the appellant Alok, but his son and wife from the properties of Amarendra. The court below also found that there was no corroboration of the statement of Amarendra made in his will (Ext. 1) that Alok was arrogant and abusive and that he had condoned his earlier lapses but an incident dated 27th September, 1979 was too much for the testator to bear and he had separated Alok with effect from 1st Oct., 1975. The learned advocate for the appellant, in this connection, has also strongly relied upon the evidence of Sailendra Nath Mitra, brother-in-law of the testator, who testified that Amarbabu (the testator) had good relations with his eldest son, Alok and that the father and the sons lived in joint mess. But Sailendra Nath Mitra, D.W. 3, and testator's daughter, Anita, both spoke about constant friction and misunderstanding between the two sons of the testator. Alok, D.W. 1, himself admitted on the date mentioned

in the will, he had some serious differences with his brother. The appellant, Alok, further deposed that it was not a fact that his relationship with his father was very bitter. But he had to concede that his father took him to task if he returned home late. Anita, D.W. 2, also admitted on 27th September, 1975 there was a serious quarrel between her two Dadas. She, however, denied that the father had separated Bards (meaning the appellant) since 1st October, 1975. It has transpired in evidence that in August, 1974, Alok, the eldest son of the testator, had married and since the said time the testator and his youngest son used to live in the same room. It also appeared from the evidence that the testator had at least two joint accounts with his youngest son, Asoke. It was reasonable and probable that the youngest son, Asoke, was closer to his father and probably the testator had taken the said side of the youngest son in his quarrels with his eldest brother, Asoke. It further appears according to Alok's evidence, that the testator was fairly old and was peevish and easily irritable (vide the evidence of Alok, D.W. 1, at page 64 of the paper book). But no other witness has corroborated the evidence of Alok (D.W. 1) that his father had lost his power of discrimination. In fact, the witnesses examined on other sides had testified that Amarendra throughout possessed sound disposing mind.

12. We have perused the contents of the will (Ext. 1). The testator by his said will had disinherited his eldest son and his family and the same indicated that he was very much displeased and annoyed with the appellant and his family. It is immaterial that about a year back he had written an inland letter to Alope's wife in affectionate terms (vide Ext. 1 dated 28th September, 1974). In October, 1975 the testator recorded in his will that he was very much displeased with the behaviour of his son and, therefore, he was disinheriting him and his family. The evidence of Sailendra Nath Mitra, D.W. 3, also indicated that Amarendra was then contemplating about making his will. It may be because Amarendra became displeased, he did not ultimately make dispositions in the manner. He had attentively discussed with Sailendra Nath Mitra, D.W. 3, when the latter visited the testator after Vijaya

Dashami in the year 1975. We believe the evidence of Amiya Kumar Sen that the testator, Amarendra, had approached him and had taken his advice in Oct., 1975 and, therefore, in December, 1975 Amarendra again met Amiya Kumar Sen, P.W. 4 with the will already written by him. Therefore, it is clear that Amarendra after deliberation had prepared and executed the will. After execution and attestation, Amarendra himself went to the Registration Office and got the will registered.

13. Thus, there was overwhelming evidence—both internal to the will and external about the testamentary capacity of Amarendra Chandra Aich, and that with full knowledge and his free will he had executed the said testamentary document. We have already held that the propounder by examining three of the attesting witnesses proved due execution and attestation of the will. Therefore, the court need not decide whether or not the testator was justified in disinheriting his eldest son and his family. In this connection, the learned advocate for the respondent has relied upon the decision of C. C. Ghose and S. K. Ghose, JJ. in *Shyam Sundar Debanshi v. Srimati Kamal Kumari Dassi*, (1933) 57 Cal LJ 246 : (AIR 1933 Cal 769). The Division Bench had held that if the court considered that 'due execution' has been proved, that in itself will amount to a finding that the testator with full knowledge of the claims of his relations upon his bounty, with the full knowledge of the state of his properties and with full knowledge of every material circumstance, had executed the will. The Division Bench had further observed that if the court is satisfied about the factum of execution, it is not entitled to pay exclusive attention to the terms of the will. The court should confine its attention to the due execution of the will and whether the probate of the will should be granted or not, the court will not, however, overlook or disregard such elements of suspicion as may be brought to its notice. The court is to analyse direct or positive evidence as regards execution of the will and try to test the accuracy of the evidence remembering of the time what are the real elements of suspicion which may attach to the execution of the will. The Division Bench also pertinently pointed out that it is not permis-

sible to a court of probate to consider aliunde the terms of the will to consider whether the relations who had natural and legitimate claim on the testator's bounty have been cut off altogether or not. We respectfully agree with the above statement of law. In the instant case due execution of the will has been proved. It has been also proved that the testator had full testamentary capacity and, therefore, the onus probandi has been discharged and the probate of the will cannot be refused on the ground that the reasons given by the testator in his will for excluding his eldest son, Alok have not been satisfactorily established.

14. It is also settled law that once it has been proved that a will has been executed with due solemnity by a person of competent understanding, the burden of proving that it was executed under undue influence is on the party who alleges it: (See *Naresh Charan Das Gupta v. Paresch Charan Das Gupta*, AIR 1955 SC 363 which relied upon the decision of the Judicial Committee in *Craig v. Lamoureux* AIR 1919 PC 132). Mr. Mukherjee, learned advocate for the respondent No. 1, has correctly pointed out that the defendant appellant in his written statement did not make any specific allegation against the propounder and did not give any particulars of alleged undue influence. He only broadly claimed that the alleged will was not the outcome of the free will of Amarendra Chandra Aich. The defendant in the trial court did not raise any specific issue regarding undue influence and the judgment of the trial court does not indicate that the defendant had urged that the propounder by exercising undue influence upon his father procured the will in question. We are unable to allow the defendant appellant to advance the plea of undue influence because the defendant did not adduce sufficient evidence on the said point. He did not give any particulars in support of his statement in his examination-in-chief that "Father never wrote this will under his free will. My brother bore grudge against us and he has somehow procured this will.....". Again D. W. 1 in course of his cross-examination stated that the will was procured from him applying pressure and taking advantage of his physical and financial weakness. Neither Anita, the younger daughter of the testator (D. W.2) nor the

testator's brother-in-law, Sailendra (D. W. 3) has corroborated the claim of the defendant, Alok, D. W. 1, that the testator had no mental capacity or that the will was procured by exercising undue influence upon him.

15. The Supreme Court in Naresh Charan Das Gupta's case (AIR 1955 SC 363) (supra), had pointed out that it was elementary law that it is not every influence which is brought to bear on a testator that can be characterised as 'undue'. It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favour. And if the testator retains his mental capacity, and there is no element of fraud or coercion — it has often been observed that undue influence may in the last analysis be brought under one or the other of these two categories — the will cannot be attacked on the ground of undue influence. The respondents have allegedly pointed out that there must be pleading and evidence to prove that the person against whom allegation of undue influence is made, was in a position to dominate the will of of the testator. Secondly, the said influence was actually exercised and the amount of influence even if exercised, must be proved to be undue. In the instant case, the defendant has failed to prove these elements constituting undue influence.

16. We have already held that when the propounder has satisfactorily proved that the testator had himself written out the will and had executed the same and that his signature was duly attested, the probate cannot be refused on the ground that the propounder did not prove that the defendant No. 1 deserved to be excluded from inheritance. We have perused the will and we find that while the testator deprived his eldest son, his wife and son from his property, the testator had acknowledged that his eldest son had given him Rs. 6,400. The testator had directed repayment of the said sum of Rs. 6,400 to his eldest son. Further, while the testator directed that his residential house would devolve only upon his youngest son, Asoke, his wife and his youngest daughter, Anita, so long the latter remain unmarried, were given right of residence in a portion of the house. He also directed Asoke to pay to them Rs. 150 as maintenance per

month. The testator gave further directions regarding the marriage expenses of his youngest daughter Anita. Therefore, the dispositions made in the will do not rouse any suspicion about its genuineness. Mr. Ghosh also submitted before us that it was not believable that the propounder had no knowledge about making of the will and its execution and attestation and that he had for the first time come to know of it from Amiya Kumar Sen, P.W. 4, after the death of his father. In our view, when it has not been proved that the propounder had taken any part in the above matters and the evidences was that the testator himself consulted P.W. 4 and in his own handwriting wrote the will and, thereafter, got his signature attested by the witnesses, it is immaterial to find out whether or not Asoke had known about the will during the lifetime of his father.

17. For the foregoing reasons, we conclude that the court below rightly granted probate in respect of the aforesaid will of Amarendra Chandra Aich, the testator and this appeal should fail. We, therefore, dismiss this appeal without any order as to costs.

18. No order is passed on the application filed by the respondent. But this would be without prejudice to the rights and contentions of the parties in any proceeding according to law.

19. Operation of this order will remain stayed for one month from date.

SANYAL, J.:— I agree.

Appeal dismissed.

AIR 1982 CALCUTTA 605

RAMENDRA MOHAN DUTTA

AND C. K. BANERJI, JJ.

The Commissioner of Payments (Coking Coal), Appellant v. Sourindra Nath Basu and others, Respondents.

Appeal No. 150 of 1981, D/- 22-7-1982.

(A) Civil P. C. (5 of 1908), O. 21, R. 58 (1) Proviso (b); (3) (d), (4) and (5) — Application for modification of decree — Order giving opportunity to make further application on proper materials — Order is one under sub-rule (3) (d)

HZ/IZ/D725/82/TGD/SNV

and as such a decree under sub-rule (4) — It is appealable.

Where in the order on an application under R. 58 for varying or modifying the decree, an opportunity to make further application on proper materials was given and the court did not indicate its mind that on the basis of the proviso (b) to sub-rule (1) the objection was refused to be entertained and as such the same was dismissed, O. 21, R. 58, sub-rule (5) would have no application and, accordingly, the order passed would be deemed to have been so passed under O. 21, R. 58, sub-rule (3) (d). Therefore, the order so passed under sub-rule (3) (d) would have the effect as if it were a decree under sub-rule (4) and the appeal would lie from such order of dismissal as a matter of course.

(Para 3)

(B) Civil P. C. (5 of 1908), O. 21, R. 58 — Application under for modification of decree — Dismissal of, on ground of want of sufficient particulars — Validity. Order of single Judge, Reversed.

Where in an application for modification of decree, the applicant had stated that he had received a comparatively small amount for disbursement on account of acquisition of coal mine and the same was not sufficient for paying off priority debts and nothing would remain to pay the decree-holder who was not a secured creditor, the dismissal of the application on the ground of want of sufficient particulars was not justified. When the decree-holder was not secured creditor his claim would be postponed until the secured or preferential creditors were paid off. That being the position, the rest of the particulars that would be required for disposal of the matter would be the subject matter of an order for discovery and inspection and thereafter the same would be considered after evidence was led in respect thereof in adjudicating the claim of the decree-holder. As such, the court could not dismiss the application without such adjudication on the ground that the detailed particulars had not been furnished in the petition itself. It was not a case where no particulars at all had been furnished. Order of single Judge D/- 26-8-1980. Reversed.

(Para 8)

RAMENDRA MOHAN DATTA, J.:—

This appeal arises from the order dated Aug. 26, 1980, passed by Mrs. Khastagir,

J. in an application for an order for vacating or modifying or varying the order of attachment dated Jan. 22, 1975. The application was apparently made under the provisions of O. 21, R. 58 of the Civil P. C. as amended in 1976 but in the cause title it has been described as an application pro interesse suo or in the nature thereof.

2. There is no judgment in the matter but the learned Judge ordered as follows:

"Upon reading an application of Commissioner of Payments (Coking Coal) (hereinafter referred to as the said applicant) pursuant to a notice of motion dated the first day of July last and upon hearing the Advocates for the parties appearing herein,

It is ordered that the application made in this suit be and the same is hereby dismissed. And it is further ordered that the said applicant do pay to the plaintiff/respondents their costs of and incidental to this application to be taxed by the Taxing Officer of this court. And it is further ordered that the parties appearing in this suit be at liberty to apply on proper materials".

3. The provisions of O. 21, R. 58 relate to the adjudication of claim when an attachment has been levied on the property of the person concerned in an application in execution of the decree. The amendment of the Code has provided that such adjudication would be made in the application itself and the matter would be finally disposed of by making orders as provided thereunder and such orders so passed would have the character as if it were a decree. It is only when the matter is disposed of under the proviso to sub-rule (1) thereof, the provisions of sub-rule (5) would be attracted and under such provision, the party concerned against whom such order, refusing to entertain his application would be passed, would be at liberty to file a suit and subject to the result of such suit, the order refusing to entertain such application, would be conclusive. In the present case there is no indication from the order itself that the learned Judge has refused to entertain the application on the ground as mentioned in proviso (b) to sub-r. (1) of R. 58. Proviso (b) also requires some determination inasmuch as the court has to consider therein that the claim or objec-

tion was either designedly or unnecessarily delayed and on that basis the court would make an order refusing to entertain the application. That is not the case here as would appear from the last sentence of the order where it has been provided that the parties appearing in the said suit be at liberty to apply on proper materials. If the court had been satisfied that it was a case of delay which was caused designedly or unnecessarily, then the court would not have given them an opportunity to make further application on proper materials. The court under such circumstances should have indicated its mind that on the basis of the proviso the objection was refused to be entertained and as such the same was dismissed. That, not having been made, in our opinion, O. 21, R. 58, sub-rule (5) could have no application and, accordingly, the order passed herein must have been so passed under O. 21, R. 58, sub-rule (3) (d). The position, therefore, is that the order so passed under sub-r. (3) (d) would have the effect as if it were a decree under sub-rule (4) and the appeal would lie from such order of dismissal as a matter of course.

4. On that basis we decide that the appeal is maintainable and we reject the argument put forward by Mr. Mukherjee that no appeal lies because of the provisions of O. 21, R. 58, sub-rule (5) read with the proviso (b) to sub-rule (1) thereto. With this observation we proceed to consider the merits of this appeal.

5. This is a case where an attachment order was passed on January 22, 1975, wherein it was inter alia ordered that the

"sum of Rs. 2,03,145.06 paise only be realised by attachment of the sum of Rs. 56,500/- being the amount to be paid to the defendant under Sec. 10 of the Coking Coal Mines Nationalisation Act, 1972 in pro tanto satisfaction thereof. And it is further ordered that the said attachment shall be levied on the compensation money if any, which has become payable and still payable to the defendant under the Coking Coal Mines Nationalisation Act, 1972. And it is further ordered that the plaintiffs decree-holder shall be at liberty to proceed with the realisation of their claim before the Commissioner for Payments ap-

pointed under the said Act. And it is further ordered that the costs of and incidental to this application to be added to the claim of the plaintiffs-decree-holder. And it is further ordered that all parties concerned do act on a copy of minutes of this order signed by an officer of this Court being produced before them."

6. The said attachment order, however, was not sought to be further executed until Nov. 23, 1977 when the respondents preferred their claim along with a certified copy of the order of attachment. Thereafter the appellant herein made the application before the court below on June 23, 1980, inter alia for vacating and/or modifying and/or varying the order of attachment. The matter was heard and decided on Aug. 26, 1980 by the learned Judge of the court below and thereafter on June 11, 1981 this appeal was preferred.

7. It appears from the order itself that the learned Judge was not satisfied as to the particulars which have been furnished in the petition of the appellant. In paragraph 2 of the petition, the appellant, inter alia, stated that "..... your petitioner has received Rs. 56,500/- only for disbursement on account of acquisition of the said coal mine. As against Rs. 56,500/- available for disbursement, your petitioner has received claims totalling over Rs. 9,11,000 including a claim of Rs. 2,03,145.06 paise from the plaintiffs decree-holder. Out of the said amount of Rs. 9,11,000/- the priority debts will amount to more than Rs. 90,000/- your petitioner states that even priority debts cannot be paid in full with the available amount of Rupees 56,500/-.

There will remain nothing in hand to pay any unsecured creditors."

8. Admittedly the decree-holders, the respondents herein are not secured creditors and their claim would be postponed until the secured or preferential creditors are paid off. If that be the position, the rest of the particulars that would be required for disposal of this matter would be the subject-matter of an order for discovery and inspection and thereafter the same would be considered after evidence would be led in respect thereof in adjudicating the claim of the respondents-decree-holders. The court cannot dismiss the application without such adjudication on the ground

that the detailed particulars have not been furnished in the petition itself. It is not a case where no particulars at all had been furnished. The particulars broadly have been furnished before the court and the rest would be the subject matter of further and better particulars and discovery in the trial itself. The learned Judge also should have considered that the said averments, made in paragraph 2 of the appellants petition, had not been denied in the Affidavit-in-Opposition, filed by Gopal Krishna Basu, affirmed by him on August 4, 1980.

9. That being the position, the appeal must be and is hereby allowed. The order of the court below is set aside but since the matter has not been adjudica-

ted upon, we remand the case to the court below and direct that the same be adjudicated upon in accordance with the provisions of O. 21, R. 58, read with Order 41, R. 23 of the Civil P. C. The matter be disposed of within a fortnight after reopening of the High Court after the long vacation. Let a copy of the judgment and order passed herein be sent to the appropriate court which passed the order under appeal.

10. Each party to pay and bear its own costs.

C. K. BANERJI, J.— I agree.

Appeal allowed.

END